

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25522
C/kmg

_____AD3d_____

Argued - November 30, 2009

PETER B. SKELOS, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
SANDRA L. SGROI, JJ.

2009-05429

DECISION & ORDER

In the Matter of Arthur S. (Anonymous).
Administration for Children's Services, appellant;
Rose S. (Anonymous), respondent.

(Docket No. N-2302/08)

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Leonard Koerner and Suzanne Colt of counsel), for appellant.

Christopher J. Robles, Brooklyn, N.Y., for respondent.

Steven Banks, New York, N.Y. (Tamara A. Steckler and Judith Stern of counsel), attorney for the child.

In a child protective proceeding pursuant to Family Court Act article 10, the Administration for Children's Services appeals from an order of the Family Court, Richmond County (DiDomenico, J.), dated June 9, 2009, which, after a fact-finding hearing, dismissed the petition.

ORDERED that the order is reversed, on the law, without costs or disbursements, the petition is reinstated, and the matter is remitted to the Family Court, Richmond County, for further proceedings, including a dispositional hearing.

Family Court Act § 1012(f) defines a “[n]eglected child” as one whose “physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired” because of a parent's failure “to exercise a minimum degree of care . . . by misusing a drug” (Family Ct Act § 1012[f][i][B]). In addition, Family Court Act § 1046(a)(iii) provides that repeated drug use by a parent is prima facie evidence of parental culpability (*see Matter of Keira O.*, 44 AD3d 668;

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Matter of Luis B., 302 AD2d 379). In particular, that section states that “proof that a [parent] repeatedly misuses a drug . . . to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence” of neglect except when the parent “is voluntarily and regularly participating in a recognized rehabilitative program” (Family Ct Act § 1046[a][iii]; see *Matter of Aaliyah G.*, 51 AD3d 918; Besharov, Practice Commentaries, McKinney’s Cons Laws of NY, Book 29A, Family Ct Act § 1012, at 351-355). This presumption is not rebutted by a showing that “the children were never in danger and were always well kept, clean, well fed and not at risk” (*Matter of Paolo W.*, 56 AD3d 966, 967 [internal quotation marks omitted]; see *Matter of Krewsean S.*, 273 AD2d 393).

At a conference with representatives of the Administration for Children’s Services, the mother, Rose S., admitted to using illegal drugs over a prolonged time period. She tested positive for various illegal drugs, and she was arrested and charged with marijuana possession shortly after being released from a detoxication program in 2008. The records indicate that she avoided taking drug tests during the relevant period, and that she was asked to leave a treatment program in 2008 because of compliance issues. The mother’s long-term use of illegal drugs, failure to meaningfully treat her addiction, and history of erratic behavior in the home established, by a preponderance of the evidence, that the mother neglected the child.

In this case, the mother’s repeated attendance at drug rehabilitation programs “without meaningful compliance would be further evidence of child neglect” (*Matter of Keira O.*, 44 AD3d at 671, quoting *Matter of Maximo M.*, 186 Misc 2d 266, 276). Where as here, a prima facie case has been established pursuant to Family Court Act § 1046(a)(iii), dismissal of a petition based “upon petitioner’s failure to present any evidence of impairment of the physical, mental or emotional condition of [the child] or of imminent danger of such impairment pursuant to Family Court Act § 1012(f)(i)” constitutes error as a matter of law (*Matter of William T.*, 185 AD2d 413, 414).

Accordingly, the order appealed from must be reversed, the petition reinstated, and the matter remitted to Family Court, Richmond County for further proceedings, including a dispositional hearing.

SKELOS, J.P., DICKERSON, ENG and SGROI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court