

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1279

CAF 16-00343

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF AYDEN W. AND MALAKAI W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JOHN W., RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

ELISABETH M. COLUCCI, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF
BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL).

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered February 5, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject children.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent father appeals from an order that terminated his parental rights with respect to the subject children on the grounds of mental illness and intellectual disability. Contrary to the father's contention, petitioner met its burden of establishing by clear and convincing evidence that he is "presently and for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate care for [the] child[ren]" (Social Services Law § 384-b [4] [c]; see *Matter of Henry W.*, 31 AD3d 940, 941 [3d Dept 2006], *lv denied* 7 NY3d 711 [2006]). The testimony and report of petitioner's expert psychologist established that the father's capacity to care for the children was substantially impaired as the result of both his limited intellectual functioning (see *Matter of Destiny V. [Lynette V.]*, 106 AD3d 1495, 1495-1496 [4th Dept 2013]; *Matter of Cayden L. R. [Jayme R.]*, 83 AD3d 1550, 1550 [4th Dept 2011]), and his antisocial personality disorder (see *Matter of Christopher B., Jr. [Christopher B., Sr.]*, 104 AD3d 1188, 1188 [4th Dept 2013]; *Matter of Kaylene S. [Brauna S.]*, 101 AD3d 1648, 1648-1649 [4th Dept 2012], *lv denied* 21 NY3d 852 [2013]). Petitioner's expert further concluded that the father's conditions were not amenable to treatment, and thus the father's inability to care for the children extended into the foreseeable future (see *Destiny V.*, 106 AD3d at

1496; *Kaylene S.*, 101 AD3d at 1649).

The father did not object to the testimony or report of the expert psychologist on the ground that his methods should have been subjected to a *Frye* hearing, and thus the father failed to preserve that contention for our review (see *Matter of Nadya S. [Brauna S.]*, 133 AD3d 1243, 1244 [4th Dept 2015], *lv denied* 26 NY3d 919 [2016]; *Matter of York v Zullich*, 89 AD3d 1447, 1448 [4th Dept 2011]). The father also failed to preserve for our review his challenge to the admission in evidence of several exhibits consisting of case notes and progress notes, inasmuch as he did not object to those exhibits on the ground presently raised on appeal, i.e., that petitioner failed to establish a proper foundation for their admission (see *Matter of Samantha M. [Allison Y.]*, 112 AD3d 421, 422 [1st Dept 2013]; *Matter of Cassie L. K.*, 225 AD2d 550, 550 [2d Dept 1996]). In any event, any error in admitting those exhibits was harmless (see *Matter of Skye N. [Carl N.]*, 148 AD3d 1542, 1544 [4th Dept 2017]; *Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court