

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

775

CAF 22-00267

PRESENT: SMITH, J.P., LINDLEY, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF ARIONA P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DEMETRIUS D., RESPONDENT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT.

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered February 14, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Memorandum: In this neglect proceeding pursuant to Family Court Act article 10, respondent father appeals from an order of fact-finding and disposition that, inter alia, adjudicated the child to be a neglected child. Initially, we note that the father contends that he has been denied adequate appellate review because the transcript of the testimony of several of petitioner's witnesses is missing due to the apparent failure to record the proceedings of that day. The father failed to seek a reconstruction hearing with respect to the missing parts of the record (*see Matter of Mikel B. [Carlos B.]*, 115 AD3d 1348, 1348 [4th Dept 2014]). Thus, the father's contention is not properly before us inasmuch as it is raised for the first time on appeal (*see generally Matter of Abigail H. [Daniel D.]*, 172 AD3d 1922, 1923 [4th Dept 2019], *lv denied* 34 NY3d 901 [2019]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). In any event, we conclude that "the record as submitted is sufficient for this Court to determine" the issues raised on appeal (*Matter of Stephen B.* [appeal No. 2], 195 AD2d 1065, 1065 [4th Dept 1993]).

The father further contends that petitioner failed to establish neglect by a preponderance of the evidence. We reject that contention. To establish neglect, the petitioner must establish, by a preponderance of the evidence, " 'first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent

danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship' " (*Matter of Jayla A. [Chelsea K.-Isaac C.]*, 151 AD3d 1791, 1792 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017], quoting *Nicholson v Scopetta*, 3 NY3d 357, 368 [2004]; see Family Ct Act § 1012 [f] [i]). Although a parent may use reasonable force to discipline their child and to promote the child's welfare (see *Matter of Balle S. [Tristian S.]*, 194 AD3d 1394, 1395 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021]; *Matter of Damone H., Jr. [Damone H., Sr.]* [appeal No. 2], 156 AD3d 1437, 1438 [4th Dept 2017]), the infliction of excessive corporal punishment constitutes neglect (see § 1012 [f] [i] [B]), and a single incident of excessive corporal punishment can be sufficient to support a finding of neglect (see *Matter of Ryanna H. [Monique H.]*, 214 AD3d 1308, 1309 [4th Dept 2023], *lv dismissed* 40 NY3d 964 [2023]; *Balle S.*, 194 AD3d at 1395; *Matter of Steven L.*, 28 AD3d 1093, 1093 [4th Dept 2006], *lv denied* 7 NY3d 706 [2006]).

Here, the evidence at the fact-finding hearing included the testimony of the nurse practitioner who examined the child two days after the incident and observed "wounds about the left eye," as well as "bruising and swelling." In addition, the nurse practitioner testified that the child reported having been kicked in the abdomen and "beaten with a broom." The child reported pain in the abdomen and head. The nurse practitioner testified that the child presented as anxious and restless. She referred the child to the emergency room for further treatment due to the pain in the child's abdomen. We therefore conclude that petitioner established by a preponderance of the evidence that the father neglected the child by inflicting excessive corporal punishment (see *Matter of Amarion M. [Faith W.]*, 214 AD3d 1457, 1458 [4th Dept 2023], *lv denied* 39 NY3d 915 [2023]; *Matter of Kayla K. [Emma P.-T.]* [appeal No. 1], 204 AD3d 1412, 1413 [4th Dept 2022]; *Balle S.*, 194 AD3d at 1395; see generally Family Ct Act § 1046 [a] [vi]; *Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011]).