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

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CAF 24-01569

PRESENT: CURRAN, J.P., MONTOUR, SMITH, OGDEN, AND DELCONTE, JJ.

IN THE MATTER OF AKEEM M. AND AKEELAH M.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN
AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

THOMAS M., RESPONDENT-APPELLANT,
AND ROSE J., RESPONDENT.
(APPEAL NO. 1.)

THOMAS L. PELYCH, HORNELL, FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (LISA S. CUOMO OF COUNSEL), FOR PETITIONER-RESPONDENT.

ANDREW S. GREENBERG, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered September 19, 2024, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Thomas M. had neglected the subject children.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent father appeals from three orders of fact-finding and disposition. In the orders in appeal Nos. 2 and 3, Family Court, inter alia, adjudged that he neglected the eldest and the youngest of the four subject children, respectively, and in appeal No. 1, the court, inter alia, adjudged that he neglected the two middle children. We affirm in each appeal.

Initially, to the extent that the father purports to appeal from a June 2022 temporary order entered in a separate neglect proceeding, we note that his contention is not properly before us inasmuch as he "failed to take a timely appeal from that order" (*Matter of Arkadian S. [Crystal S.]*, 130 AD3d 1457, 1458 [4th Dept 2015], *lv dismissed* 26 NY3d 995 [2015]; *see* Family Ct Act § 1113).

We reject the father's contention in appeal Nos. 1 and 2 that the court erred in determining that he neglected the three eldest children. Pursuant to Family Court Act § 1046 (a) (iii), "proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, 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 that a child of or who is the legal responsibility of such person is a neglected child except that such drug, or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program." Thus, "neglect may in some circumstances be presumed if the parent chronically and persistently misuses alcohol and drugs which, in turn, substantially impairs [their] judgment while [the] child is entrusted to [their] care" (*Matter of Samaj B. [Towanda H.-B.-Wade B.]*, 98 AD3d 1312, 1313 [4th Dept 2012]; *see Matter of Chassidy CC. [Andrew CC.]*, 84 AD3d 1448, 1449 [3d Dept 2011]). "In other words, [t]he presumption contained in Family [Court] Act § 1046 (a) (iii) operates to eliminate a requirement of specific parental conduct vis-à-vis the child and neither actual impairment nor specific risk of impairment need be established" (*Samaj B.*, 98 AD3d at 1313 [internal quotation marks omitted]; *see Matter of Paolo W.*, 56 AD3d 966, 967 [3d Dept 2008], *lv dismissed* 12 NY3d 747 [2009]). Here, we conclude that petitioner met its burden of proof at the fact-finding hearing that was held with respect to the three eldest children (first hearing). Petitioner established that the father tested positive for cocaine while he had custody of the eldest child and that the police responded to two domestic violence calls while the mother—who is a respondent in the proceedings in appeal Nos. 1 and 3—was pregnant with the two middle children, twins, during which the father was found to be severely intoxicated. Although the father denied using cocaine in his testimony, we "accord great deference to the findings of the court, which is in the best position to evaluate the character and credibility of the witnesses" (*Matter of Garland v Goodwin*, 13 AD3d 1059, 1059 [4th Dept 2004]).

Additionally, the evidence at the first hearing established that the father engaged in abusive behavior against the mother on at least two occasions while the eldest child was present, on at least one additional occasion while the mother was pregnant that resulted in the father having to be subdued by the police with a Taser, and on another occasion in the hospital immediately after the birth of the twins (*see Matter of Jacob W. [Jermaine W.]*, 170 AD3d 1513, 1513 [4th Dept 2019], *lv denied* 33 NY3d 906 [2019]; *Matter of Michael WW.*, 20 AD3d 609, 611-612 [3d Dept 2005]). Thus, petitioner established by a preponderance of the evidence that the three eldest children's "physical, mental or emotional condition[s] [were] impaired or [were] in imminent danger of becoming impaired" by the father's actions (*Jacob W.*, 170 AD3d at 1513 [internal quotation marks omitted]; *see* Family Ct Act § 1012 [f] [i] [B]; *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]).

Likewise, contrary to the father's further contention with respect to appeal No. 3, we conclude that petitioner adduced sufficient evidence at the fact-finding portion of the relevant hearing concerning the youngest child to establish that he

derivatively neglected that child. As relevant here, "[t]he focus of the inquiry to determine whether derivative neglect is present is whether the evidence of . . . neglect of [the three eldest] child[ren] indicates a fundamental defect in the [father's] understanding of the duties of parenthood . . . or demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [his] care" (*Matter of Eliora B. [Kennedy B.]*, 146 AD3d 772, 774 [2d Dept 2017] [internal quotation marks omitted]; *see Jacob W.*, 170 AD3d at 1513-1514). The evidence of the father's repeated physical abuse of the mother, as well as his verbal abuse during supervised visitation with all four subject children, established that his neglect of the eldest children is "so closely connected with the care of [the youngest] child as to indicate that [the youngest] child is equally at risk" of being neglected (*Matter of Marino S.*, 100 NY2d 362, 374 [2003], *cert denied* 540 US 1059 [2003]; *see Matter of Ryanna H. [Monique H.]*, 214 AD3d 1308, 1309-1310 [4th Dept 2023], *lv dismissed* 40 NY3d 964 [2023]; *see also* Family Ct Act § 1046 [a] [i]).

We also reject the father's contention in each appeal that petitioner failed to establish that it exercised reasonable efforts to encourage and strengthen his relationship with the subject children, as required by Family Court Act § 1052 (b) (i) (A). Petitioner created a services plan for the father, informed him on a monthly basis of its requirements, attempted home visits frequently, offered drug tests on a regular basis, provided the father with a clinical visitation service, and offered the father access to anger management services, domestic violence classes, and counseling, all of which the father refused. On this record, we conclude that petitioner " 'made reasonable efforts to prevent or eliminate the need for removal of the children from [the father's] home' " (*Matter of Ruth H. [Marie H.]*, 159 AD3d 1487, 1489 [4th Dept 2018]; *see Matter of Jack NN. [Sarah OO.]*, 173 AD3d 1499, 1503-1504 [3d Dept 2019], *lv denied* 34 NY3d 904 [2019]; *Matter of Cloey S. [Anthony T.]*, 99 AD3d 1080, 1081 [3d Dept 2012]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court