SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CAF 22-00564

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

IN THE MATTER OF JAYLIN B.

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

MEMORANDUM AND ORDER

MARIAH S., RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS R. BABILON OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (JOSEPH M. MARZOCCHI OF COUNSEL), FOR PETITIONER-RESPONDENT.

BRIAN P. DEGNAN, BATAVIA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered March 1, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged 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 proceeding pursuant to article 10 of the Family Court Act, respondent mother appeals from an order that determined that she neglected the subject child, an infant, by, inter alia, exposing him to dangerous and unsanitary conditions in a hotel room where they had stayed for an extended period of time. When the mother was evicted from the room for failing to pay the bill, the hotel manager observed, among other things, more than 30 dirty diapers in the room, feces on the wall, sharp knives within the reach of a child and what looked like cocaine residue on a coffee table. The mother does not dispute that the conditions in the hotel room posed an imminent risk of harm to an infant, nor does she dispute that her infant son was in the room with her at some point during her month-long stay at the hotel. The mother contends, however, that the child went to visit his grandmother in Ohio approximately one week before the hotel manager entered the room and observed the dangerous conditions, and, as a result, petitioner failed to establish that the room was in a dangerous condition while the child was in the room with the mother. We reject that contention.

We note at the outset that the mother did not testify at the hearing, and Family Court thus properly drew the strongest possible

negative inference against her (*see Matter of Grayson S. [Thomas S.]*, 209 AD3d 1309, 1313 [4th Dept 2022]; *Matter of Jack S. [Leah S.]*, 176 AD3d 1643, 1644 [4th Dept 2019]). Nor did the mother present the testimony of the grandmother who the child had allegedly visited in Ohio, or any other witnesses. The only evidence introduced at the hearing that would support the conclusion that the child visited the grandmother arose from hearsay statements in the caseworker's notes, which the mother contends should not have been admitted in evidence at the hearing. Those notes indicate that the mother refused to provide the grandmother's address to the authorities and that the grandmother, when reached by phone, refused to disclose her address as well. Such evidence raised questions of credibility concerning whether the child ever actually went to Ohio, as the mother alleged.

Additionally, the hotel manager testified that she observed the child at the hotel with the mother on several occasions, and there were many toys in the room when the mother was evicted, as well as soiled children's clothing and dirty baby bottles, suggesting that the child had recently been in the room. That evidence, together with the negative inference drawn against the mother based on her refusal to testify at the hearing, supports the court's finding that petitioner established by a preponderance of the evidence that the mother neglected the child by exposing him to the undisputedly dangerous conditions in the hotel room (*see Matter of Mollie W. [Corinne W.]*, 214 AD3d 1463, 1463-1464 [4th Dept 2023]; *Matter of Danaryee B. [Erica T.]*, 145 AD3d 1568, 1568 [4th Dept 2016]). The mother has raised no challenge to the court's other grounds for determining that the child was a neglected child, so we deem any challenge related to those grounds abandoned (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [1994]). Thus, even if we were to agree with the mother that petitioner failed to establish that the child was in the hotel room while the room presented a danger, we would nevertheless affirm the court's neglect finding.

Contrary to the mother's further contention, she was not denied her right to due process when the court proceeded with the fact-finding hearing in her absence. "While due process of law applies in Family [Court] Act article 10 proceedings and includes the right of a parent to be present at every stage of the proceedings, that right is not absolute . . . The court is authorized to proceed despite a parent's absence, but must vacate any resulting order and permit a rehearing on motion of that parent, supported by affidavit, unless the court finds that the parent 'willfully refused to appear at the hearing' " (*Matter of Elizabeth T. [Leonard T.]*, 3 AD3d 751, 753 [3d Dept 2004], quoting Family Ct Act § 1042; *see Matter of Malachi S. [Michael W.]*, 195 AD3d 1445, 1446-1447 [4th Dept 2021], *lv dismissed* 37 NY3d 1081 [2021]). Inasmuch as the mother made a belated request for an in-person hearing and refused to attend the hearing virtually from the jail where she was incarcerated, we conclude that the mother willfully refused to appear at the fact-finding hearing and thus waived her right to be present (*see Malachi S.*, 195 AD3d at 1446-1447; *Matter of Ceirra L.*, 50 AD3d 1520, 1521 [4th Dept 2008]). We note that the court double-checked with a corrections officer at the jail to make sure that the mother refused to participate in the hearing.

We also reject the mother's contention that the court abused its discretion in denying her two requests for an adjournment of the hearing. The first request for an adjournment was for the incarcerated mother to meet with her attorney, and the second request for an adjournment was for the mother to present two witnesses. " '[T]he determination whether to grant a request for an adjournment for any purpose is a matter resting within the sound discretion of the trial court' " (*Matter of Logan P.G. [William G.]*, 208 AD3d 1643, 1643 [4th Dept 2022], *lv denied* 39 NY3d 909 [2023]; *see Matter of Nathan N. [Christopher R.N.]*, 203 AD3d 1667, 1669 [4th Dept 2022], *lv denied* 38 NY3d 909 [2022]).

Here, although the mother was incarcerated at the time of the hearing, that hearing was held over one year after the neglect petition was filed and the mother has not offered an explanation why she and her attorney could not have conferred at any other time during that one-year period. With respect to the second request, we note that, nearly six weeks before the hearing, the court informed the parties of the hearing date and specifically informed the attorneys that they needed to "make sure that the technology [wa]s there" for the witnesses to testify remotely via Microsoft Teams or in person. During the hearing, when it was time for the mother's attorney to call the mother's witnesses, he was granted a brief adjournment to secure their virtual appearances, but returned to the court, stating that he was unable to contact either witness despite having informed them of the hearing date the week before. The court thereafter denied the request of the mother's attorney for an adjournment of the hearing to locate those witnesses. Where, as here, a party's inability to secure witnesses is due to a lack of diligence in preparing for the hearing, a court does not abuse its discretion in denying that party's request for an adjournment (*see Matter of Steven B.*, 6 NY3d 888, 889 [2006]; *Logan P.G.*, 208 AD3d at 1643; *Matter of John D., Jr. [John D.]*, 199 AD3d 1412, 1413 [4th Dept 2021], *lv denied* 38 NY3d 903 [2022]).

Contrary to the mother's additional contention, the court did not err in admitting in evidence petitioner's case file inasmuch as the contents thereof were admissible as business records (*see* CPLR 4518 [a]; *Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1626 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]; *see generally Matter of Leon RR*, 48 NY2d 117, 123 [1979]). Even assuming, arguendo, that the records contained hearsay that was not subject to the business records exception, we find any error in their wholesale admission "to be harmless . . . in light of the other evidence in admissible form that amply supports [the court's] determination" (*Matter of Zaiden P. [Ashley Q.]*, 211 AD3d 1348, 1355 n 5 [3d Dept 2022], *lv denied* 39 NY3d 911 [2023]; *see Matter of Carmela H. [Danielle F.]*, 185 AD3d 1460, 1461 [4th Dept 2020], *lv denied* 35 NY3d 915 [2020]).

We have reviewed the mother's remaining contentions and conclude that none warrants modification or reversal of the order.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court