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No. 69  
In the Matter of Afton C.  
(Anonymous).

Dutchess County Department of  
Social Services,  
Appellant;  
James C. (Anonymous), et al.,  
Respondents.  
(And Four Other Proceedings.)

Laura Gail Skojec, for appellant.  
Ronna L. DeLoe, law guardian for Trevor C.  
James C., respondent pro se.  
John A. Pappalardo, law guardian for Afton C. et al.  
New York Civil Liberties Union; Chemung County  
Department of Social Services; Steuben County Department of  
Social Services; Lawyers for Children; Saratoga County Department  
of Social Services et al.; Washington County Department of Social  
Services, amici curiae.

CIPARICK, J.:

On this appeal, we consider whether there is  
sufficient evidence to support a finding that the subject  
children are neglected pursuant to article 10 of the Family Court  
Act. We agree with the Appellate Division that the evidence  
presented is insufficient to prove neglect.

In October 2007, respondent father pleaded guilty to rape in the second degree, engaging in sexual intercourse with a person less than 15 years of age (Penal Law § 130.30 [1]), and patronizing a prostitute in the third degree, which at the time of his conviction was defined as patronizing a prostitute under 17 years of age (former Penal Law § 230.04; L 2007, ch 74, § 5). He was sentenced to one year imprisonment, and was released on time served. The court adjudicated father a level three sex offender under the Sex Offender Registration Act (SORA), but he was never ordered to attend any sex offender treatment. Father returned home, where he lived with his wife and their five children, then between the ages of four and 14.

In November 2007, the Dutchess County Department of Social Services (DSS) filed neglect petitions pursuant to Family Court Act article 10 against both parents. As relevant here, the petitions alleged that father neglected the children because he was an "untreated" sex offender whose crimes involved victims between 13 and 15 years old.<sup>1</sup> Mother allegedly "failed to protect the children" from father. DSS sought to have the children adjudicated neglected, both parents ordered into a sex offender relapse intervention program, and a temporary order of

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<sup>1</sup> The petitions also alleged that father "engaged in excessive corporal punishment" of his children. Family Court found that DSS "failed to prove . . . that the children's physical, mental or emotional condition has been impaired as a result of excessive corporal punishment." DSS did not appeal that determination, and it is not before us.

protection issued against father on the children's behalf.<sup>2</sup>

At the fact-finding hearing, the DSS caseworker who authored the neglect petitions testified that he began investigating the family after receiving a report from the SORA registry that father was an untreated level three sex offender. He did not receive any documentation from the New York County District Attorney's office regarding father's conviction, and had not interviewed any of the victims in that case. The caseworker acknowledged that he had no evidence that father was sexually inappropriate with any of the subject children.

Father testified that he "pled guilty to whatever [his] lawyer told [him] to plead guilty to," and recalled that, during his plea colloquy, he had affirmed that he committed the crimes. He explained that the indictment had alleged that he patronized a prostitute "between 2000 and 2004," when she was 15 to 19, but testified that he first met the victim in 2003, when she was 18. Father claimed that when he was asked during his plea colloquy "whether [he] engaged in sexual acts with her between 2000 and 2004 [he] said yes meaning . . . when she was 18 or 19." With respect to the second degree rape conviction, father refused to comment on whether he had sexual relations with someone below the age of consent, exercising his Fifth Amendment right. Family Court permitted him not to answer, but drew a "negative inference

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<sup>2</sup> Family Court issued an Order of Protection, requiring father to vacate the home. That order is likewise not before us.

. . . that the victim was under the age of consent." Father further testified that, other than the events resulting in his conviction, he had never had "intercourse with an under age woman." He acknowledged that he was a level three sex offender under SORA, and had never received sex offender treatment.

Mother testified that she had "no personal knowledge" of father's crimes, beyond knowing what he had pleaded to, and had not inquired into the details. She did not think father was a risk to their children because "he has never engaged in any behavior . . . that would create a risk to his children." Other witnesses included the eldest child and a school resource officer. DSS proffered father's certificate of conviction, but no additional evidence was submitted regarding the facts underlying the conviction.

Family Court concluded that both parents neglected their children. It found that father's behavior created a substantial risk of harm to the children because he is a convicted level three sex offender, and therefore "pose[s] a risk of harm to the public at large." His testimony, in the court's view, demonstrated a "lack of candor, a shortage of insight into his own behavior and . . . obvious attempts to avoid responsibility for the illegal acts involving minors." Moreover, the court saw father's "failure to address any issues in counseling [as] demonstrat[ing] an 'impaired level of parental judgment as to create a substantial risk of harm'" (quoting

Matter of Shaun X, 300 AD2d 772, 772 [3d Dept 2002])). The court's finding that mother had neglected the children was based on her "failure to inquire into the details of the father's illegal conduct and her decision to gauge the children's safety by her knowledge of the father." Both parents appealed the finding of neglect.

The Appellate Division reversed the Family Court order, denied the petitions, and dismissed the proceedings, holding that "[t]he mere fact that a designated sex offender resides in the home is not sufficient to establish neglect absent a showing of actual danger to the subject children" (Matter of Afton C. (James C.), 71 AD3d 887, 888 [2d Dept 2010])). The court added that although Family Court could properly consider whether father's testimony was evasive and that he invoked his Fifth Amendment right, "the evidence was insufficient to establish that the father posed an imminent danger to the children" (id.). Because DSS failed to prove that father's presence endangered the children, the court found that, by extension, mother did not neglect them by allowing him to reside in the home (see id.). We granted DSS's motion for leave to appeal from the Appellate Division order (15 NY3d 709 [2010]), and now affirm.

Under section 1012 (f) of the Family Court Act, a neglected child is defined as, inter alia:

"a child less than eighteen years of age  
(i) whose physical, mental or emotional  
condition has been impaired or is in imminent  
danger of becoming impaired as a result of

the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . . .  
(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof" (Family Court Act § 1012 [f] [i] [B]).

The statute thus imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence (see Family Court Act § 1046 [b] [i]). First, there must be "proof of actual (or imminent danger of) physical, emotional, or mental impairment to the child" (Nicholson v Scopetta, 3 NY3d 357, 369 [2004]). In order for danger to be "imminent," it must be "near or impending, not merely possible" (id.). Further, there must be a "causal connection between the basis for the neglect petition and the circumstances that allegedly produce the . . . imminent danger of impairment" (id.). This requirement is intended to "focus [neglect proceedings] on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior" (id.).

Second, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care (see Family Court Act § 1012 [f] [i]; see also Nicholson, 3 NY3d at 368 [2004]). This is an objective test that asks whether "a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances" (id.). A parent may deviate from this standard by "unreasonably inflicting . . . a substantial risk" of harm to the child (Family Court Act

§ 1012 [f] [i] [B]). Critically, however, "the statutory test is minimum degree of care -- not maximum, not best, not ideal -- and the failure must be actual, not threatened" (Nicholson, 3 NY3d at 370 [internal quotation marks omitted]).<sup>3</sup>

DSS and the attorney for the eldest child argue that because father is an untreated, level three sex offender whose crimes involved minors, and because he failed to demonstrate sufficient introspection or remorse, the children were properly adjudicated neglected. DSS also maintains that mother neglected the children by allowing him to return home. In response, father and the attorney for the other four children argue that DSS failed to prove that either parent neglected their children.<sup>4</sup>

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<sup>3</sup> Notably, these statutory requirements have constitutional underpinnings:

"Fundamental constitutional principles of due process and protected privacy prohibit governmental interference with the liberty of a parent to supervise and rear a child except upon a showing of overriding necessity. [Thus,] the State may not deprive a natural parent of the right to the care and custody of a child absent a demonstration of . . . behavior evincing utter indifference and irresponsibility to the child's well-being" (Matter of Marie B., 62 NY2d 352, 358 [1984]).

<sup>4</sup> Additionally, father argues that this appeal is moot, since (1) he has already submitted to a psychological assessment which determined that he was not a risk to his own children, (2) his wife has moved to Canada with the four younger children and has no intention of returning, while his felony conviction prevents him from entering Canada, and (3) the proceeding involving the eldest child became moot when the child turned 18 during the course of this appeal. While we agree that the proceeding regarding the 18 year old is now moot, the other four

To the extent that DSS is arguing that father's status as a level three sex offender convicted of sex crimes involving minors is sufficient to establish a presumption that he poses a danger to his children in the absence of treatment, we disagree. In Nicholson, we rejected use of a presumption of neglect where a parent had allowed a child to witness domestic violence, holding that this bare allegation did not meet the Family Court Act's requirements (see 3 NY3d at 371). We emphasized that a finding of neglect was only permissible where a preponderance of evidence established actual or imminent harm to the subject children as a result of the parent's failure to exercise a minimal degree of care (see id. at 372). For similar reasons, we now reject any presumption that an untreated sex offender residing with his or her children is a neglectful parent. Even where, as here, the offender's crimes involve victims younger than 18, that alone does not demonstrate that his actions "inflicted harm, or a substantial risk thereof" to his children, or that the children's "physical, mental or emotional condition [was] in imminent danger of becoming impaired" (Family Court Act § 1046 [f] [i]).

DSS argues that because father is a level three sex offender under SORA, and has therefore been deemed particularly

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are not. That mother and the children are in Canada does not render these proceedings moot, since they may return. Father's submission to psychological evaluation creates no mootness concern, as DSS seeks to have the children adjudicated neglected and father entered into a treatment program.

likely to reoffend (see Correction Law § 168-1 [5], [6] [c]), he is a danger to the subject children. SORA assessment was not designed, however, to ascertain whether the offender has met the Family Court Act's parental neglect standard. Here, even assuming that a level three SORA assessment is evidence of likely recidivism, DSS failed to prove that father's crimes endangered his children. It follows that the likelihood of a repeat offense -- which is all SORA purports to measure -- is not directly relevant to whether the children are in imminent danger. While DSS could have introduced evidence from the plea and SORA proceedings, it did not do so, and the SORA designation alone is not dispositive.

No doubt there are circumstances in which the facts underlying a sex offense are sufficient to prove neglect. Where, for example, sex offenders are convicted of abusing young relatives or other children in their care, their crimes may be evidence enough (see e.g. Matter of Christopher C. (Joshua C.), 73 AD3d 1349, 1351 [3d Dept 2010]; Matter of Shaun X., 300 AD2d at 772-773). Our conclusion here might also be different if respondent had refused sex offender treatment after being directed to participate in it, or if other evidence showed that such treatment was necessary. In all cases, however, petitioner must meet its statutory burden. It failed to do so here.

DSS proved only father's conviction; that he was adjudicated a SORA level three sex offender; that he never sought

sex offender treatment; and that he was residing at home. This evidence, without more, does not demonstrate that father breached a minimum duty of parental care and poses a near or impending harm to his children. That he declined to discuss the circumstances of his conviction and, in Family Court's view, lacked candor or insight into his behavior does not fill the evidentiary gap.

Because DSS failed to prove by a preponderance of the evidence that father posed an imminent danger to his children, it necessarily failed to prove that mother neglected the children by allowing father to return home.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Matter of Afton C.

No. 69

GRAFFEO, J. (Concurring):

I concur with the result reached by the majority but write separately to clarify why the evidence of neglect was insufficient in this case. As is clear from the majority opinion, this is not an area of law amenable to bright-line rules. Rather, whether neglect has been established during a proceeding turns on the particular facts and circumstances proven at the hearing. Here, the determination of insufficiency stems from the manner in which county social services chose to present its proof -- there is no general principle of law that dictated this result. For this reason, I doubt that our holding in this case will have broad precedential value -- but it does highlight the need for an adequate evidentiary basis before a finding of neglect can be entered.

In essence, the county relied almost entirely on the fact that the father had been convicted of certain criminal offenses and that he had been adjudicated a level 3 sex offender

to support the inference that he posed an imminent threat of harm to his children and, concomitantly, that the mother was neglecting the children by failing to protect them from the father. Yet the county submitted only the certificate of conviction and did not offer any evidence detailing the facts underlying the criminal convictions. The record does not contain any accusatory instruments, witness statements or even the transcript from the plea or sentencing proceedings in the criminal case. The county's attempts to develop proof concerning the criminal acts through questioning of the father were, not surprisingly, of limited value given his reluctance to provide details that might have substantiated the county's case.

Nor did the county offer any evidence establishing the basis for the father's designation as a level 3 sex offender. For example, the county did not submit any materials from the hearing held under the Sex Offender Registration Act (SORA), such as the Risk Assessment Instrument or hearing transcript, that would have revealed the factors on which the SORA court relied in making that adjudication. The facts underlying that finding may have supported an inference that the father posed a threat of harm -- but they do not appear in the record of this neglect proceeding.

Finally, the county failed to present evidence, expert or otherwise, explaining how the father's criminal history indicated that he posed a risk of harm to his children. In fact,

it remains unclear whether the neglect petition was filed because the county social services agency feared that the father would sexually offend against his own children or believed a neglect finding was warranted on the theory that his criminal conduct reflected such a profound lack of judgment on his part that it demonstrated an inability to properly fulfill his parental role. Even the caseworker who initiated the petition neglected to clarify the nature of the imminent risk he believed these parents posed to their children.

By detailing the absence of evidence in this case, I do not mean to suggest that proof of each type must be offered in every neglect proceeding similar to this one. If some of these gaps had been filled, the evidence might have risen to the sufficiency threshold. On this record, however, the neglect findings were not sufficiently supported and the Appellate Division order dismissing the petitions must be affirmed.

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Order affirmed, with costs. Opinion by Judge Ciparick. Chief Judge Lippman and Judges Read, Smith, Pigott and Jones concur. Judge Graffeo concurs in result in an opinion.

Decided May 5, 2011