

<b>Matter of J.G.</b>
2009 NY Slip Op 33477(U)
December 3, 2009
Supreme Court, Bronx County
Docket Number: N-10689/09
Judge: Monica Drinane
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At a Term of the Family Court of  
the State of New York, held in  
and for Bronx County at  
900 Sheridan Avenue  
on December 3, 2009

P R E S E N T:

HON. MONICA DRINANE  
Judge of the Family Court

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In the Matter of

J [REDACTED] G [REDACTED]  
K [REDACTED] G [REDACTED]

Docket Nos.:N-10689 /09  
N-10690/09

Children Under Eighteen Years of Age  
Alleged to be Neglected by

DECISION AND ORDER

K [REDACTED] G [REDACTED]  
Respondent

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**DRINANE, J:**

Before the Court is respondent's Motion to Exclude certain documentary evidence, i.e., a NYPD Domestic Incident Report, which was provisionally entered into evidence over objection during the fact finding hearing of this child protective proceeding. The Domestic Incident Report (hereinafter DIR) was deemed provisionally admissible only to the extent of identifying the person noted to be the complainant and that a report was made, with no other weight assigned to any other portion of the Report. The Court granted respondent's application to bring this motion. The motion seeks to have the report excluded in its entirety pursuant to the provisions of Criminal Procedure Law (hereinafter CPL) § 160.50(1)(c), which in relevant part provides for the sealing of all official records and papers relating to the arrest or prosecution of an individual upon the favorable termination of a related criminal action brought against that individual. That motion is opposed by counsel for the Administration for Children's Services (hereinafter ACS) and each of the two Attorneys for the Children. ACS and one of the Attorneys seek to broaden the DIR in evidence by reinstating some of the redactions, the other Attorney seeks to maintain the DIR as admitted.

Although there is no controversy that a criminal prosecution of the respondent based upon the incident reported in the DIR was terminated favorably toward the respondent, the thrust of the ACS and

Attorneys for the Children's opposition is that the DIR is not the type of record contemplated under the statute for sealing; that the DIR is a business record falling under evidentiary rules set forth in Family Court Act (hereinafter FCA) §1046(a)(iv), which removes the DIR from the provisions of CPL §160.50; and finally that the lower evidentiary threshold in the quasi-civil child protective proceeding in Family Court as opposed to the higher Criminal Court threshold under which the prosecution was terminated in favor of the respondent is a basis to not apply the CPL §160.50 sealing provision.

Initially, this Court determines that the DIR sought to be introduced is indeed the type of document within the contemplated scope of CPL §160.50(1)(c) directing "all official records and papers....relating to the arrest or prosecution...on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency;"

The DIR is, at a minimum, an official record and/or paper used to evaluate whether or not an initial arrest is legally warranted. The DIR memorializes reported allegations of criminal conduct; physical descriptions and observations of responding police authority; and often preliminary investigation details. This Court is not persuaded by counsel's argument that a DIR does not fall within the plain language of the statute.

The Court notes the responsive papers attempt to contrast the provisions of CPL §140.10(5), which sets forth an administrative requirement relating to police record keeping in relation to family offense investigations and sets forth a four-year moratorium on the discarding of such records (*see* McKinney's Practice Commentaries to CPL §140.10). This statute does not abrogate the sealing requirement, nor does it entail legal conflict with CPL §160.50; it simply provides a minimum four-year period to maintain a DIR-type report before disposal.

Additionally, the 1991 amendment of the statute in effect established a self-executing component to the sealing provision. As such, the DIR in this case became a sealed document on the date of disposition of the respondent's Criminal Court proceeding, October 8, 2009. The document thus became inaccessible as of that date. Neither the responsive papers nor this Court's own review of the statute

indicate the DIR falls within any of the narrowly defined exceptions or exclusions to the sealing provision contained in the statute.

In opposing exclusion of the DIR, responsive papers urge that the provisions of FCA §1046(a)(iv), providing a business record exception to hearsay objections within the fact finding phase of child protective cases, applies as the basis for entry of the DIR, or at least a redacted form of the DIR. This Court recognizes the evidentiary implication of the statute under most circumstances, and agrees that a DIR is the type of business record contemplated by the statute, however, this DIR was already inaccessible, having been sealed, when sought to be introduced under §1046(a). That statute had lost its relevance to admitting this specific piece of evidence once it became sealed. The DIR was no longer “available” to be moved into evidence. Again, the responsive papers do not set forth, nor did this Court’s own research establish, any independent repository of the DIR that might have had a specially or legislatively created mandate to maintain access to documents, including DIRs, independent of the sealing provisions of §160.50. In the absence of such maintenance, this Court is compelled to find that the DIR was a sealed document unavailable to be entered into evidence when proffered.

Finally, this Court is making no determination that the substantive information contained in the DIR is inadmissible because the document itself is sealed. Response papers urge that a determination that the DIR be excluded will undermine public policy within the child protective mandate, and “potentially compromise the safety of the subject children”. This Court’s determination is that CPL §160.50 applies under the unique circumstances of this case to bar the particular document from being entered into evidence. There is no determination finding collateral estoppel or res judicata implications. The statute does not provide that.

The respondent’s Motion to Exclude the DIR is granted.

This constitutes the decision and order of this Court.

ENTER

  
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MONICA DRINANE, J.F.C.

Dated: Bronx, New York  
December 3, 2009