Matter of Evans (Tinnin)
2013 NY Slip Op 33357(U)
December 31, 2013
Fam Ct, Bronx County
Docket Number: 10927-29/13
Judge: Marcelle Z. Brandes
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At a term of the Family Court of the State of New York, held in and for the County of Bronx, at 900 Sheridan Ave, Bronx, NY 10451 on December 31, 2013

P R E S E N T: Hon. Marcelle Z. Brandes

In the Matter of

KANYE EVANS
ISAIH EVANS
KAREEM EVANS

DOCKET NO. NN 10927-29/13

Children under Eighteen Years of Age Alleged to be Neglected by

DECISION AND ORDER ON FACT FINDING

JAMIE TINNIN,

Respondent.

BRANDES, J:

The Administration for Children's Services (Petitioner) contends that Respondent, who continued to test positive for cocaine while enrolled in a drug treatment program, is culpable of neglect and that its prima facie case is not rebutted by a showing that the children were never harmed or in danger. FCA §1046(a)(iii), *In the Matter of Keira O*, 44 AD3d 688 (2nd Dept 2007) (Respondent's enrollment in a treatment program does not, standing alone, negate the possibility of a neglect finding). Respondent and the Attorney for the Child argue that since Respondent was at all times engaged in a drug treatment program, Petitioner's prima facie case is rebutted by the fact that the children were never harmed or in danger of harm. FCA 1046(a)(iii); FCA §1012(f)(i)(B); *Matter of Amber DD*, 26 AD3d 689 (3rd Dept 2006) (Petitioner's *prima facie* case of neglect was not rebutted by Respondent's engagement in a *mandatory* drug treatment program).

Background

On April 19, 2013, Petitioner filed a petition against Jamie Tinnin, (Respondent) alleging that Respondent failed to provide Kanye Evans (DOB 4/29/2005); Isaih Evans (11/10/2001) and Kareem Evans (DOB 8/22/2003) (Subject Children) with proper supervision and guardianship by misusing a drug or drugs and not voluntarily and regularly participating in a rehabilitative

program. According to the petition, Respondent told the Child Protective Specialist that she has been using cocaine for the past 15 years and that she uses cocaine 3 to 4 times weekly; that Respondent is enrolled in a drug treatment program at Palladia, but she has not attended since April 3, 2013 and she is at risk for being discharged and has tested positive for cocaine on February 28, 2013, March 6, 13, and 27, 2013 and on April 3, 2013.

Fact-finding

The fact-finding commenced and was completed on December 11, 2013. Petitioner submitted Respondent's Drug Treatment Records from Palladia, and called two witnesses: Sparkle Dixon (Dixon), Child Protection Specialist (Caseworker) and Jocelyn Dorsett (Dorsett), Family Support Unit. At the close of its case Petitioner asked to conform the pleadings to the evidence. There was no objection to this motion, which is granted, and Respondent and Attorney for Child rested without putting on a defense.

Dixon testified that on February 21, 2013 she received a report from the State Central Registry regarding Respondent from a non-mandated reporter. In investigating the case she learned that the family composition was comprised of Respondent, Subject Children, and Vanderbilt Evans (Non-Respondent Father). Dixon went to the case address unannounced on February 21, 2013 and found Respondent cooking dinner for the Subject Children. She interviewed Respondent alone about her drug use. Respondent admitted to using cocaine after the Subject Children were asleep; and that she had been in services in the past but was not presently receiving any services. Respondent agreed to accept a referral to Palladia for drug treatment. Subsequently, in April, 2013, Dixon received a phone call from Respondent's caseworker at Palladia and she thereupon went to visit Respondent on April 11, 2013. Respondent told Dixon she was compliant with her drug treatment program but admitted she had missed some days. Respondent also admitted that she was still using cocaine when the Subject Children were asleep. Dixon's testimony is unclear about how often Respondent said she was using, it ranged from once a week to 4-5 times per week, but the evidence shows she always said it was after the children went to sleep.

Dixon further testified that the Subject Children were well cared for. When she went to the house she observed an abundance of food and Respondent cooked for the family every night. The Subject Children's medicals were up to date. The children were doing well in school and there were no school issues that the mother had not successfully addressed. The children graduated to the next grade at the end of the school year in 2013. The children were never left alone; the Respondent or Non-Respondent Father were always home with the children. The children were taken to the park and to church functions.

On February 22, 2013, Dixon interviewed the Subject Children individually at school. The two younger boys did not know what drugs were. The middle child thought alcohol was for putting on cuts; he could not understand why people would drink alcohol. The three children were very open when talking with the caseworker, they were very happy at home, and denied

seeing Respondent acting differently or strangely. The oldest child said he knew about drugs from movies and that they mess people up. He never saw drugs at school and never saw his parents use drugs.

Petitioner also called Jocelyn Dorsett, Family Support Unit as a witness. She was assigned to the family in August 2013. She spoke to Respondent about her drug use and attendance at the program. Respondent was always forthcoming about her drug use. Respondent said her drug use would range from the weekend to 2-3 times per week.

The drug treatment records from Palladia establish that Respondent enrolled in the drug treatment program on March 6, 2013 (the Petition was filed on April 19, 2013). The program scheduled Respondent to attend the program four days a week, Monday through Thursday. Petitioner points out that Respondent tested positive for cocaine and missed several days of the program. On February 28, 2013, March 6, 2013, March 13, 2013, March 27, 2013, and April 3, 2013 and in future tests, Respondent tested positive for cocaine. On April 16, 2013, there is a Brief Treatment Note that states: "Patient continues to test positive for Cocaine and her referral source has been contacted. Participant was informed that if she continues this pattern of behavior, she will be referred to a higher level of care – 28 day Inpatient Treatment Program." However, there are also positive notations regarding Respondent's progress: she had relapsed, but recognized that through admission she can control recovery (May 18, 2013), Respondent is noted to be "very involved in group" (July 1, 2013), Respondent "has cut down use significantly" (July 9, 2013), and "Client trying very hard and her use decreased from daily to once a week. She has made progress" (July 10, 2013). At all times, Respondent remained enrolled in the drug treatment program.

Legal Analysis

The Family Court Act defines a "neglected child" as a child less than 18 years of age, "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 to exercise a minimum degree of care in providing the subject child with proper supervision or guardianship, by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions" FCA §1012(f)(i)(B).

"The first statutory element requires proof of actual (or imminent danger of) physical, emotional or mental impairment to the child *(see Matter of Nassau County Dept. of Social Servs. [Dante M.] v. Denise* J., 87 NY2d 73, 78-79 (1995). This prerequisite to a finding of neglect ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior. 'Imminent danger' reflects the Legislature's judgment that a finding of neglect may be appropriate even when a child has not actually been harmed; 'imminent danger of impairment to a child is an independent and separate ground on which a neglect finding may be based' (*Dante M.,* 87 NY2d at 79). Imminent danger, however, must be near or impending, not

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merely possible." *Nicholson v. Scoppetta*, 3 NY3d 357, 369 (2004).

FCA § 1012(h) defines "Impairment of emotional health" and "impairment of mental or emotional condition"as "a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior, including incorrigibility, ungovernability or habitual truancy; provided, however, that such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child."

When the allegations of neglect are based upon substance abuse, Petitioner may "satisfy its burden of proof regarding actual or imminent danger of physical , mental or emotional impairment in one of two ways. First, Petitioner can establish a prima facie case pursuant to Family Court Act §1046(a)(iii). Second, it can introduce evidence proving that the parent's substance abuse resulted in actual or imminent danger of impairment to the physical, mental or emotional condition of the child pursuant to Family Court Act §1012(f)(i)(B)." *In the Matter of a Proceeding Under Article 10 of the Family Court Act,* 34 Misc 3d 1226(A) (Fam. Ct., Kings County, 2012).

Family Court Act § 1046(a)(iii) provides "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." "In other words, '[t]he presumption contained in Family [Ct.] Act Sec 1046(a)(iii) operates to eliminate a requirement of specific parental conduct vis-a-vis the child and neither actual impairment nor specific risk of impairment need be established *[Citations omitted]*." *In the Matter of Paolo W*., 56 AD3d 966 (3rd Dept 2008); see also, *In the Matter of Angela M*., 111 AD3d 940 (2nd Dept 2013).

Here, the uncontroverted evidence establishes that Respondent was enrolled in a drug treatment program before the Petition was filed and voluntarily continued in the program thereafter. It is also uncontroverted that Respondent continued to test positive for cocaine while enrolled in the drug treatment program. However, although the drug treatment records of April 16, 2013, state that Respondent will be referred for a 28 day in-patient treatment if she continues to test positive, that referral was never made. Rather, the record establishes that Respondent continued with her drug treatment program at Palladia without interruption and that the records indicate she was actively participated in the program.

The language of 1046(a)(iii) is unambiguous. If a person is "voluntarily and regularly participating in a recognized rehabilitative program," then drug use alone may not establish a

prima facie case of neglect. Petitioner argues that because she continued to test positive Respondent was not "regularly participating," citing *In the Matter of Keira O*, 44 AD3d 688 (2nd Dept 2007). However, in *Keira O* the Court reversed Family Court's granting of the respondent's motion to dismiss inasmuch as "whether she was 'voluntarily and regularly participating' in this program is a factual one which should be explored at a hearing where the Respondent was continuing to test positive [citation omitted]." *Id* at 670.

Here, the evidence at the hearing established that Respondent was referred to Palladia before the Petition was filed, and that although she missed some treatment dates and continued to test positive for cocaine, Respondent was never dropped from the program, and she in fact continued to voluntarily attend. Most importantly, the record establishes that Respondent was actively engaged in her program and her cocaine usage decreased during the course of her treatment, which this Court credits to Respondent's regular participation in the program. Therefore, based upon the evidence submitted, it is determined that Respondent was at all times "voluntarily and regularly enrolled" in a drug treatment program.

Inasmuch as Petitioner may not rely upon Respondent's drug use alone to establish neglect pursuant to FCA § 1046(a)(iii), Petitioner must establish imminent danger pursuant to FCA § 1012(f)(i)(B). As the Court of Appeals cautioned: "Imminent danger, however, must be near or impending, not merely possible. *Nicholson*, 3 NY3d at 369). *See, e.g., In the Matter of Anna F.* 56 AD3d 1197 (3rd Dept 2008) (Neglect petition dismissed; respondent's admission of drug or alcohol use while the children are asleep was insufficient as petitioner argued the children were at risk because it was possible that they would wake up or need to be taken to the emergency room in the middle of the night). Furthermore, Petitioner failed to establish how much cocaine Respondent used and how it affected her. There was no testimony that anyone observed Respondent when she was under the influence or how her drug use impacted her ability to function or to care for the children. *Compare, In re Christina G.*, 100 AD3d 454, 455 (1st Dept 2012) (Neglect established inasmuch as respondent father admitted using cocaine and that he was not in a treatment program. Additionally, his daughter testified that on one occasion he had used cocaine while she was in the car).

Here Petitioner failed to establish imminent danger due to Respondent's drug use. The evidence presented unequivocally establishes that the children's physical, mental or emotional condition were not impaired and were not in danger of becoming impaired. Instead the evidence established Respondent cooks dinner every night and arranges for the children to go the park and church functions; the children regularly attended school, did well in school, and all graduated to the next grade. The children are happy at home and most importantly, are unaware of their mother's drug usage. Respondent was always forthright about her drug use to the Petitioner's caseworker and Palladia's caseworker. Respondent always expressed to the caseworkers that she only used cocaine when the Subject Children were asleep. Petitioner has failed to establish where Respondent was when she used cocaine, if she was at home, whether she was at home alone with the children or whether Non-Respondent Father was also present.

While the court is entitled to draw the strongest negative inference against Respondent for her failure to testify in these proceedings, the strongest negative inference cannot provide a missing element of proof. *Matter of Kayla F.*, 39 AD3d 983 (3rd Dept. 2007).

Based on the foregoing, the court finds that Petitioner has failed to establish a prima face case of neglect under FCA § 1046(a)(iii) and FCA § 1012(f)(i)(B). Accordingly, the petition is dismissed. This constitutes the decision and order of the court.

ENTER:

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MARCELLE Z. BRANDES, J.F.C.