

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CITY OF NEW YORK

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In the Matter of :
M [REDACTED] K [REDACTED] : NOTICE OF MOTION
: :
A Child Under Eighteen Years of Age : Docket No. NN- [REDACTED]
Alleged to be Neglected by : :
A [REDACTED] K [REDACTED] : :
Respondent. :
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PLEASE TAKE NOTICE that upon the annexed Affirmation of [REDACTED]
Brooklyn Defender Services, 195 Montague Street, Brooklyn, New York 11201, affirmed on the
27th day of January, 2023, the attached memorandum of law, and upon all the pleadings and
proceedings heretofore had herein, the undersigned will move this Court, at 330 Jay Street,
Brooklyn, New York 11201, Part 10 on the 13th day of February, 2023 at 10:00 A.M., or as soon
thereafter as counsel can be heard for an Order:

1. Dismissing the Petition pursuant to Civil Practice Law and Rules § 3211(a)(7) for failure to state a cause of action; and
2. Providing for further relief as may be deemed just and proper.

Responses to this motion, if any, are due on February 6, 2023, pursuant to C.P.L.R § 2214(b).

Dated: January 27, 2023
Brooklyn, New York

[REDACTED]
[REDACTED]
[REDACTED]
Brooklyn Defender Services
Family Defense Practice
Counsel for [REDACTED]
177 Livingston Street, 7th Floor
Brooklyn, NY 11201

[REDACTED]

[REDACTED]

To:

[REDACTED]

Administration for Children's Services
Family Court Legal Services
330 Jay Street, 12th Floor
Brooklyn, NY 11201

[REDACTED]

Attorney for the Child
Legal Aid Society
111 Livingston Street, 8th Floor
Brooklyn, NY 11201

[REDACTED]

Attorney for the Respondent Mother
300 Cadman Plaza West, 12th Floor
Brooklyn, NY 11201

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Affirmation in Support of
Respondent's Motion to Dismiss

Docket No. NN-[REDACTED]

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1. I am an attorney with the BROOKLYN DEFENDER SERVICES, FAMILY DEFENSE PRACTICE, 177 Livingston Street, Brooklyn, New York, the attorneys of record for the respondent father A [REDACTED] K [REDACTED]. As such, I am fully familiar with the facts and circumstances of this case.
2. I make this affirmation in support of Mr. K [REDACTED]'s motion for an order dismissing the petition for failure to state a cause of action pursuant to Civil Practice Law and Rules ("CPLR") § 3211(a)(7).
3. The Administration for Children's Services ("ACS") commenced this child protective proceeding on December 27, 2022, pursuant to Article 10 of the Family Court Act, alleging that Mr. K [REDACTED] and Ms. A [REDACTED], the respondent mother, failed to provide their son M [REDACTED] with proper supervision or guardianship by misusing a drug or drugs and not voluntarily and regularly participating in rehabilitative programs. *See* Article 10 Petition, attached hereto as Exhibit A. M [REDACTED] K [REDACTED] was born on or about November 16, 2022. *Id.* With regards to Mr.

K[REDACTED], the Petition alleges that he tested positive for various substances as a result of a urine sample taken on November 18, 2022, and that according to Mr. K[REDACTED]'s psychiatrist, all the positive test results can be explained by medications he prescribes to the respondent father except the positive results for Marijuana, Methamphetamine and Alprazolam¹. *Id.*

4. On information and belief, Mr. K[REDACTED] provided a CPS worker with his psychiatrist's name and phone number but did not sign a HIPAA release form that authorized his psychiatrist to release confidential medical information regarding his prescribed medication to ACS.
5. On December 27, 2022, Mr. K[REDACTED] appeared in court and Brooklyn Defender Services was assigned to represent him. The Family Court remanded M[REDACTED] to the custody of ACS with a restrictive placement to his paternal grandmother. Mr. K[REDACTED] reserved his right to a hearing pursuant to Family Court Act Section 1028 at that time.
6. For the reasons contained in the attached memorandum of law, the petition fails to state a cause of action for neglect and should be dismissed.

WHEREFORE, your affirmant respectfully requests that this Court dismiss the within petition.

Dated: Brooklyn, New York
January 27, 2023

[REDACTED]

Brooklyn Defender Services
Family Defense Practice
Attorney for A[REDACTED] K[REDACTED]
177 Livingston Street, 7th Floor
Brooklyn, NY 11201

[REDACTED]

[REDACTED]

¹ A medication, more commonly known as Xanax, used to treat anxiety and panic disorders. *See* Mayo Clinic, *Alprazolam (Oral Route)* (November 2022), accessible at <https://www.mayoclinic.org/drugs-supplements/alprazolam-oral-route/description/drg-20061040>.



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Docket No. NN-[REDACTED]

MEMORANDUM OF LAW IN SUPPORT OF
RESPONDENT FATHER'S MOTION TO DISMISS

[REDACTED]

[REDACTED]

THE PETITION SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE A CAUSE OF ACTION FOR NEGLECT

The Court should dismiss the petition against Mr. K [REDACTED] because, even if true, the allegations in the petition against Mr. K [REDACTED] do not constitute neglect as defined by the Family Court Act (“FCA”). The petition alleges that Mr. K [REDACTED] tested positive for various substances, some confirmed to be prescribed, on one toxicology test taken when his son M [REDACTED] was two days old and in the care of hospital staff. The petition does not allege that Mr. K [REDACTED] ever misused substances in his son’s presence, that he was ever under the influence of drugs while visiting or caring for his son, or even that he used any substances after his son’s birth. The allegations in the petition do not amount to neglect as defined by FCA 1046(a)(iii) or FCA 1012(f), thus the petition should be dismissed.

Section 3211(a)(7) of the Civil Practice Law and Rules (“CPLR”) provides that a party may move to dismiss a cause of action on the ground that the pleading fails to state a cause of action. “On a motion to dismiss a petition in a child protective proceeding, the court must accept the allegations set forth in the petition as true and afford the petitioner the benefit of every favorable inference that can be drawn therefrom.” *In re Keira O.*, 844 N.Y.S.2d 344, 345 (2d Dept. 2007). However, this does not relieve petitioner of the obligation to plead “facts sufficient to establish that a child is an abused or neglected child.” *See* FCA § 1031(a); *see also In re Roman*, 405 N.Y.S.2d 899, 901 (Onondaga Cty. Fam. Ct. 1978); Douglas Besharov, Practice Commentary, McKinney's Cons. Laws of New York, Book 29A at 56, Fam. Ct. Act. § 1031(a) (“[G]eneral or conclusory pleadings are prohibited.”).

The petition does not contain any specific allegation, as required by FCA § 1031(a), of any failure by Mr. K [REDACTED] to exercise a minimum degree of care that caused the subject child to be physically, mentally, or emotionally impaired, or in imminent danger of such impairment.

Reciting the elements of FCA § 1012(f), as this petition does, is inadequate to fulfill the requirements of FCA § 1031(a), which states that the petition must allege facts sufficient to establish petitioner's claim that a child is neglected. The petitioner cannot make up for deficiencies in the petition's factual allegations by reciting the statutory elements of neglect at the outset of the petition. Nor do the specific facts alleged in the petition state a claim for neglect, in that, even if true, they do not demonstrate that M■■■■ was ever harmed or in imminent danger of near or impending, serious harm as a direct result of any failure by his father to exercise a minimum degree of care.

In *Nicholson v. Scoppetta*, the Court of Appeals held that to establish neglect under FCA section 1012(f)(i)(B), the petitioner must prove two elements:

first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship.

3 N.Y.3d 357, 369 (2004). Accordingly, in order to state a claim for neglect the petitioner must plead facts sufficient to establish actual or imminent danger of physical, mental or emotional impairment to the child, and the imminent danger "must be near or impending, not merely possible." *See id.* at 369; FCA § 1031(a). This requirement ensures that the Family Court "will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior." *Nicholson*, 3 N.Y.3d at 369. A parent's actions constitute neglect only when they fall below a "'minimum degree of care'—not maximum, not best, not ideal." *Nicholson*, 3 N.Y.3d at 370. As explained below, the petition in this case fails to state a cause of action because it does not allege any facts that would establish that the subject child was ever harmed or in imminent danger of harm as a result of any failure on Mr. K■■■■'s part to exercise a minimum degree of care.

A. The Allegation that Mr. K [REDACTED] Provided One Positive Toxicology Report, Two Days After His First Child's Birth, Does Not State a Claim for Neglect

Petitioner may demonstrate neglect by reason of a parent's misuse of drugs in one of two ways. First, petitioner may allege facts that demonstrate a prima facie case of neglect pursuant to FCA 1046(a)(iii); presenting evidence "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." Alternatively, petitioner may allege facts that demonstrate that the parent misused drugs and that as a result of the parent's drug use, the child was impaired or placed at imminent risk of impairment. *See* FCA 1012(f). In the instant case, because the petition contains insufficient facts to support either form of neglect, the petition must be dismissed.

i. Petitioner Has Not Alleged Facts Demonstrating the Repeated Misuse of Drugs as Defined in FCA 1046(a)(iii).

The mere fact that Mr. K [REDACTED] is alleged to have tested positive for non-prescribed substances on one occasion does not constitute neglect as defined in FCA 1046(a)(iii) because there is no allegation that Mr. K [REDACTED] misused drugs repeatedly to the extent required under the statute to support a prima facie case. In order to demonstrate neglect pursuant to FCA 1046(a)(iii), ACS must present evidence "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." Thus, "if the parent is a *heavy, regular* user of a drug or alcohol, then no specific harm or risk of harm to the child need be established before a finding of neglect

can be made.”² Besharov, Practice Commentary, McKinney's Cons Laws of NY, Book 29A 352, Fam. Ct. Act. § 1012.

The petition against Mr. K [REDACTED] contains no facts suggestive of heavy or regular substance use and no information at all about the extent and duration of Mr. K [REDACTED]'s alleged use, and thus fails to state a claim under FCA 1046(a)(iii). Allegations of a single positive toxicology test clearly do not amount to the repeated misuse of drugs as defined in the statute. *See In re Bentley C.*, 165 A.D.3d 1629, 1630 (4th Dept. 2018) ("Here, petitioner submitted evidence that the father tested positive for THC, oxycodone, and opioids on one occasion, which is insufficient to establish that the father repeatedly misused drugs."), *see also In re Anastasia G.*, 52 A.D.3d 830, 830-31 (2d Dept. 2008) (father's admission that he used drugs and lack of enrollment in a drug treatment program were insufficient to support a neglect finding where ACS failed to elicit testimony establishing the type of drugs and the duration, frequency, or repetitiveness of his drug use); *In re Anna F.*, 56 A.D.3d 1197 (4th Dept. 2008) (the father's admission to occasional alcohol and drug use while the children were asleep did not establish the level of repeated misuse required for a finding of neglect); *In re Rebecca W.*, 504 N.Y.S.2d 928, 929 (4th Dept. 1986) (affirming lower court's dismissal of the petition where evidence that the subject child may have been exposed to adults occasionally smoking marijuana in the home during her visitation did not rise to "the magnitude described in Family Court Act 1046(a)(iii)"). Therefore, the allegation that Mr. K [REDACTED] tested positive for various prescribed and non-prescribed substances on one

² There is an exception to this rule with respect to a parent or caretaker's use of cannabis. Where ACS alleges repeated misuse of marijuana, ACS must still demonstrate harm to the child. FCA 1046(a)(iii) ("[T]he sole fact that an individual consumes cannabis, without a separate finding that the child's physical, mental, or emotional condition was impaired or is in imminent danger of becoming impaired established by a fair preponderance of the evidence, shall not be sufficient to establish prima facie evidence of neglect.")

occasion, two days after his son's birth, is not sufficient to establish a claim for neglect as defined in FCA 1046(a)(iii).

ii. **Petitioner has Not Alleged Facts Demonstrating that Mr. K [REDACTED] Misused Drugs and Placed Milan at Imminent Risk of Harm as defined in FCA 1012(f)**

The allegations also do not constitute neglect under F.C.A. 1012(f)—petitioner has not alleged facts that would establish Mr. K [REDACTED] misused drugs and thus placed M [REDACTED] at imminent risk of harm. Parental drug use does not provide a basis for a per se finding of neglect under F.C.A. 1012(f). Rather, petitioner must allege facts sufficient to show that the parent's drug use caused the child to become impaired or be placed at imminent risk of impairment. *In re Diamond J.*, 102 A.D.3d 784 (2d Dept. 2013) (affirming dismissal of neglect petition because there was no evidence that mother's drug use harmed children or placed them in imminent danger of harm); *In re Shaun B.*, 55 A.D.3d 301, 303 (1st Dept. 2008) (reversing neglect finding based on respondent's admission that she smoked marijuana and was not participating in a drug treatment program, where there was no evidence establishing when or how often respondent smoked marijuana or how the child's condition was impaired or in imminent danger of impairment); *In re Anna F.*, 56 A.D.3d at 1197 (overturning lower court's finding of neglect, finding that the father's admission to occasionally drinking alcohol and using drugs while caring for the children after they went to bed failed to establish imminent risk of harm). And, after the passage of the Marijuana Regulation and Taxation Act, it is clear that the legislature does not intend for marijuana use to provide the basis for a finding of neglect without a specific showing that a parent's marijuana use has caused impairment or imminent risk of impairment in the child. See FCA § 1046(a)(iii), see generally Cannabis Law § 127(5) (stating that "whether, when, and how often" a parent uses cannabis cannot be used to deny parenting time under the Family Court Act absent a showing of impairment or imminent danger of impairment to the child."). Petitioner thus

cannot rely on a positive toxicology test alone, without specifically alleging impairment or risk of impairment to the child.

Mr. K■■■■'s single positive toxicology test, taken while his newborn child was hospitalized and in the care of medical staff, does not demonstrate that he misused drugs or that as a result of his drug use, his child was impaired or placed at imminent risk of impairment as required by the Nicholson standard. The petition does not allege any facts about when and how Mr. K■■■■ used drugs. When Mr. K■■■■ submitted to urinalysis on the one occasion described in the petition, M■■■■ was two days old, in the hospital, and under the care of medical staff. *C.f. In re Hakeem*, 206 A.D.3d 1537 (3d Dept. 2022) (insufficient evidence of imminent risk of impairment to the children where they were supervised by shelter staff while their mother was intoxicated). Critically, the petitioner does not allege that Mr. K■■■■ used drugs in the presence of M■■■■, that he ever visited with or cared for M■■■■ under the influence of drugs, or that his use of medications or drugs had any effect whatsoever on M■■■■. The petition simply offers no relevant facts from which to infer impairment or imminent risk of impairment as a result of Mr. K■■■■'s alleged use of drugs. The single positive toxicology report therefore does not show any "near or impending danger" to M■■■■. *Nicholson*, 3 N.Y.3d at 369, *see also In re Hakeem S.*, 206 A.D.3d at 1537. The petition does, however, allege that Mr. K■■■■ is under the care of a psychiatrist and that the toxicology results confirmed his use of several prescribed medications. It cannot reasonably be inferred from these facts alleged in the petition that Mr. K■■■■ provided inadequate supervision and guardianship to M■■■■ or that his child was ever in imminent danger of harm.

The petition also does not even allege that Mr. K■■■■ misused any substances after his son was born, further failing to state a cause of action that Mr. K■■■■'s drug use placed his son at

risk of harm. Urinalysis results taken on one occasion, two days after M■■■■ born, could reflect substance use either before or after M■■■■'s birth. Article Ten of the FCA is concerned with parental behavior, and neglect requires proof of “the parent’s failure to exercise a minimum degree of care.” *Nicholson*, 3 N.Y.3d at 370 (2004). The minimum degree of care is the “baseline of proper care for children that all *parents*, regardless of lifestyle or social or economic position, must meet.” *Nicholson*, 3 N.Y.3d at 370 (emphasis added) (citing Douglas Besharov 1998 Practice Commentary; McKinney’s Cons. Laws of N.Y. Book 29A, Fam. Ct. Act Section 1012 at 326 [1999 ed.])). To hold otherwise would mean that Article 10 of the Family Court Act establishes requirements of behavior on all potential parents, which is not the case. *See In re Jessica Y.Y.*, 258 A.D.2d 743 (3d Dept. 1999) (“prenatal conduct alone cannot be the basis of a neglect finding”); *In re Jayvien E.*, 70 A.D.3d 430 (1st Dept. 2010) (“a finding of neglect should not be made lightly, nor should it rest upon past deficiencies alone.”); *In re Xavier G.*, 19 Misc. 3d 1113(A) (Kings Cty. Fam. Ct. 2008) (conditionally granting motion to dismiss where there was no allegation that respondent father's prenatal substance abuse harmed the child or placed him at imminent risk of harm, noting that it is well-settled that a parent’s prenatal conduct alone cannot be the basis of a neglect finding in the absence of evidence it placed the child at imminent risk of harm). M■■■■ is Mr. K■■■■'s first child, and Mr. K■■■■'s prenatal conduct does not establish that he placed M■■■■ at imminent risk of harm.

Although probably unlikely, to the extent that ACS might attempt to argue that Mr. K■■■■'s allegedly positive toxicology test in combination with M■■■■'s positive toxicology test adequately alleges neglect, the law is clear that a single positive toxicology test of a child at birth is insufficient to establish neglect on its face—this rule logically applies even more forcefully where, as in this case, it was the respondent *father* who provided a single positive toxicology test

after the birth of his child. In *Dante M.*, the Court of Appeals held that a single positive toxicology report of a child at birth is insufficient to prove a child is actually impaired or in imminent danger of becoming impaired. 87 N.Y.2d 73, 78-79 (1995) (standing alone, a single positive toxicology report at birth fails to make out the “necessary causative connection to all the surrounding circumstances that may or may not produce impairment or imminent risk of impairment in the newborn child”); *see also In re Saphire A.W.*, 204 A.D.3d 488 (1st Dept. 2022) (finding a mother’s marijuana use during pregnancy, and mother and child’s positive marijuana test at birth, insufficient to show imminent danger of harm and a neglect finding on that basis “inconsistent with this State’s public policy legalizing marijuana, as reflected in the recent amendment to the Family Court Act.”). The insufficient causative link between one positive toxicology test at birth and imminent risk, as articulated in *Dante M.* and *Saphire A.W.*, is even more attenuated where, as here, it cannot be reasonably inferred from the facts alleged that Mr. K■■■■’s alleged drug use *caused* his son’s positive toxicology when he was not the birthing parent. Accordingly, neither the allegation of Mr. K■■■■’s single positive toxicology test, nor the allegation that M■■■■ tested positive at birth, alone or together, are sufficient to demonstrate that Mr. K■■■■ failed to exercise a minimum degree of care towards his son or that he placed his child at imminent risk of impairment.

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition pursuant to C.P.L.R. § 3211(a)(7) for failure to state a cause of action for neglect.

Dated: January 27, 2023
Brooklyn, New York

Respectfully submitted,

