SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

283

CAF 16-01495

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF TYREE B., JR., AND AMAREE B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHRISTINA H., RESPONDENT,
AND TYREE B., RESPONDENT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT.

JAMES E. BROWN, BUFFALO, FOR PETITIONER-RESPONDENT.

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered August 18, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined that respondents abused their three-month-old child and derivatively abused their two-year-old child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent father appeals from an order adjudging that respondents abused their three-month-old child and derivatively abused their two-year-old child. We reject the father's contention that the evidence is legally insufficient to support Family Court's findings with respect to the younger child. Petitioner presented the testimony of a physician establishing that the younger child had a fractured humerus and rib, and the explanation offered by respondents for those injuries was inconsistent with the nature and severity of the injuries. Petitioner therefore established a prima facie case of child abuse with respect to the younger child (*see* Family Ct Act § 1046 [a] [ii]), and the father failed to rebut the presumption of parental responsibility (*see Matter of Philip M.*, 82 NY2d 238, 246 [1993]). Contrary to the father's contention, petitioner "was not required to establish whether [respondent] mother or the father actually inflicted the injuries, or whether they did so together . . . [, and] the [father's] denial of fault and [the mother's] attempt to blame [the older child] for the injuries [were] insufficient to rebut [petitioner's] prima facie evidence of . . . abuse" (*Matter of Nyheem E. [Jamila G.]*, 134 AD3d 517, 518 [1st Dept 2015]; *see Matter of Jacinta J.*, 140 AD2d 990, 991-992 [4th Dept 1988]).

The father also contends that the court erred in admitting the entire case file in evidence because the case file contained some hearsay. We reject that contention. Here, unlike in *Matter of Leon RR* (48 NY2d 117, 120 [1979]), the court received the case file conditionally, subject to the father's hearsay objections (*see Matter of Merle C.C.*, 222 AD2d 1061, 1062 [4th Dept 1995], *lv denied* 88 NY2d 802 [1996]). We note in any event that any error in admitting the case file in evidence is harmless because "the result reached herein would have been the same even had such record[s], or portions thereof, been excluded . . . Moreover, [t]here is no indication that the court considered, credited, or relied upon inadmissible hearsay in reaching its determination" (*Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1478 [4th Dept 2017] [internal quotation marks omitted]; *see Merle C.C.*, 222 AD2d at 1062).

Entered: April 27, 2018

Mark W. Bennett
Clerk of the Court