

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

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CAF 22-00476

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

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IN THE MATTER OF ZAKIYYAH T.

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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LAMAR R., RESPONDENT-APPELLANT.  
(APPEAL NO. 1.)

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CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO  
(RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), dated March 7, 2022, in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, determined that respondent abused the subject child.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent father appeals from two separate orders and respondent stepmother appeals from the second of those two orders. In appeal No. 1, the father appeals, as limited by his brief, from that part of an order adjudging that he abused one of his daughters (older child). In appeal No. 2, the father appeals, as limited by his brief, from that part of an order adjudging that he abused another daughter (younger child), and the stepmother appeals, as limited by her brief, from that part of the same order adjudging that she neglected the younger child.

Contrary to the father's contention in appeal Nos. 1 and 2, Family Court did not err in denying his motion to dismiss the petitions against him at the close of petitioner's proof inasmuch as petitioner established a prima facie case of sexual abuse in the first degree against him with respect to both children (see Penal Law § 130.65 [4]). Penal Law § 130.65 (4) is violated when the actor subjects another person to sexual contact when the actor is 21 years old or older and the victim is less than 13 years old (*id.*). " 'Sexual contact' means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of

either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed" (§ 130.00 [3]). Inasmuch as the term "intimate parts" has been interpreted very broadly, it has been "held that the thigh/upper leg is an intimate part" of the body (*People v Manning*, 81 AD3d 1181, 1182 [3d Dept 2011], *lv denied* 18 NY3d 959 [2012]; see *People v Gray*, 201 AD2d 961, 962 [4th Dept 1994], *lv denied* 83 NY2d 1003 [1994]; see also *People v Beecher*, 225 AD2d 943, 944-945 [3d Dept 1996]). Here, with respect to the element of sexual gratification, a determination that the father's "actions were for the purpose of gratifying his sexual desire . . . may be inferred from a totality of the circumstances" (*Matter of Jani Faith B. [Craig S.]*, 104 AD3d 508, 509 [1st Dept 2013]; see *Matter of Daniel R. [Lucille R.]*, 70 AD3d 839, 841 [2d Dept 2010]; see generally *People v Hatton*, 26 NY3d 364, 370 [2015]), including the "humiliation evoked" in the victims (*Hatton*, 26 NY3d at 371).

Both children told interviewers that the father committed acts of sexual contact against them. According to the older child, the father touched her vaginal area over clothing, while exposing his erect penis and asking her to perform a sexual act on him. She also stated that, on a separate occasion, the father touched one of her breasts over clothing. The younger child said that the father touched the upper, inner area of one of her thighs, while simultaneously attempting to remove her shirt. "The cross-corroborating accounts of the children with respect to the nature and progression of the sexual abuse '[gave] sufficient indicia of reliability to each [child's] out-of-court statements' " (*Matter of Janiece B. [James D.B.]*, 93 AD3d 1335, 1335 [4th Dept 2012], quoting *Matter of Nicole V.*, 71 NY2d 112, 124 [1987], *rearg denied* 71 NY2d 890 [1988]; see *Matter of Grayson S. [Thomas S.]*, 209 AD3d 1309, 1312-1313 [4th Dept 2022]).

The father further contends in both appeals that, in light of the evidence presented by him and the stepmother following the denial of their respective motions to dismiss the petitions against them at the close of petitioner's case, the court's ultimate determination that petitioner established his abuse of the children by a preponderance of the evidence is not supported by a sound and substantial basis in the record (see generally Family Ct Act § 1046 [b] [i]; *Matter of Mollie W. [Corinne W.]*, 214 AD3d 1463, 1463 [4th Dept 2023]). We disagree. Although the father denied the allegations of abuse, his " 'denial[s] of the[ ] allegations, along with other contrary evidence, merely presented a credibility issue for [the court] to resolve' " (*Matter of Lylly M.G. [Theodore T.]*, 121 AD3d 1586, 1587 [4th Dept 2014], *lv denied* 24 NY3d 913 [2015]).

Based upon our review of the evidence, we conclude that the testimony of the father and the stepmother at the hearing also served to corroborate the allegations of abuse made by both girls. "We accord great weight and deference to [the court]'s determinations, 'including its drawing of inferences and assessment of credibility,' " and we will not disturb the court's credibility determinations with respect to the abuse allegations against the father inasmuch as those

determinations are supported by the record (*Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401 [4th Dept 2013], *lv denied* 21 NY3d 862 [2013]; see *Lylly M.G.*, 121 AD3d at 1587-1588).

With respect to the stepmother's contentions in appeal No. 2, we conclude that, even assuming, arguendo, that the evidence presented by petitioner established a prima facie case of neglect against the stepmother based on the younger child's statements that she told the stepmother about the father's abuse of her and that the stepmother failed to take any steps to protect her, thus warranting the denial of the stepmother's motion (see generally *Matter of Anastasia C. [Carol C.]*, 78 AD3d 1579, 1580 [4th Dept 2010], *lv denied* 16 NY3d 708 [2011]), the court's ultimate determination that petitioner established the stepmother's neglect of the younger child by a preponderance of the evidence is not supported by a sound and substantial basis in the record (see generally Family Ct Act § 1046 [b] [i]; *Mollie W.*, 214 AD3d at 1463).

Petitioner was required to establish by a preponderance of the evidence that the stepmother, as a parent or caretaker, "knew or should have known of circumstances which required action in order to avoid actual or potential impairment of the child and failed to act accordingly" (*Matter of Crystiana M. [Crystal M.-Pamela J.]*, 129 AD3d 1536, 1537 [4th Dept 2015] [internal quotation marks omitted and emphasis added]; see *Mollie W.*, 214 AD3d at 1464; see generally Family Ct Act § 1046 [b] [i]). The evidence presented at the hearing established that, upon being informed of the father's actions against the younger child, the stepmother acted to separate the child from the father and that no further improprieties took place. Thus, even if we were to credit the child's statements to the interviewer that she told the stepmother of the father's conduct, the record does not establish that the stepmother thereafter failed to protect her

We note that the record on appeal reflects that Erie County Child Protective Services has expunged the indicated report of maltreatment against the stepmother following a determination that the alleged maltreatment of the younger child was not proven by a fair preponderance of the evidence. Taking judicial notice of the subsequent court proceedings relevant to these appeals (see generally *HoganWillig, PLLC v Swormville Fire Co., Inc.*, 210 AD3d 1369, 1371 [4th Dept 2022]; *Matter of Clifford*, 204 AD3d 1397, 1397 [4th Dept 2022]), we further note that petitioner has since moved to vacate the order of fact-finding and disposition against the stepmother, indicating that it no longer wishes to pursue the matter against her. That motion was denied by the court. In light of the foregoing, we modify the order in appeal No. 2 by vacating the adjudication of neglect against the stepmother and dismissing the petition against her.