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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF DASHAWN W. No. 71

20 Eagle Street
Albany, New York 12207
March 20, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 71, Matter of
2 Dashawn W.

3 Okay, counselor, go ahead.

4 MS. BARNES: Yes. Good afternoon, Your
5 Honor. My name is Elisa Barnes. I appear today for
6 Antoine N. In this matter, I would request five
7 minutes of rebuttal time.

8 CHIEF JUDGE LIPPMAN: Okay. Go ahead.

9 MS. BARNES: Your Honor, my client, the
10 appellant, appeals two decisions from the First
11 Department. One is of fact, and the final one, as a
12 final order, is a matter of statutory construction
13 and of law.

14 CHIEF JUDGE LIPPMAN: Talk about - - - talk
15 about depra - - - depraved indifference and the
16 difference between the Penal Law - - -

17 MS. BARNES: Yes.

18 CHIEF JUDGE LIPPMAN: - - - and - - - yeah,
19 go ahead.

20 MS. BARNES: The family court judge who
21 heard this matter in 2008 had before her Suarez and
22 Feingold.

23 CHIEF JUDGE LIPPMAN: Right.

24 MS. BARNES: And it was her understanding
25 that, based on this Court's decisions, depraved

1 indifference was a special or a separate mens rea - -
2 - separate - - -

3 CHIEF JUDGE LIPPMAN: Yeah, but is it
4 different than the Social Service Law or the Penal
5 Law?

6 MS. BARNES: I would say no, Your Honor.

7 CHIEF JUDGE LIPPMAN: Why - - - why not?

8 MS. BARNES: And I would ask you not to
9 change it.

10 CHIEF JUDGE LIPPMAN: Why isn't the Social
11 Service Law both intentional and reckless?

12 MS. BARNES: Because I think that Your
13 Honors and the courts can parse it and it can be
14 separate. Intentional is intentional. Reckless with
15 depraved indifference is the same as Your Honors have
16 defined it in the criminal context.

17 JUDGE SMITH: You - - - you admit that - -
18 - you would agree that - - - that intentionally - - -
19 at least on your view, intentional with depraved
20 indifference is impossible; it's a meaningless
21 phrase?

22 MS. BARNES: Yes. Given - - -

23 JUDGE SMITH: But isn't - - - but that is
24 what the statute seems to say.

25 MS. BARNES: Yes, but it is a much older

1 statute. It is - - - dates from 1981. And if the
2 Court - - - I know Your Honors took a long time to
3 get to the - - - the current definition of depraved
4 indifference in the criminal context, and if you
5 wanted not to go there completely in the social
6 services context, I would simply say that this case,
7 factually, is very different than the cases that you
8 have discussed, that have come up in the depraved
9 indifference criminal context involving injuries
10 against children.

11 JUDGE SMITH: In the criminal context,
12 depraved indifference is a mens rea - - - as we
13 finally figured out, is a mens rea for murder.

14 MS. BARNES: Yes.

15 JUDGE SMITH: I mean, just as policy
16 matter, can - - - can the legislature really have
17 intended that if you want to find severe abuse of a
18 child you have to show the same - - - you have to
19 make the same mens rea showing you would have to make
20 in a murder case?

21 MS. BARNES: Yes, I think they can, Your
22 Honor. And I think that's the - - -

23 JUDGE SMITH: And there are a lot of people
24 - - - there are a lot of people who severely abuse
25 their children who - - -

1 MS. BARNES: Well - - -

2 JUDGE SMITH: - - - bad as they are, aren't
3 murders.

4 MS. BARNES: - - - Your Honor, I would
5 submit that your statement in People v. Mui, that
6 there is - - - this is a very, very small subset.

7 JUDGE SMITH: Yeah, that - - - but I guess
8 that's what I'm saying. Is it - - - is it supposed
9 to be that small? I mean - - -

10 MS. BARNES: Yes, Your Honor, because it's
11 a fast track to an immediate parental termination of
12 rights which - - - I know Your Honors deal in the
13 criminal context, but in the civil context this, in
14 our world, is tantamount to a civil death penalty.

15 CHIEF JUDGE LIPPMAN: Why - - - why isn't
16 this analogous to, like, a shaken baby case?

17 MS. BARNES: Because there's no evidence
18 that he did anything. There is no evidence at all
19 that he was the one who inflicted any of these
20 injuries. You had two five-year-olds who testified
21 completely that it was the others, no - - - he didn't
22 do it, and you had the mother in the home. Court
23 counsel, for whatever reason, did not perfect the
24 appeal, did not appeal against the mother who the
25 trial judge found exactly as she found with Antoine

1 N., abuse, derivative abuse, and neglect.

2 It is not factually the case to say that
3 this, quote/unquote, garden-variety abuse which the
4 trial judge - - -

5 JUDGE SMITH: Well, I mean, this - - - yeah
6 - - - there is a finding that your - - - I mean, it
7 was the father, not the mother, who broke the child's
8 clavicle and ribs. Isn't is that - - -

9 MS. BARNES: There was no finding, Your
10 Honor. The trial court judge found both of them
11 guilty of abuse.

12 JUDGE SMITH: But you don't think we can
13 infer from this record that the actual blows were
14 inflicted by the father?

15 MS. BARNES: The mother was in the house,
16 and I do not believe - - - I can - - - while I'm
17 doing - - - waiting for my rebuttal, I can look back
18 through the record, but I do not think we can infer
19 that. And in fact, I think, Your Honor, as Corp.
20 Counsel admits, this decision was rendered
21 essentially on a res ipsa concept which it - - - it
22 comes under the Family Court Act - - -

23 JUDGE SMITH: Suppose - - -

24 MS. BARNES: - - - at 1046.

25 JUDGE SMITH: Suppose - - - suppose - - -

1 you may be right about the facts. Hypothetically,
2 suppose you've got a case where what you know is that
3 on one occasion the father hit the child - - - hit a
4 baby hard enough to break his ribs and another time
5 hit the same baby hard enough to break his clavicle.
6 You're saying that's not severe abuse under the
7 statute?

8 MS. BARNES: Well, the - - - I'm saying
9 that that comes much closer to where we are; however,
10 I would - - - I would just ask for a greater point of
11 - - - of statutory construction. The severe abuse
12 statute adds in at the end the Penal Law Section 10,
13 which is, like, duplicative because you have to have
14 an abuse finding which has the same language;
15 however, the Penal Law Subsection 10, the severe
16 injury, does have "causes death" in it as a
17 possibility. The evidence from the expert, who is a
18 CAC expert at Bellevue Hospital is that a fractured
19 clavicle requires no treatment, fractured ribs
20 require no treatment, that neither of them are life
21 threatening, and a fractured clavicle - - -

22 CHIEF JUDGE LIPPMAN: Garden-variety abuse?

23 MS. BARNES: That's what the trial judge,
24 who is a very experienced judge, had said.

25 JUDGE SMITH: She's - - - she's - - - she's

1 used to working in a rather - - - a rather disturbing
2 kind of garden, isn't she? I mean, if this is garden
3 variety - - -

4 MS. BARNES: Yeah, of course, Your Honor.
5 I - - - and I admit that this is a troubling and sad
6 case; however, I do not think under even the - - -
7 the more extraordinary facts that Your Honor proposes
8 that a severe abuse finding can be found that will,
9 with one step, lead to the termination of parental
10 rights.

11 JUDGE SMITH: And what would - - -

12 JUDGE GRAFFEO: Well, maybe I would better
13 understand, what do you need to show severe abuse?

14 MS. BARNES: Well - - - you mean under the
15 statute, the - - - whatever it is?

16 JUDGE GRAFFEO: Under your interpretation
17 of --

18 MS. BARNES: Well, you - - -

19 JUDGE GRAFFEO: - - - how the statute
20 operates.

21 MS. BARNES: Murder, manslaughter,
22 termination of a prior child - - - rights to a prior
23 child, assault.

24 JUDGE GRAFFEO: So you have to meet the - -
25 -

1 MS. BARNES: It has to be the - - -

2 JUDGE GRAFFEO: - - - the cause of - - -

3 cause of death?

4 MS. BARNES: Well, it doesn't have to be
5 death because it does have an assault provision.

6 CHIEF JUDGE LIPPMAN: What tells you that
7 conclu - - - where do you get that conclusion from?

8 MS. BARNES: That I get from the clear
9 language of the statute, 1051 in the Family Court Act
10 which is what brings you - - -

11 CHIEF JUDGE LIPPMAN: Clear language tells
12 you that, that you have to have - - - commit one of
13 those crimes?

14 MS. BARNES: Yes. If you go 1051(e), you
15 go to 384(b) and you read through it, they have
16 certain things. Then you - - - unfortunately, it's
17 very Talmudic. You have to be back to 1039 - - -

18 CHIEF JUDGE LIPPMAN: Yeah.

19 MS. BARNES: - - - (b) which is when you
20 can dispense with reasonable effort, and 1039 either
21 refers you to 1012(j) - - -

22 CHIEF JUDGE LIPPMAN: Well, it's - - - it's
23 circul - - -

24 MS. BARNES: - - - but it's a cir - - - it
25 - - - Your Honor - - -

1 CHIEF JUDGE LIPPMAN: It's circular to some
2 - - - yeah.

3 MS. BARNES: It is - - - it is - - - I
4 would - - - I would disagree, Your Honor.

5 CHIEF JUDGE LIPPMAN: Yeah.

6 MS. BARNES: It is not as the ch - - - the
7 lawyer for the children said, nonsensical. It is
8 limited. It is severely limited. It's limited by
9 clear design, and it's - - -

10 JUDGE PIGOTT: Does it fol - - - does it
11 follow, then, that diligent efforts should be applied
12 in every single case absent going - - - you know, the
13 limited number that you're talking about - - -

14 MS. BARNES: I think that is - - -

15 JUDGE PIGOTT: - - - that it'd be rare case
16 where diligent efforts weren't required?

17 MS. BARNES: Your Honor, I think this is
18 how you have to read the clear language of the
19 statute which is a result of intense legislative
20 compromise.

21 JUDGE SMITH: Yeah, but the - - -

22 MS. BARNES: They went - - -

23 JUDGE SMITH: As clear as it is, what it
24 seems - - - what it clearly says is you can excuse
25 diligent efforts if you've already performed them.

1 That doesn't make sense.

2 MS. BARNES: Well, no, if - - - it - - - no
3 - - - well, it - - - it - - - it says in that section
4 they can be excused if you have performed them and
5 you don't think they're working, which is an argument
6 that the - - -

7 JUDGE SMITH: Yeah, but what's the point -
8 - - what's the point of making diligent efforts a
9 part of - - - a part of the prerequisite for - - -
10 for excusing diligent efforts?

11 MS. BARNES: Because the legislatures are
12 very concerned about mistakes being made, that - - -
13 that people should not, without a full hearing or an
14 admission or a criminal conviction, have their
15 children taken away, because in the hubbub of that
16 difficult garden where family court judges work, a
17 lot of mistakes are made that are then changed.

18 JUDGE PIGOTT: Would it follow then that in
19 this case where the clavicles and the ribs were
20 apparently broken at different times, they were just
21 - - -

22 MS. BARNES: Yes.

23 JUDGE PIGOTT: - - - that the judge should
24 then still say you can keep your child but we're
25 going to have somebody come in and check on you from

1 time to time? Is that - - -

2 MS. BARNES: Well, in this case, the
3 children were not at home. They had taken the
4 children away.

5 JUDGE PIGOTT: I know, but you want them
6 back. You want to say they didn't - - - you know,
7 they didn't use diligent efforts therefore we should
8 have our children back.

9 MS. BARNES: No, no. I'm just saying that
10 there shouldn't be a severe abuse finding that can
11 later be used to terminate their rights.

12 JUDGE PIGOTT: I get that, but what I'm
13 saying is that when you - - - we have this abuse that
14 you say is not severe - - -

15 MS. BARNES: That - - - yes, that - - -

16 JUDGE PIGOTT: - - - and therefore - - -

17 MS. BARNES: Uh-huh.

18 JUDGE PIGOTT: - - - there should be
19 diligent efforts to keep the family together.

20 MS. BARNES: Exactly, and they should go in
21 and - - -

22 JUDGE PIGOTT: And so what I'm saying is
23 that, you say - - - and so this doctor comes in and
24 says - - - I think the ribs were broken first - - -
25 that the ribs showed evidence of an older injury.

1 MS. BARNES: Yes.

2 JUDGE PIGOTT: Then there's a - - - there's
3 a situation where his - - - his clavicle was broken.

4 MS. BARNES: Yes.

5 JUDGE PIGOTT: And the judge should then
6 say, okay, father, we're giving you your child back
7 but stop - - - I mean, what - - - I mean, isn't it
8 dangerous?

9 MS. BARNES: No. The judge then says - - -
10 the judge says - - - then says, this is an abuse
11 case, you will have to satisfy, you know, ten
12 different social services; you will have to go to
13 counseling; you will have to take anger management
14 and - - -

15 JUDGE PIGOTT: But the child goes back.

16 MS. BARNES: No, the child didn't go back.
17 The child stayed away from the mother for, I believe,
18 two-and-a-half years.

19 JUDGE PIGOTT: But I mean, I thought that's
20 what you're complaining about. I thought you said -
21 - -

22 MS. BARNES: No, I'm not complaining - - -

23 JUDGE PIGOTT: So you're saying the child
24 can stay away - - -

25 MS. BARNES: Yes.

1 JUDGE PIGOTT: - - - it just - - - it just
2 can't be - - - there can't be termination.

3 MS. BARNES: The severe - - - the severe
4 abuse is such a Draconian circumstance and it's such
5 a fast track to an immediate termination; that's all
6 I'm saying.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.
8 Thank you.

9 MS. BARNES: Thank you.

10 CHIEF JUDGE LIPPMAN: You'll have your
11 rebuttal.

12 MS. BRENNER: Good afternoon. May it
13 please the Court, I am Deborah Brenner, and I am here
14 for the petitioner/respondent, Administration for
15 Children's Services.

16 CHIEF JUDGE LIPPMAN: Counselor, how do you
17 interpret the statutory framework in terms of do you
18 have to commit one of those crimes in order to have a
19 severe abuse finding?

20 MS. BRENNER: Absolutely not, Your Honor.

21 CHIEF JUDGE LIPPMAN: Why not?

22 MS. BRENNER: Because if that was what the
23 legislature has intended, then when it amended the
24 statute, it would have gotten rid of 384(b)(8)(A)(i)
25 which is still fully in effect, which says when a

1 parent inflicts serious physical injury on a child as
2 a result of reckless or intentional acts of wretch -
3 - - reckless or intentional acts committed under
4 circumstances evincing a depraved indifference to
5 human life, that, too, is severe abuse.

6 CHIEF JUDGE LIPPMAN: So what's - - -
7 what's the difference in your - - - from your
8 perspective between the Penal Law standard and this
9 standard?

10 MS. BRENNER: So many distinctions, Your
11 Honor, and I think that - - -

12 CHIEF JUDGE LIPPMAN: Go ahead.

13 MS. BRENNER: - - - my adversary is trying
14 very hard to make this much more like a criminal case
15 than it should. The - - - the Social Services Law as
16 well as the Family Court Act are designed to protect
17 children, and therefore, many of the basic rules are
18 very different. First of all, once it's been
19 established that there is a - - - an injury that is
20 suspicious of child abuse, the burden shifts to the
21 parent to demonstrate that he was not the one who
22 inflicted it. Secondly, when a parent chooses not to
23 testify, the court can draw the strongest possible
24 inference against them.

25 CHIEF JUDGE LIPPMAN: Well, your adversary

1 is saying that there's no evidence that he inflicted
2 it.

3 MS. BRENNER: There is - - -

4 CHIEF JUDGE LIPPMAN: Your - - - your - - -
5 your argument is that you can infer that he did it
6 from - - -

7 MS. BRENNER: Absolutely, Your Honor.

8 CHIEF JUDGE LIPPMAN: - - - from these - -
9 - from what particular circumstance?

10 MS. BRENNER: Well, the third thing that I
11 was just about to mention is that proof of the abuse
12 of one child is admissible to prove the abuse of
13 another child by - - -

14 JUDGE PIGOTT: But is the - - -

15 MS. BRENNER: - - - by that parent.

16 JUDGE PIGOTT: Is the mens rea the same?

17 MS. BRENNER: The mens rea is not the same.

18 JUDGE PIGOTT: So how do you - - - how does
19 that happen where you have - - - we have identical
20 language in two different statutes but the mens rea
21 is different?

22 MS. BRENNER: Because this statute was
23 drafted in 1981 when People v. Register was still the
24 prevailing understanding of what depraved
25 indifference meant.

1 JUDGE PIGOTT: Yeah, but - - -

2 JUDGE SMITH: Even Register - - - even
3 Register hadn't been decided then, I think.

4 MS. BRENNER: That's correct, Your Honor.

5 JUDGE SMITH: But - - - but nevertheless,
6 they copied language out of the murder statute.

7 MS. BRENNER: But they also - - -

8 JUDGE SMITH: Why would you - - - why would
9 you do that if you weren't looking for at least a
10 murder mens rea?

11 MS. BRENNER: They also used -- well,
12 there's no requirement that the child die in any of
13 these statutes.

14 JUDGE SMITH: No, no, no, but the mens rea
15 - - -

16 MS. BRENNER: The mens rea is intentional
17 or reckless, right? In fact, it's reckless or
18 intentional, so there's - - - there can't even be any
19 sort of ambiguity as to whether - - -

20 JUDGE PIGOTT: You have to go the rest of
21 the way towards depraved indifference and - - -

22 MS. BRENNER: Depraved indifference, and so
23 - - -

24 JUDGE PIGOTT: And this Court said, this is
25 what depraved indifference is. It wasn't the legis -

1 - -

2 MS. BRENNER: Later.

3 JUDGE PIGOTT: That's right, but it wasn't
4 the legislature that said that. They didn't - - -
5 they didn't change either one of these statutes; we
6 did.

7 MS. BRENNER: That's - - - that's correct,
8 Your Honor.

9 JUDGE PIGOTT: So - - -

10 MS. BRENNER: But at the - - -

11 JUDGE PIGOTT: So - - - wait. So are you
12 saying that when we changed the criminal - - - the
13 definition of mens rea under the criminal - - - under
14 the Penal Code, we did not change it under the Social
15 Services Law?

16 MS. BRENNER: That can't be, Your Honor,
17 because if it were true, then the two words
18 "intentional" and "reckless" could not stand in this
19 statute. It would have to be - - -

20 JUDGE SMITH: But even - - - whatever - - -
21 whatever the word - - - yeah, I admit, we've had a
22 little problem figuring out what "depraved
23 indifference to human life" means. But whatever it
24 means, it's been in - - - it's been in a murder
25 statute forever, and its purpose - - - its main

1 purpose has always been to distinguish murder from
2 manslaughter.

3 MS. BRENNER: Well, that's correct.

4 JUDGE SMITH: Why would a legislature
5 describing severe abuse choose language that was used
6 to de - - - to identify a crime that is worse than
7 manslaughter, that goes all the way to murder?

8 MS. BRENNER: Because I think that Register
9 did accurately describe what was in the legislature's
10 mind when they drafted that language. And think
11 about it, would it make sense when you're trying to
12 determine which parents have such a compromised
13 understanding of parental obligation that they should
14 lose their parental rights to say, well, if you did
15 it recklessly, we're going to terminate your rights,
16 but if you did it intentionally, I'm going to let you
17 keep your children.

18 JUDGE SMITH: I - - - I think your
19 adversary is admitting that if they're - - - that if
20 they're trying to kill the child that - - - that that
21 would be severe abuse - - -

22 MS. BRENNER: Okay, but - - -

23 JUDGE SMITH: - - - even though I admit - -
24 - I - - - I'm not sure how you get that other
25 language either - - -

1 MS. BRENNER: Exactly.

2 JUDGE SMITH: - - - but I think she
3 concedes that.

4 MS. BRENNER: I mean, the - - -

5 JUDGE SMITH: Yes.

6 MS. BRENNER: It doesn't make any sense.
7 The statute says what the statute says, and it was
8 written at a time when the understanding was that the
9 surrounding circumstances are what you look at to
10 determine whether there was depraved indifference.
11 Was there a special kind of wantonness?

12 JUDGE SMITH: But whatever - - - but - - -
13 yeah, okay, but whatever it is, it's always been the
14 sort of thing you need to label a person a murderer.
15 Didn't - - - weren't they saying when they wrote that
16 statute we want something - - - someone whose mental
17 state or whose - - - who - - - maybe the victim
18 doesn't have to die, but we want someone who's as bad
19 as a murderer?

20 MS. BRENNER: Well, in the Penal Law,
21 that's true because - - - and you can look at the
22 structure of the statute; it has certain gradations
23 in terms of when depraved indifference applies, when
24 intentional applies, and those are all different.
25 But here they're all lumped together. And the point

1 is that it doesn't matter how you did this.

2 If you have depraved indifference, right,
3 if the surrounding circumstances show us that you
4 were constantly showing brutality toward your child
5 over and over again and you lie to the - - - to the
6 providers - - - to the medical providers to get - - -
7 possibly keep them from determining what appropriate
8 medical care should be, and you prolong the child's
9 suffering by not getting them medical care at all or
10 by - - - by delaying it for at least six hours, which
11 is what this father told - - - as stated out of
12 court, then that is a special kind of wantonness.

13 And in fact, I would - - - I would - - - I
14 would submit, Your Honor that when a grown man
15 inflicts these kinds of injuries, a broken clavicle
16 and four broken ribs, on a practically newborn baby,
17 four months old, that standing alone is a depraved
18 indifference to human life.

19 JUDGE PIGOTT: But if the - - - if the baby
20 had died, would you then say that - - - that - - -
21 under the Penal Law that that person's been guilty of
22 depraved indifference murder?

23 MS. BRENNER: Under the Penal Law, he would
24 probably - - - well, it would depend on the
25 circumstances. I mean - - -

1 JUDGE PIGOTT: But I mean, isn't that odd
2 that you're saying if the child lives it's depraved
3 indifference but if the child dies it's not?

4 MS. BRENNER: No, Your Honor, because the
5 purpose of these two statutes - - -

6 JUDGE PIGOTT: I understand the purposes.

7 MS. BRENNER: - - - are completely
8 different.

9 JUDGE PIGOTT: I'm just saying are we - - -
10 so you're saying that the mental state is different
11 in the two statutes?

12 MS. BRENNER: The mental state - - - that
13 all of the different mental states that are comprised
14 in the Penal Law to define these three forms of
15 homicide are all - - - all come together and fall
16 under the ambit of the Social Services Law provision
17 - - -

18 CHIEF JUDGE LIPPMAN: Okay.

19 MS. BRENNER: - - - because under any of
20 those theories the parent who does such an act under
21 such circumstances is not fit to be in charge of this
22 child anymore.

23 CHIEF JUDGE LIPPMAN: Okay, counselor.
24 Thank you.

25 MS. BRENNER: Thank you.

1 MS. MERKINE: Good afternoon, Your Honors.
2 My name is Claire Merkine, and I'm from the Legal Aid
3 Society, and I represent the children in this case.
4 And I would like to address appellant's argument
5 regarding the diligent efforts requirements - - -

6 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

7 MS. MERKINE: - - - under Section 384(b).
8 So the statute, unfortunately, as it is now - - -

9 CHIEF JUDGE LIPPMAN: It's automatic? If
10 it's severe abuse, it's automatic that you don't have
11 to make diligent efforts?

12 MS. MERKINE: No, it's not - - - it's not
13 automatic.

14 CHIEF JUDGE LIPPMAN: Okay. What is it?

15 MS. MERKINE: If you have a finding of
16 severe abuse, the agency - - - if the statute did not
17 require the diligent efforts, they could move under
18 1039(b) to have diligent efforts excused, in which
19 case the family court would have to make a
20 determination if diligent efforts should be excused
21 and they're in - - -

22 CHIEF JUDGE LIPPMAN: So it's not - - -
23 it's not just by that finding?

24 MS. MERKINE: It's not just by that finding
25 - - -

1 CHIEF JUDGE LIPPMAN: You have to go
2 through the - - - the protocols to do it.

3 MS. MERKINE: Right. And then you would
4 have a petition to terminate parental rights filed,
5 and then there would have to be a showing that this
6 person severely abused, and then the agency would
7 have to show that either diligent efforts have been
8 excused or were made, and then the family court - - -

9 JUDGE SMITH: You're - - - you're saying
10 the court has discr - - - but as I read the statute,
11 it says, reasonable efforts shall not be required
12 when the court determines that there are aggravated
13 circumstances. That's what it says, right?

14 MS. MERKINE: Right. But - - -

15 JUDGE SMITH: Now, you say "aggravated
16 circumstances" means essentially the first three
17 subsections of the definition of severe abuse but not
18 the fourth.

19 MS. MERKINE: Right.

20 JUDGE SMITH: So - - - but if you - - - so
21 if you prove those three, then reasonable efforts are
22 gone.

23 MS. MERKINE: But that - - - but the - - -
24 first of all 1039(b) has a clause there that they say
25 unless the court determines that providing reasonable

1 efforts would be in the best interest of the child,
2 not contrary to the health and safety of the child
3 and would likely result in the reunification of the
4 parent, the court shall - - - in the foreseeable
5 future, which means that it gives an out clause in
6 case the family court finds that - - -

7 JUDGE SMITH: I see.

8 MS. MERKINE: - - - that they can - - -
9 that diligent efforts should be required because they
10 are in the best interest of the child.

11 But I think the distinction here is when
12 should the agency show that diligent efforts were
13 made or excused. Should it be in the Article 10 part
14 of the proceeding or is it something that should be a
15 reserved determination? And my argument is that the
16 statute and the way the legislature intended it to
17 work is that during the Article 10, which is
18 logically only concerned with the acts of the
19 parents, the fact-finding has to do with what has the
20 parent done to the child. You make determination as
21 to the acts of the parent which includes acts - - -
22 maybe acts of severe abuse.

23 But the diligent efforts requirement then
24 comes into play if there is a termination of parental
25 rights petition filed, and then the agency has to

1 show whether, you know, it made diligent efforts and
2 they were unsuccessful and are like - - - unlikely to
3 be successful in the foreseeable future or whether
4 diligent efforts were excused.

5 Now, even in those circumstances, even if
6 the agency was excused from making diligent efforts,
7 there is nothing - - - it's merely a burden shifting.
8 The parent could still have worked on their own to
9 rehabilitate themselves. It's not that this is
10 automatic. The only thing we're saying by excusing
11 diligent efforts is that the agency doesn't have to
12 work with the parent; they don't have to make these
13 efforts that they would otherwise need to - - -

14 JUDGE PIGOTT: Well, you agree with Ms.
15 Weigel (sic) then that they - - - that the lack of
16 diligent effort requirement should be rare, that it
17 should be rare for a court to say we're not going to
18 require diligent efforts?

19 MS. MERKINE: Well, the legislature
20 determined which categories - - - which types of
21 cases do not require - - - or allow the agency to
22 excuse diligent efforts.

23 JUDGE PIGOTT: So that would be a yes, you
24 would agree with her that it's - - - that it's very
25 rare.

1 MS. MERKINE: That it's in these categories
2 that the legislature delineated, yes. But I don't
3 agree with her that the categories that she says are
4 the only categories that are allowed. So what the
5 legislature - - - the situations in which the legis -
6 - -

7 JUDGE SMITH: But you agree that it's a
8 small minority of cases?

9 MS. MERKINE: It's a minority of cases, but
10 the legislature decided that in severe abuse cases,
11 that's a whole category that you can allow to excuse
12 diligent efforts. It's explicitly put it in there.
13 The rest of the categories were taken verbatim from
14 the federal legislation, and the federal - - - the
15 Congress basically told the states there is one
16 category which we're leaving to you to define, and
17 that's aggravated circumstances. And what they did
18 is defined "aggravated circumstances" by reference to
19 severe and repeated abuse. So they basically said
20 whatever qualifies as severe and repeated abuse is a
21 basis to have diligent efforts excused.

22 JUDGE GRAFFEO: So what are you proposing
23 should happen to the child in this case?

24 MS. MERKINE: So that we're -- well, in
25 terms of the finding, the problem is with the finding

1 of severe abuse that appellant is appealing, we're
2 saying that, you know, there hasn't been a showing of
3 diligent efforts, and my argument is for a finding of
4 severe abuse in Article 10, you don't have to make
5 that showing. I think that is where the point of
6 contention is.

7 JUDGE SMITH: So where do we stand - - -

8 JUDGE GRAFFEO: I understand that. So what
9 happens to the child now - - -

10 MS. MERKINE: So - - -

11 JUDGE GRAFFEO: - - - if we agree with you?

12 MS. MERKINE: What would happen to the
13 child now, if you have - - - if you have a finding of
14 severe abuse in Article 10, you can then use it as a
15 res judicata for a termination proceeding for the
16 acts, and then the agency would have to show that
17 diligent efforts were excused or were made. At this
18 point, there was a - - -

19 JUDGE GRAFFEO: So are you seeking for the
20 child - - - for the termination rights to be - - -

21 MS. MERKINE: The children have now been
22 returned to the mother, so there is no termination
23 pending at this point.

24 But this - - - this issue and the problem
25 with the diligent efforts, as Leon K. demonstrates,

1 and that's in the brief, is that it has led to
2 reversal of cases in similar - - - of severe abuse
3 findings in similar cases because you have the
4 circularity. You can't have a severe abuse finding
5 without a severe abuse finding before in order to
6 have diligent efforts excused. It's the statute - -
7 -

8 JUDGE SMITH: Let me see if I just
9 understand the procedural posture. The order that we
10 have in front of us here is an order of what,
11 dispensing with diligent efforts?

12 MS. MERKINE: Yes.

13 JUDGE SMITH: And you're saying - - -
14 you're saying you want us to affirm that, but you
15 also want us to say you didn't have to go through
16 everything you went through to get there?

17 MS. MERKINE: Well, there are - - - there
18 are two Appellate Division's decisions here, and what
19 happened in the first decision in the - - - in the
20 first Appellate Div - - - Appellate Division decision
21 is that Corporation Counsel appealed the fact that
22 the court did not find a severe abuse - - - make a
23 severe abuse finding but then remanded it for a
24 diligent efforts finding. And we said, you don't
25 need to make that finding now, so don't remand it;

1 just defer.

2 JUDGE SMITH: So you want us - - - you want
3 us to affirm and in the course of affirming say, by
4 the way, that remand was unnecessary?

5 MS. MERKINE: Yes, and to say that the
6 statute should be read as not requiring diligent
7 efforts in Article 10 because that's not where the
8 role of - - - of diligent efforts is and the statute
9 doesn't work if you read it that way. It's just the
10 statutory scheme does not contradict legislative
11 intent, it doesn't work logically, and it makes
12 injustice to all of these children like in the other
13 - - -

14 JUDGE SMITH: Well, the language is pretty
15 - - - pretty clear though, isn't it?

16 MS. MERKINE: It is, but - - - with the
17 language, but once you try to implement, the statute
18 - - -

19 JUDGE SMITH: So you're saying no matter
20 how clear it is, it can't be what they meant?

21 MS. MERKINE: It can't be. It's - - - the
22 statute just doesn't work. It leads you back and
23 forth in between, you know, the circularity, and - -
24 - and it - - - it can't never be fulfilled. That's
25 one of the problems. You can now never make a severe

1 abuse finding in Article 10 because of the way the
2 statute works right now.

3 CHIEF JUDGE LIPPMAN: So we're going to
4 have to read them together, the statutes, otherwise -
5 - -

6 MS. MERKINE: You have - - - you have to
7 read the - - - the purpose and the legislative intent
8 in enacting these provisions - - - well, what the
9 purpose was in terms of allowing an Article 10
10 finding and a severe abuse finding in Article 10,
11 this was all passed with ASFA, and the ability to
12 excuse diligent efforts was passed with ASFA.

13 CHIEF JUDGE LIPPMAN: So the spirit of ASFA
14 really almost compels the reading that - - -

15 MS. MERKINE: Yes.

16 CHIEF JUDGE LIPPMAN: - - - you're making?

17 MS. MERKINE: Yes, because currently what
18 you have in a situation where children who have been
19 severely abused, the family court can't make a
20 finding of severe abuse during the Article 10 because
21 it now - - - the plain language of the statute
22 requires that the agency show that diligent efforts
23 were made or excused, diligent efforts could not be
24 made because there is no time, and also because of
25 the earlier point where it doesn't make sense that

1 you have to make diligent efforts to have them
2 excused.

3 That's exactly what ASFA didn't want. It
4 wanted to tell agencies you can dispense from
5 diligent efforts now and not have to worry until
6 termination to make that determination. And you
7 can't excuse diligent efforts in the article - - - so
8 you can have diligent efforts - - - you can't make
9 diligent efforts and then contradict ASFA, but you
10 also can't excuse diligent efforts which is the other
11 part of the statute because to excuse, you need to
12 have a finding of severe abuse which you can't have
13 because you have to have diligent excuse - - -
14 diligent efforts excused because the statute is
15 completely circular.

16 So what I'm asking this Court is to really
17 give - - - you know, uphold the spirit of ASFA and
18 also construct the statute in a way that makes sense
19 and that serves the permanency of these children.

20 CHIEF JUDGE LIPPMAN: Okay, counselor.
21 Thank you, counselor.

22 Counselor, rebuttal?

23 MS. BARNES: Yes, Your Honor, just very
24 briefly. I - - - I would just like to correct the
25 attorney for the child's statement that there have

1 been no severe abuse findings at the Article 10
2 stage. I list them in my reply brief. There have
3 been at least two, both of which involve criminal
4 convictions which then led immediately to a severe
5 abuse finding and subsequently a termination, the
6 same thing that your - - - that Your Honors had in
7 Marino S., that very horrific case. So on that
8 level, the statute works, ASFA works. ASFA told the
9 State of New York, look, you haven't complied with
10 what we need. We need parental rights terminated for
11 murder, manslaughter, assault, which we did.

12 The legislative scheme was developed over a
13 very contentious period. It is the subject of
14 extreme back and forth. We went to three separate
15 extensions where the feds told us we couldn't have
16 650 million dollars. There is no support offered by
17 counsel for the statement that this is what the
18 legislature meant. I would submit that reading the
19 statutory history, the legislature meant for it to be
20 interpreted as it is written, and it makes sense in
21 the terms of what the legisla - - -

22 CHIEF JUDGE LIPPMAN: Makes sense in the
23 context of ASFA?

24 MS. BARNES: Exactly right, because ASFA
25 said, we're - - - we're going to withhold 650

1 million dollars if you don't make your severe abuse
2 findings tighter, shorten the time that abused
3 children get adopted, and we need you to say murder
4 takes you out of that situation, manslaughter and
5 assault, and we did that. We - - - we absolutely did
6 that.

7 My last point, Your Honors, is that the
8 family courts are courts of limited jurisdiction.
9 They are not common law courts. There is no common
10 law right of child protection, and they do not have
11 that power. They are bound to determine what the
12 statute says and follow it. If counsel for the Legal
13 Aid Society, counsel for the City of New York, very
14 powerful institutions, want to take it up with the
15 legislature to expand this so that they can go around
16 terminating in more garden-variety cases, then my
17 suggestion is for them to do that.

18 And the old saying, you know, give a person
19 a hammer, the whole world looks like a nail.
20 Unfortunately, where children are at risk, the
21 impetus is so strong to protect them that situations
22 that are not severe abuse begin to look like nails,
23 and I would submit, Your Honor, that a change from
24 this very rigid system is doing a disservice to all
25 the courts who grapple with these issues, children

1 who stay away from abusive parents such as these did
2 and - - -

3 JUDGE SMITH: But isn't it also - - - isn't
4 it also a problem children staying in foster care for
5 years when there's really - - - when putting this
6 family back together doesn't really make any sense?

7 MS. BARNES: There is that, and there's a
8 whole separate system that was promoted or propounded
9 in ASFA that now requires six-month hearings, that
10 requires the proceeding to a termination within
11 fifteen months other than, you know, if you don't
12 show that there's some extraordinary reason not to,
13 you're going to a termination in fifteen months
14 afterwards. And I think fairly stated since ASFA,
15 the time frames have gone down.

16 I would just submit Your Honors to ask you
17 to look at the decisions coming out of the Second
18 Department which are well reasoned and fair. Thank
19 you.

20 CHIEF JUDGE LIPPMAN: Okay. Thank you,
21 counselor.

22 Thank you all.

23 (Court is adjourned)

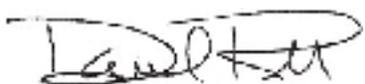
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C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript of proceedings in the Matter of Dashawn W., No. 71 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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