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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF SUAREZ,

Appellant,

-against-

WILLIAMS,

Respondent.

No. 198

(Papers sealed)

20 Eagle Street
Albany, New York 12207
November 17, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM (By Video)
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

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1 CHIEF JUDGE LIPPMAN: Number 198, Matter of
2 Suarez v. Williams.

3 Counselor - - -

4 MS. CAMPBELL: May it please - - -

5 CHIEF JUDGE LIPPMAN: - - - you want any
6 rebuttal time?

7 MS. CAMPBELL: Two minutes, Your Honor, if
8 possible.

9 CHIEF JUDGE LIPPMAN: Two minutes, you're
10 on. Go ahead.

11 MS. CAMPBELL: May it please the court,
12 Linda Campbell representing the appellant
13 grandparents, Ricardo and Laura Suarez. Section
14 72(2) of the Domestic Relations Law was enacted by
15 the legislature, recognizing the critical role that
16 grandparents are now playing in the lives of
17 grandchildren for whom - - -

18 CHIEF JUDGE LIPPMAN: Counsel, how much of
19 - - - of the child's life has he lived with the
20 grandparents?

21 MS. CAMPBELL: All of it, Your Honor. From
22 eight days old until he was ten, when the mother took
23 him from the grandparents saying, it's my turn. He
24 had resided with the grandparents almost exclusively.
25 He had visited with the mother from time to time.

1 JUDGE STEIN: Can I ask you, the trial
2 court made some pretty extensive findings of fact.

3 MS. CAMPBELL: Yes, she did, Your Honor.

4 JUDGE STEIN: Did - - - did the Appellate
5 Division find any new facts or did the - - - the
6 Appellate Division just reach a different legal
7 conclusion based on the facts that - - - that were
8 already found?

9 MS. CAMPBELL: Your Honor, it's hard to
10 tell from their decision. They - - - the - - - the
11 Fourth Department starts out adopting the credibility
12 determinations that were made by the trial court, and
13 then proceeds to articulate various facts which were
14 not found by the trial court, and using those, shall
15 we say, different fact findings, reaches entirely
16 different conclusions than those reached by the trial
17 court. For example, one of the - - - the places
18 where the two courts differ is with respect to these
19 authorizations.

20 JUDGE STEIN: Well, but - - - now, that's
21 my - - - that's exactly what I was thinking of. So
22 did they really find different facts or did they just
23 find different inferences that led them to different
24 conclusions, or is that splitting hairs?

25 MS. CAMPBELL: How many angels dance on the

1 head of the pin? It's hard to tell from the
2 Appellate Division's decision. The trial court takes
3 those authorizations and finds them to be indicative
4 or demonstrative of the relinquishment of care and
5 control.

6 JUDGE STEIN: Um-hum.

7 MS. CAMPBELL: The Fourth Department cites
8 to those authorizations and would seem to phrase them
9 as being permission, that the mother is granting
10 permission.

11 JUDGE STEIN: That's a different
12 conclusion.

13 MS. CAMPBELL: Is it a different conclusion
14 or is it articulating that those permissions have a
15 different significance? The - - -

16 JUDGE PIGOTT: Well, are - - - are you
17 arguing, in a sense, that either way, it's an
18 extraordinary circumstance?

19 MS. CAMPBELL: Yes, Your Honor.

20 JUDGE PIGOTT: So that - - - so - - - and
21 that - - - that gets you to standing.

22 MS. CAMPBELL: Yes, Your Honor.

23 JUDGE PIGOTT: You got - - - you got to do
24 the two. You got - - - you got standing and then you
25 got to get best interest.

1 MS. CAMPBELL: Correct.

2 JUDGE PIGOTT: But in terms of standing,
3 whether the Appellate Division definition of these -
4 - - of these authorizations is one thing and - - -
5 and the family court was another, the fact of the
6 matter is that that's an extraordinary circumstance
7 and if that's the case, then we look, you know, at -
8 - - at best interest.

9 MS. CAMPBELL: Correct.

10 JUDGE FAHEY: The only - - - the only way
11 that - - - is - - - isn't your point the only way the
12 Appellate Division could be right, if they're right
13 in the interpretation of Section 72(b), or whatever
14 it is, the twenty-four month rule; if they're right
15 that that's the way it should be interpreted, rather
16 than a different reading of it.

17 MS. CAMPBELL: I think that this case - - -
18 with all due respect to the Fourth Department, I
19 think they were wrong two ways. First of all, they
20 were wrong in the way that they looked at 72(2).

21 JUDGE FAHEY: Um-hum.

22 MS. CAMPBELL: And they were wrong in the
23 way they looked at - - - at extraordinary
24 circumstances in this particular case.

25 CHIEF JUDGE LIPPMAN: Did they look at best

1 interest? Did they do a best interest analysis in
2 the Appellate Division?

3 MS. CAMPBELL: No, Your Honor. They did
4 not. They never reached best interest because they
5 made the - - - they reached the conclusion that 72(2)
6 seemed to be controlled by Bennett v. Jeffreys,
7 extraordinary circumstances.

8 CHIEF JUDGE LIPPMAN: So if there were
9 extraordinary circumstances, then do we have to send
10 it back to them to do a best interest analysis?

11 MS. CAMPBELL: Your Honor, I don't believe
12 you do in this particular case.

13 CHIEF JUDGE LIPPMAN: Why not?

14 MS. CAMPBELL: Because there - - - first of
15 all, there has been an incredible amount of time that
16 has elapsed between - - -

17 CHIEF JUDGE LIPPMAN: Should - - - the - -
18 - the child is with the grandparents, though, still,
19 yeah.

20 MS. CAMPBELL: The - - - the child is now,
21 thanks to the stay of this court, yes, the child is
22 back with the grandparents. Since Judge Pirro-Bailey
23 made her determination to restore the child to the
24 custody of the grandparents, that was December of
25 2012, the child remained with the grandparents from -

1 - - from December of 2012 until today with a brief -
2 - -

3 CHIEF JUDGE LIPPMAN: So you're saying we
4 don't have time to send it back to the Appellate
5 Division?

6 MS. CAMPBELL: I'm sorry, Your - - -

7 CHIEF JUDGE LIPPMAN: You're saying that it
8 would be not a - - - not a practical solution to send
9 it back - - -

10 MS. CAMPBELL: It would not - - -

11 CHIEF JUDGE LIPPMAN: - - - after all this
12 time?

13 MS. CAMPBELL: It would not, Your Honor.

14 CHIEF JUDGE LIPPMAN: What would you have
15 us do?

16 MS. CAMPBELL: I would have - - - well, I'd
17 love to have this court decide the best interest
18 determination itself on this record, but if that's
19 not possible, then I would say it needs to be
20 returned to the trial court to determine what's in
21 the best interest of this child today, three years
22 have - - - having gone by.

23 JUDGE FAHEY: So he's going to be a
24 freshman in high school?

25 MS. CAMPBELL: He's still - - - the law

1 guardian can answer that question. I know he is in -
2 - - in high school now or - - - or junior - - -

3 JUDGE STEIN: Do you think that the cont -
4 - - that the mother's contact is - - - is - - - is a
5 factor here in determining whether there's been a
6 prolonged separation or an extended disrupt - - -
7 disruption of custody? Is that a relevant
8 consideration, the degree of her contact?

9 MS. CAMPBELL: I - - - I think it is a
10 relevant consider - - -

11 JUDGE STEIN: Okay, how - - - how is - - -
12 how do you think it's relevant?

13 MS. CAMPBELL: Well, it - - - the - - - the
14 contact - - - the Fourth Department seems to be using
15 contact in a preclusive methodology toward the - - -
16 the portion of 72(2) that requires prolonged
17 separation of parent from child. Contact is not
18 mentioned in 72(2), and in point in fact, there are
19 several - - - 72(2) is certainly not a statute that's
20 used frequently, but when it has been used, there are
21 cases, some of them members of this court have sat
22 on, where contact between a parent and a child has
23 not precluded a filing - - - a finding of 72(2) - - -

24 JUDGE STEIN: Where - - -

25 MS. CAMPBELL: - - - extraordinary

1 circumstances.

2 JUDGE STEIN: Where - - - where would we
3 draw the line? What - - - what are the relevant
4 considerations? Does it matter who initiated the
5 contact? Does it matter what the nature of the
6 contact is?

7 MS. CAMPBELL: I - - - I think certainly
8 who initiated the contact is an important
9 consideration, because we do want to encourage
10 contact between parents and children, even though the
11 children may be being cared for by the grandparent.
12 I think that residence of the child is a very
13 important consideration. Where does the child
14 consider himself or herself to be at home? If the
15 child considers home to be where the grandparents
16 are, then it seems to me the - - - the parent could
17 even - - - as have been found in previous cases even
18 under 72(2) - - - the parent could actually reside in
19 the same household with the grandparents and - - -
20 and still you may have a - - - a separation between
21 the parent and the child, insofar as who is parenting
22 this child. So that contact should not be the
23 benchmark, if you will, nor should - - -

24 JUDGE STEIN: Well, the question of who is
25 parenting the child, I mean you have to have the

1 other factors - - -

2 MS. CAMPBELL: Correct.

3 JUDGE STEIN: - - - at least under 72(2).

4 MS. CAMPBELL: Correct.

5 JUDGE STEIN: And which would mean the - -
6 - the residence, of course, with the grandparents - -
7 -

8 MS. CAMPBELL: Correct.

9 JUDGE STEIN: - - - and the - - - well,
10 certainly the relinquishment of care and control.
11 That's - - -

12 MS. CAMPBELL: Correct, correct. But - - -

13 JUDGE FAHEY: You know, in - - - in - - -
14 in analyzing this case, I - - - I focus first on the
15 statute itself which uses the phrase "shall", when
16 talking about extended disruption - - -

17 MS. CAMPBELL: Correct.

18 JUDGE FAHEY: - - - in its analysis, and it
19 - - - and that "the court shall include prolonged
20 separation for at least twenty-four months as
21 consideration." But it seems that it's written to be
22 broad enough to - - - to allow both the trial court
23 and the Appellate Division in the fact-finding role
24 to be flexible when it says, while you - - - it - - -
25 it doesn't say it's dispositive in any way, it just

1 says you shall include it in an analysis.

2 MS. CAMPBELL: Correct.

3 JUDGE FAHEY: The second part of the - - -
4 the statutory analysis that I don't know if we get to
5 it or not, but it seems if you look at the
6 legislative history, it - - - it even more so favors
7 the mother as opposed to the grandparents' analysis.

8 MS. CAMPBELL: I don't know that I would
9 necessarily agree with that, Judge Fahey.

10 JUDGE FAHEY: Okay, well, why not?

11 MS. CAMPBELL: Because I think the
12 legislative history, the - - - the - - - the
13 legislature is recognizing in the statute - - -

14 JUDGE FAHEY: Um-hum.

15 MS. CAMPBELL: - - - that there has been a
16 change in the complexion of what families are all
17 about today, and that grandparents are pay - - -
18 playing a much more significant role. It - - -
19 Bennett v. Jeffreys had been decided years previous
20 to this.

21 CHIEF JUDGE LIPPMAN: So did the
22 legislation change the law appreciably?

23 MS. CAMPBELL: I don't believe so, Your
24 Honor.

25 CHIEF JUDGE LIPPMAN: Did it change it at

1 all?

2 MS. CAMPBELL: I don't - - - I don't
3 believe so, Your Honor.

4 CHIEF JUDGE LIPPMAN: So what was the
5 purpose of the leg - - - just to highlight the
6 changing nature of the family?

7 MS. CAMPBELL: I think it was to provide an
8 alternative procedural mechanism for grandparents to
9 - - - to obtain standing to then possibly obtain
10 custody of the children. A recognition that
11 grandparents are taking on this critical role as it -
12 - - as the legislature specified in its legislative
13 history. And almost taking on - - - and I hate to
14 use this phraseology, but maybe it's close to the
15 truth - - - a quasi-parental role. If a parent has
16 voluntarily relinquished a child to grandparent or
17 grandparents for such an extended period of time,
18 this extended disruption of custody - - -

19 CHIEF JUDGE LIPPMAN: So is it more a
20 statement of policy than a statement of law that they
21 - - - what - - - what's going on in the - - -

22 MS. CAMPBELL: Oh, no. I don't think so,
23 Your Honor. I mean, they - - - they - - - they
24 specified - - -

25 CHIEF JUDGE LIPPMAN: So it did change the

1 law as to what the grandparent - - -

2 MS. CAMPBELL: I think it provides a
3 different law. I think Bennett v. Jeffreys is there
4 - - -

5 CHIEF JUDGE LIPPMAN: Yes.

6 MS. CAMPBELL: - - - for grandparents to
7 use, whether it's abandonment - - -

8 CHIEF JUDGE LIPPMAN: Right. Go ahead.

9 MS. CAMPBELL: - - - fitness, et cetera.
10 And extraordinary circumstances, which is that sort
11 of catch-all. This provides this alternative
12 mechanism - - -

13 JUDGE STEIN: Well, Bennett v. Jeffrey
14 (sic) talks about abandonment, unfitness, persistent
15 neglect, and other like extraordinary circumstances.

16 MS. CAMPBELL: Correct.

17 JUDGE STEIN: Couldn't this just be viewed
18 as the legislature's way of saying, when it comes to
19 a grandparent, this is one of those other like
20 extraordinary circumstances that Bennett talked
21 about?

22 MS. CAMPBELL: They - - - they actually do
23 that. They - - -

24 JUDGE FAHEY: Yeah, I - - - I would think
25 that - - - I think Judge Stein has hit on the - - -

1 the heart of the matter here is - - - is that this -
2 - - this seems to be more an example, a prolonged
3 separation of those other circumstances that weren't
4 previously defined. That doesn't mean that the
5 legislative history favors you, but it does - - -
6 seems it'd be the only reasonable way to read the
7 statute.

8 MS. CAMPBELL: It - - - it provides an
9 alternative.

10 JUDGE FAHEY: Um-hum.

11 MS. CAMPBELL: It - - - it gives a
12 grandparent a definition for in this situation, this
13 is what we need to prove extraordinary circumstances.

14 CHIEF JUDGE LIPPMAN: Okay, counsel.
15 You'll have your rebuttal. Let's - - -

16 MS. CAMPBELL: Thank you.

17 CHIEF JUDGE LIPPMAN: Okay.

18 MR. HABER: May it please the court, my
19 name is Patrick Haber. I will take one minute of
20 rebuttal time.

21 CHIEF JUDGE LIPPMAN: You have it, one
22 minute. Go ahead.

23 MR. HABER: I am the attorney for the child
24 in this matter and have been since, I believe, March
25 of 2012. At the time of those petitions being filed

1 in family court, my client was nine. He is now
2 thirteen years old, and to answer Judge Fahey's
3 question - - -

4 CHIEF JUDGE LIPPMAN: How is the - - - how
5 is the child doing now?

6 MR. HABER: Since this court's stay on June
7 9th, he's been doing excellent. He's back in the
8 home with his grandparents where he's been his entire
9 life, except for two periods of time. He's in eighth
10 grade doing extremely well in school. The two rough
11 periods that he had were from May to December of 2012
12 and then from March 20th of this year until June 9th.

13 To address, I believe, Judge Stein's
14 concern that they were getting at was one of the
15 issues that the Appellate Division raised in
16 indicating that the grandparents had not established
17 extraordinary circumstances was the communication
18 that took place between the mother and the
19 grandparents. I believe the mother, in her brief, in
20 order to display that there was not a relinquishment
21 of custody, listed some trial excerpts from the
22 grandparents' testimony to show that there was this -
23 - - no - - - no relinquishment. What those
24 transcripts - - - excerpts from the transcripts show
25 is that it was the grandmother - - - basically the

1 grandmother providing the mother with information in
2 regards to this child - - - I had a meeting with the
3 school today, this is what took place, we're going to
4 put the child in a special class - - - and provide
5 that information to the - - -

6 CHIEF JUDGE LIPPMAN: How is that important
7 in terms of the law that we're looking at?

8 MR. HABER: In ply - - - applying the law
9 to the facts, it shows that there was not - - - or
10 there - - - there was a relinquishment of custody by
11 this mother. The - - - the mother attempts to show
12 that there was some type of back-and-forth in regards
13 to her communication with the grandparents and that
14 was not the case. It was - - - it was a one-way
15 street of providing information to the - - -

16 JUDGE RIVERA: Why - - - why couldn't that
17 be based on an understanding, right, the mother wants
18 to be kept up to date and that's their understanding?

19 MR. HABER: It - - - it was the
20 grandparents' efforts to keep the mother aware and
21 involved of this child. I believe it was - - -

22 JUDGE PIGOTT: Can a mother - - - can a
23 mother give up custody of a child without knowing it?

24 MR. HABER: Can she?

25 JUDGE PIGOTT: Yeah.

1 MR. HABER: As far as an abandonment or - -
2 -

3 JUDGE PIGOTT: Well, no. I'm just - - - as
4 - - - as was described and as, you know, the mother
5 points out here, this seemed like a, you know, pretty
6 happy band of people raising a kid almost like a
7 tribe. I mean, she was involved, they were involved,
8 everybody's - - -

9 MR. HABER: She was not involved in the
10 decision-making. The Fourth - - -

11 JUDGE PIGOTT: Well, you say that. And - -
12 - but she says, I don't mind if Grandma wants to - -
13 - you know, wants to handle this stuff. It's fine
14 with me. She's, you know, my mother - - - or
15 actually, my mother-in-law, but in a different case,
16 my mother, and I think it's fine and everything is
17 cool. Then all of a sudden, because there's some
18 kind a snit in the family, somebody goes to court and
19 says, you know, she really did give up the - - - give
20 up her child. I mean, that's why I ask. Can - - -
21 can - - - can you give up custody of your child - - -

22 MR. HABER: I - - -

23 JUDGE PIGOTT: - - - almost by operation of
24 law without, you know, consent here?

25 MR. HABER: I think, under Bennett v.

1 Jeffreys and Domestic Relation Law 72(2) - - -

2 JUDGE PIGOTT: Let's - - - let's forget
3 Bennett. I mean Bennett v. Jeffreys always seemed to
4 be as kind of a mean thing. You know, in other words
5 there's a - - - there's a bad - - - bad stuff's going
6 on and that's why we're going to do it. And if I
7 understand Ms. Campbell, at least my view, you know,
8 is this - - - this made it easier. They said, you
9 know, it doesn't have to be, you know, upheaval,
10 doesn't have to be nastiness, there doesn't have to
11 be terrible things. It can just be that
12 extraordinary circumstances exist where, you know,
13 the - - - the mother has issues or the father has
14 issues and therefore, you know, this is what's
15 happened.

16 But if the mother is happy with the way
17 this thing is going on and everything is copacetic
18 and then somebody decides, you know, to - - - to make
19 an issue out of something, all of a sudden she finds
20 out that she's lost custody and didn't even know it.
21 Is that possible, in your view?

22 MR. HABER: I think if you look at the
23 situation of talking about the mother's rights as
24 opposed to as - - - as this court has held in Bennett
25 v. Jeffreys and other cases, that the child's rights

1 and interests are paramount and superior to the
2 rights of parental interest or parental rights to
3 custody, if - - - in looking at that I believe the
4 child has the superior right to stability and
5 permanency in his life.

6 JUDGE STEIN: And we're - - - we - - -
7 we're not talking about best interest here. We're -
8 - - we're really just talking about standing, right?
9 Isn't it?

10 MR. HABER: That's correct.

11 JUDGE STEIN: Yeah, we - - - we don't get
12 to best interest.

13 JUDGE FAHEY: Yeah, we don't get to that.
14 You know, what's the effect of the 2000- - - - the
15 mother got a custody order, I guess, in 2006.

16 MR. HABER: 2006, she obtained a order of
17 physical custody.

18 JUDGE FAHEY: Right, but then, as I
19 understand it, it was never really implemented. She
20 did not take physical custody - - -

21 MR. HABER: It was not. I believe the
22 purpose - - -

23 JUDGE FAHEY: - - - completely, anyway.

24 MR. HABER: The purpose of that order was
25 to obtain a child support order, what she - - -

1 JUDGE FAHEY: Which she did get; is that
2 right?

3 MR. HABER: She did get. She received
4 child support for the next six years. She never got
5 the child, though. It wasn't until 2012, after a
6 petition was filed by the father to terminate the
7 child support, is when she went over, snatched the
8 child, took the child back, didn't allow
9 communication with the parents - - - or the
10 grandparents for over thirty days until she was
11 directed by family court - - -

12 JUDGE FAHEY: Um-hum.

13 MR. HABER: - - - to allow communication.

14 JUDGE RIVERA: You're saying for the six
15 years, she pocketed the support?

16 MR. HABER: That's my understanding.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.

18 MR. HABER: Thank you.

19 CHIEF JUDGE LIPPMAN: Thank you. You'll
20 have your rebuttal.

21 MR. JUDGE: Thank you, Your Honors. My
22 name is Christopher Judge, and I represent respondent
23 Melissa Williams Clark (ph.). Immediately I'd like
24 to point out, the court makes an excellent point, can
25 a mother give up custody unknowingly? This is a

1 permanent end. Mother will only be getting custody
2 back, at any point in the future, upon a substantial
3 change of circumstances that is required in
4 furtherance of the child's best interests.

5 JUDGE FAHEY: Yeah, but you know the real
6 reality here is given the age of the child and
7 everything, you're really talking about three or four
8 years here. And what's - - - what's - - - and you
9 got to weigh that against the ten years before, and
10 we're - - - even those issues, while they're very
11 emotional and difficult, I think we're really looking
12 at a pure legal question of whether or not standing
13 can be established by more than a two-year
14 separation.

15 MR. JUDGE: I believe we're looking more at
16 a six-to-eight-year period left in the child's minor
17 - - - or infancy. But with regards to the issues of
18 fact that are being brought up now, the Appellate
19 Division heard all issues of facts and heard
20 extensive argument thereon, and it reached its
21 conclusions which were admittedly mixed fact and law,
22 some of - - - most of which, I think, affirmed the
23 trial court's findings, but it did seem to view it in
24 a very different way. The last - - -

25 JUDGE FAHEY: So didn't the Appellate

1 Division, though, did they overturn that Section
2 72(2)(b)? Is that what they were doing in their dec
3 - - -

4 MR. JUDGE: Did they render it
5 unconstitutional? No.

6 JUDGE FAHEY: Let me just get it out so we
7 can get the record clear. Is that what they were
8 doing in their decision? Go ahead.

9 MR. JUDGE: In their decision, they did not
10 render Section 72 unconstitutional. They decided
11 that appellant's rendition or interpretation of it
12 would be. It would lessen their standard under
13 Bennett v. Jeffreys which has consistently - - - or
14 and its progeny, Dickson and Adoption of L., which
15 has held that we look at the parents' conduct for
16 utter indifference and irresponsibility relative to
17 the parental role.

18 JUDGE STEIN: What about the other like
19 extraordinary circumstances?

20 MR. JUDGE: Well, that's exactly where we
21 go with this is that in determining what's an other
22 like extraordinary circumstances, we look to, quote,
23 "gross misconduct or other behavior evincing utter
24 indifference and irresponsibility to the parental
25 role." And to quote the Appellate Division's

1 decisions, quote, "a complete abdication of or
2 inability to assume parental responsibilities." In
3 this case we have none.

4 CHIEF JUDGE LIPPMAN: There can't be
5 extraordinary circumstances without that?

6 MR. JUDGE: Are there circumstances without
7 that?

8 CHIEF JUDGE LIPPMAN: Can there be
9 extraordinary circumstances that don't require a
10 total abandonment of parental guidance or role?

11 MR. JUDGE: I would say no, Your Honor.
12 Bennett - - -

13 CHIEF JUDGE LIPPMAN: There are no
14 extraordinary circumstances other than if you totally
15 abandon your child?

16 MR. JUDGE: No, excuse me, Your Honor. I
17 think I misunderstood the question. The Bennett
18 standard is abandonment, persistent neglect, things
19 of that nature, or other like extraordinary
20 circumstances, and in determining what those other
21 like extraordinary circumstances are, we have that
22 quote.

23 JUDGE STEIN: Well - - - well, then how - -
24 - how can you say that they - - - then the Appellate
25 Division didn't overturn Section 72(2) because - - -

1 MR. JUDGE: The - - -

2 JUDGE STEIN: - - - that section says that
3 there are extraordinary circumstances, absent the - -
4 - the circumstances that you just described?

5 MR. JUDGE: Because Section 72(2) can be
6 interpreted in accordance with Bennett to rise to the
7 level of an extraordinary circumstance.

8 JUDGE STEIN: But then isn't it exactly
9 what - - - why do we need 72(2) if Bennett says - - -
10 well, Bennett says abandonment. That certainly would
11 be no contact, right.

12 MR. JUDGE: Um-hum.

13 JUDGE STEIN: Or, you know, residence with
14 the grandparents or whatever. Why - - - then what -
15 - - what is - - - what is the purpose of 72(2)?

16 MR. JUDGE: I agree with Your Honor.
17 Section 72(2), as indicated within the legislative
18 history, could be described as unnecessary, as all it
19 really does is clarify Bennett.

20 JUDGE PIGOTT: I looked at it as opening
21 the door a little wider for grandparents.

22 MR. JUDGE: I do not, Your Honor.

23 JUDGE PIGOTT: Do you - - - okay.

24 MR. JUDGE: I think that within the budget
25 report for the legislative history, it actually says

1 this could be considered unnecessary. The statute -
2 - -

3 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
4 they did pass it, so they did feel there was some
5 need to do it, or it isn't totally just for the sake
6 of let's do this today. Obviously, there's some
7 reason, and I think at a minimum, it probably is
8 along the lines that Judge Pigott was saying.

9 MR. JUDGE: Well, as - - -

10 CHIEF JUDGE LIPPMAN: Was - - - wasn't that
11 a logical thing that they bothered to do this whole
12 section about grandparents? Isn't there - - -

13 MR. JUDGE: Frankly, I think - - -

14 CHIEF JUDGE LIPPMAN: - - - some purpose to
15 it?

16 MR. JUDGE: No, I don't think the fact that
17 the legislature passed a statute has any relevance
18 whatsoever if they're trying to narrow a
19 Constitutional right. It is well accepted that the
20 state legislature cannot narrow - - -

21 CHIEF JUDGE LIPPMAN: They're trying to
22 widen - - -

23 MR. JUDGE: - - - Constitutional rights.

24 CHIEF JUDGE LIPPMAN: - - - the role of the
25 grandparent or rights of grandparents in some - - -

1 MR. JUDGE: Well, by widening - - -

2 CHIEF JUDGE LIPPMAN: - - - even if it's
3 vague or kind of fuzzy, what they're trying to do, it
4 doesn't take much imag - - - imagination - - -

5 MR. JUDGE: Well, by widening - - -

6 CHIEF JUDGE LIPPMAN: - - - to get to the
7 thrust of what they're trying to do.

8 MR. JUDGE: True, Your Honor. But by
9 widening the rights of grandparents, they're
10 narrowing the rights of parents.

11 JUDGE STEIN: But - - - but there's no
12 Constitutional argument made here, was there?

13 MR. JUDGE: Well, there implicitly was upon
14 appeal here today. We hold that we - - - that our
15 interpretation of Section 72 hold - - - renders it
16 Constitutional.

17 JUDGE STEIN: But that wasn't - - -

18 MR. JUDGE: Theirs would not.

19 JUDGE STEIN: That wasn't - - -

20 MS. CAMPBELL: And that's why it was
21 rejected by the Appellate Division.

22 JUDGE STEIN: - - - argued and briefed
23 below, was it?

24 MR. JUDGE: It was not necessary because we
25 argued there was no extended disruption found,

1 there's no other like extraordinary circumstances.

2 CHIEF JUDGE LIPPMAN: So your view is that
3 if you grant standing, you're narrowing the
4 Constitutional rights of your - - - your client?

5 MR. JUDGE: Their interpretation of 72
6 would be unconstitutional as it would provide little
7 - - -

8 CHIEF JUDGE LIPPMAN: If we grant standing
9 here and exceptional circumstances, are we violating
10 the Constitutional rights of your client?

11 MR. JUDGE: If you accept their
12 interpretation of 72, then yes. Because they ignore
13 - - - seek to ignore - - -

14 CHIEF JUDGE LIPPMAN: Are there other
15 circumstances that we could find, exceptional
16 circumstances, without accepting their framing the
17 statute?

18 MR. JUDGE: If we ignore 72(2), we have the
19 other like extraordinary circumstances and we apply
20 the standard as set forth in Adoption of L., utter
21 indifference and irresponsibility relative to - - -
22 to the parental role or complete abdication - - -

23 CHIEF JUDGE LIPPMAN: So again, the - - -
24 the issue is other than total abandonment by the
25 parent there - - - there really can't be exceptional

1 physical - - -

2 JUDGE STEIN: But isn't that the DRL 72
3 does? How is this - - - how is that inconsistent
4 with Bennett?

5 MR. JUDGE: I'm - - - I'm not saying that
6 an extended disruption of custody is not an
7 extraordinary circumstance if it rises to the level
8 that Bennett has articulated. But their definition,
9 as interpreted (sic) - - - interpreted by
10 appellants, it would be unconstitutional. It does
11 not - - - first, it - - - they have not proved an
12 extended disruption of custody because they've not
13 proved prolonged separation of parent or child or - -
14 -

15 JUDGE PIGOTT: Well, in - - - in that
16 regard, prolonged separation, are you suggesting that
17 prolonged separation and contact are mutually
18 exclusive?

19 MR. JUDGE: Prolonged separation and actual
20 contact, I - - - I think that we actually have - - -
21 we have to do a fact-finding process, and I agree
22 that we have to look at what the parent's behavior
23 is. And I think that's why this situation is
24 complicated. We have Bennett, Adoption of L., Dick -
25 - - Dickson, all of which have set the standard of

1 utter irresponsibility, indifference to the parental
2 role. And I think without that, we do not have
3 extraordinary circumstances. So the - - -

4 CHIEF JUDGE LIPPMAN: So we really have to
5 clarify how do you get to extraordinary circumstances
6 - - -

7 MR. JUDGE: I don't think we need - - -

8 CHIEF JUDGE LIPPMAN: - - - because - - -
9 well, maybe we think we do, because you're saying
10 that the - - - the contentions made by your
11 adversary, you know, violate your Constitutional
12 rights, and unless you've totally abdicated your role
13 as a parent, there really can't be exceptional
14 circumstances, and obviously you have two very
15 different views of this and - - - and we really ought
16 to - - - it is then obviously time to clarify when
17 you could have extraordinary circumstances and when
18 you don't, because you do have a statute that, as
19 Judge Pigott says, seems to enlarge the - - - the
20 possibilities for grandparents. And - - - and this
21 is an area we're dealing with children and families
22 and the new kind of family structure that we have
23 today, and - - - and clearly there's a very, very
24 different view of this by the two of you.

25 MR. JUDGE: We have forty years of case law

1 on this issue with at least three Court of Appeals
2 cases.

3 CHIEF JUDGE LIPPMAN: That all support you?

4 MR. JUDGE: That do support me, I believe,
5 Your Honor, because we have this court saying that
6 the standard under Bennett is utter indifference and
7 irresponsibility on behalf of the parent. The
8 Appellate Division was able to review all the
9 mother's conduct in the context of this case. She
10 had a room for the child in her house, fully
11 furnished, fully stocked. When she left the
12 appellants' house, she - - - he did not need to bring
13 a single thing with him to her house. She provided
14 health insurance for him for his entire life.

15 CHIEF JUDGE LIPPMAN: So the bottom line in
16 your mind is if you live with, let's say, the
17 grandparents in this instance, for a dozen years, and
18 you live with them totally, but there is some
19 contact, even if it's at the - - - the - - - as your
20 adversary says or as the child's representative said,
21 even if it's totally initiated by the grandparent,
22 you can't - - - you can't have extraordinary
23 circumstances, in that general - - - putting aside
24 your case; it's a hypothetical. He lives for twelve
25 years, thirteen years, whatever it is, with the

1 grandparents; there is some contact totally initiated
2 by the grandparents; can't be extraordinary
3 circumstance?

4 MR. JUDGE: No, we're not saying that, Your
5 Honor. I think - - -

6 CHIEF JUDGE LIPPMAN: What - - - what - - -

7 MR. JUDGE: - - - if it came just to
8 counting fifty-one percent of the nights that he
9 spent with whom, we wouldn't have - - - this Bennett
10 - - -

11 CHIEF JUDGE LIPPMAN: Well, I - - - I'm - -
12 -

13 MR. JUDGE: - - - standard would be utterly
14 irrelevant or frivolous.

15 CHIEF JUDGE LIPPMAN: I'm giving you a
16 hypothetical. Can that be extraordinary
17 circumstance?

18 MR. JUDGE: If there was - - -

19 CHIEF JUDGE LIPPMAN: Thirteen years.

20 MR. JUDGE: - - - some contact, a little
21 bit of contact?

22 CHIEF JUDGE LIPPMAN: A - - - a little bit
23 of contact initiated by the grandparents.

24 MR. JUDGE: As long as there was not an
25 utter indifference and irresponsibility with regards

1 to the parental rights, then - - -

2 CHIEF JUDGE LIPPMAN: No extraordinary
3 circumstances?

4 MR. JUDGE: - - - then there would be no
5 extraordinary circumstances. And again, in this case
6 mother maintained a constant presence and parental
7 role in the child's life as discussed by the
8 Appellate Division.

9 CHIEF JUDGE LIPPMAN: Yeah, yeah. But - -
10 - but I'm talking about hypothetically. Still no
11 extraordinary circumstances?

12 MR. JUDGE: As long as that parental role
13 is maintained - - -

14 CHIEF JUDGE LIPPMAN: Okay.

15 MR. JUDGE: - - - throughout the child's
16 life, no.

17 JUDGE RIVERA: So - - - so then is it - - -
18 is it as Judge Pigott was suggesting, as long as your
19 client is comfortable what the grandparents are
20 doing, it's not an extraordinary circumstance?

21 MR. JUDGE: I - - -

22 JUDGE RIVERA: One would think she would
23 intervene, right, if she's unhappy with the treatment
24 the child is receiving?

25 MR. JUDGE: I - - - I - - - I'm not really

1 sure how to answer that question, Your Honor, because
2 what has happened here is that - - - that they would
3 discuss daily what was going on in the child's life.
4 The child would go between the residences daily and
5 they would discuss on the telephone daily what was
6 going on in the child's life and they would make
7 decisions together. They would discuss what was
8 going on in the child's life. So if - - -

9 JUDGE RIVERA: So this was like a - - - a
10 joint - - -

11 MR. JUDGE: It was - - - it was like a
12 joint legal - - -

13 JUDGE RIVERA: - - - a joint understanding,
14 she was involved constantly - - -

15 MR. JUDGE: Yes.

16 JUDGE RIVERA: - - - even if the child
17 lived with the grandparents?

18 MR. JUDGE: I think that's critical to this
19 decision is - - -

20 JUDGE RIVERA: But that - - -

21 MR. JUDGE: - - - that the Appellate
22 Division found - - -

23 JUDGE RIVERA: Right.

24 MR. JUDGE: - - - a joint legal
25 relationship.

1 JUDGE RIVERA: Yes, but isn't that getting
2 back to, as I say, what - - - what I thought Judge
3 Pigott was getting to which doesn't that boil down to
4 her feeling comfortable and acquiescing because she's
5 comfortable with what is going on in the parents'
6 (sic) household?

7 MR. JUDGE: Well, what a parent feels
8 comfortable with, I don't think is necessarily
9 relevant. I think it's their conduct with relation
10 to the child, whether that demonstrates utter
11 indifference to being a parent.

12 JUDGE STEIN: Just - - - oh.

13 CHIEF JUDGE LIPPMAN: I'm sorry, Judge
14 Stein.

15 JUDGE STEIN: One last question I have is
16 as to the contact. If - - - if this daily or weekly
17 or, you know, frequent contact was all initiated by
18 the grandparents attempting to keep the mother
19 informed, and we say that - - - that because there's
20 that much contact, then the grandparents don't have
21 standing, aren't we discouraging grandparents in this
22 situation from involving the parent as much as
23 possible?

24 MR. JUDGE: I think if - - - that - - -
25 that might be a question for another day because

1 that's not what we have before us here today. There
2 is no evidence in the record the grandparents were
3 the only ones - - -

4 JUDGE STEIN: But we - - - but if we're - -
5 - if we're going to make a decision on a rule here,
6 we - - - we have to consider that, don't we?

7 MR. JUDGE: Indeed, and if it's
8 grandparents reaching out and mother acts on it then
9 no, I don't - - - I don't think that there is the
10 utter indifference. In this case, though, we don't
11 have that, and I don't think it's necessary to reach
12 a conclusion here.

13 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
14 you.

15 MR. JUDGE: Thank you.

16 CHIEF JUDGE LIPPMAN: Counsel, does there
17 have to be utter indifference for us to find
18 extraordinary circumstance?

19 MS. CAMPBELL: I don't believe so.

20 CHIEF JUDGE LIPPMAN: Why not?

21 MS. CAMPBELL: I don't believe that that's
22 a requirement under 72(2), it doesn't specify - - -

23 CHIEF JUDGE LIPPMAN: What about under our
24 case law?

25 MS. CAMPBELL: I don't believe so in terms

1 of case law either. Not in - - - in any of this
2 court's decisions as - - - and as a matter of fact,
3 as I was looking through this, Bennett v. Jeffreys,
4 which is the pre-72(2) situation, says - - - if I
5 could find it now - - - uses the prolonged separation
6 of parent - - - "the prolonged separation of mother
7 for - - - mother and child for most of the child's
8 life was found to be an extraordinary circumstance" -
9 - - in Bennett, with nothing more. Cases have over
10 the years used the utter - - - utter indifference
11 language to, shall we say, I don't want to clarify
12 but expand upon that to - - - to solidify the concept
13 that this situation is truly extraordinary.

14 But I don't think that Bennett can be read
15 that way and I don't think the case law can be read
16 that way both under the 72(2) con - - - context and
17 also under the Bennett.

18 Judge Pigott, you asked if a parent could
19 unwitt - - - unwittingly voluntarily relinquish
20 custody of a child. Under 72(2) and, if you will,
21 under Bennett, I think that they could unwittingly in
22 the classic sense. They step back, they walk away,
23 and then years later, like in this situation, they
24 say well, I want the kid back, and the grandparent
25 says, wait a minute, wait a minute, we should have

1 custody of this kid. We believe that we are the
2 better custodial parents in this situation.

3 Now - - - but the question becomes,
4 voluntary relinquishment, what is voluntary? That
5 parent handing a child over to grandparents in form
6 or substance and saying here, raise it, then should
7 it be able to come back later and say, but I didn't
8 know what I was doing? You - - - you didn't know you
9 weren't raising your kid? That's - - - that - - -
10 that is the issue here and whether it's under 72(2) -
11 - -

12 CHIEF JUDGE LIPPMAN: You're saying it
13 doesn't matter whether they knew it or not?

14 MS. CAMPBELL: I don't think it does. I
15 think it's the circumstances. And one of the things
16 that has to happen here, in my opinion, is we have to
17 trust in the trial courts to make the determination,
18 has there been a voluntary relinquishment of care and
19 control? Has there been a prolonged separation of
20 the parent from the child? Aside from contact, which
21 the case law - - - there's - - - there's legion case
22 law where there's the contact between a parent and
23 the child all - - - all the while the parent - - -
24 the child is living with a grandparent or third
25 party. In fact, there are cases where the parent has

1 actually resided in the household during all or part
2 of that period of time.

3 CHIEF JUDGE LIPPMAN: Okay, counsel.

4 Thanks, counsel.

5 Counsel, rebuttal.

6 MR. HABER: My opponent indicated that this
7 was - - -

8 JUDGE PIGOTT: Mr. Haber, before you get
9 started, I - - - I was curious. It seems to me that
10 in - - - in - - - in past decisions, we've found that
11 the child does not have standing to appeal. Was that
12 raised at all in this case?

13 MR. HABER: Was it raised? I don't believe
14 it was.

15 JUDGE PIGOTT: No one challenged your right
16 to - - -

17 MR. HABER: No one challenged it.

18 JUDGE PIGOTT: I guess you're here.

19 MR. HABER: And I'm here.

20 JUDGE PIGOTT: Okay.

21 MR. HABER: Should I leave now?

22 CHIEF JUDGE LIPPMAN: No, certainly you're
23 here. Go ahead.

24 MR. HABER: I only have thirty seconds
25 left.

1 JUDGE RIVERA: I was going to say you've
2 got a minute left.

3 MR. HABER: Counsel suggested that the
4 parental role was never - - - was a daily parental
5 role that this mother played. That - - - that was
6 not the case. The - - - the record is sufficient
7 that suggests and shows that she did not play a - - -
8 a daily role. There was not a back-and-forth between
9 these parents in regards to permission or ongoing
10 discussions in regards to those decisions.

11 CHIEF JUDGE LIPPMAN: Do you need to have
12 it or can there just be contact on a dail - - - let's
13 assume there's contact on a daily basis but no
14 control. What's the effect of that?

15 MR. HABER: I - - - I don't think we want
16 to discourage the contact. I - - - I think that is a
17 good thing for any child to have a parent involved.

18 CHIEF JUDGE LIPPMAN: But not good enough
19 in terms of who should be the custodial parent of the
20 child?

21 MR. HABER: I think the issue is the
22 relinquishment of care and control.

23 CHIEF JUDGE LIPPMAN: Okay.

24 MR. HABER: And that is who is parenting
25 this child - - -

1 CHIEF JUDGE LIPPMAN: Okay.

2 MR. HABER: - - - on a daily basis.

3 JUDGE RIVERA: Well, if the - - - if the
4 parent wants the contact and the grandparents cut it
5 off, the parent, right, then can act to - - -

6 MR. HABER: Parent can step right in and
7 then - - -

8 JUDGE RIVERA: - - - have custody, I want
9 my child back because I'm trying to have a
10 conversation with you and you refuse to engage.

11 MR. HABER: The sooner the better, and they
12 might be successful.

13 CHIEF JUDGE LIPPMAN: Okay, counsel.

14 MR. HABER: Thank you.

15 CHIEF JUDGE LIPPMAN: Thank you all.
16 Appreciate it.

17 (Court is adjourned)

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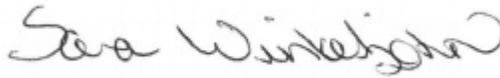
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Suarez v. Williams, No. 198 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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