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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF JAMIE J.

(Papers Sealed)

No. 118

20 Eagle Street
Albany, New York
October 17, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN



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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 118, Matter of Jamie
3 J.

4 Good afternoon, counsel.

5 MS. WOODS: Good afternoon. May it please the
6 court, Kate Woods of Legal Assistance of Western New York
7 on behalf of the appellant, Michelle C. I'd like to
8 request to reserve two minutes of my time for rebuttal.

9 CHIEF JUDGE DIFIORE: You may have it.

10 MS. WOODS: Thank you. The purpose of Article 10
11 of the Family Court Act is clear. It provides a
12 comprehensive framework for the family courts of the State
13 of New York to determine whether a child has been abused or
14 neglected.

15 JUDGE RIVERA: Okay. So let me ask you this.
16 Once, as in this case, a judge decides the - - - that -
17 that DSS has not met its burden, denies the petition, does
18 the judge have to sign a separate order so that the child
19 is released back to the custody of the parent?

20 MS. WOODS: There is no requirement that the
21 court sign a separate specific order releasing the child
22 back. It's assumed that when a petition is dismissed and
23 an order of dismissal is granted that that is what happens.

24 JUDGE RIVERA: So there's not another step that
25 the judge needed to take here?



1 MS. WOODS: No.

2 JUDGE FAHEY: Doesn't the court have to hold a
3 dispositional hearing?

4 MS. WOODS: Only if a finding of neglect or abuse
5 is made.

6 CHIEF JUDGE DIFIORIE: Is there any . . .

7 JUDGE FAHEY: So at the end of a fact-finding
8 hearing - - - and dismiss as neglect, the way I read the
9 commentaries and Professor Sobie that's it's - - - that a
10 dispositional hearing is then held.

11 MS. WOODS: If there is a finding that's correct.
12 These are bifurcated hearings.

13 JUDGE FAHEY: You have a hearing. The court
14 determines you didn't meet their - - - your burden of proof
15 to establish neglect. And then they say okay. What are we
16 going to do? They have a dispositional hearing, right?

17 MS. WOODS: There is a no dis- dispositional
18 hearing.

19 JUDGE FAHEY: So your position is that
20 immediately the parent would then take the child and - - -
21 and walk out of the courtroom?

22 MS. WOODS: No.

23 JUDGE STEIN: Okay.

24 MS. WOODS: Article 10 contemplates this
25 situation.



1 JUDGE FAHEY: Okay.

2 MS. WOODS: In a - - - in a case where there is a
3 dismissal and a child is placed in foster care, there is an
4 automatic stay on the return of the child until five p.m.
5 the following business day, and that is specifically to
6 address the concern here. If there are - - -

7 JUDGE FAHEY: So - - - so I'm clear, though, your
8 position is there's no dispositional hearing?

9 MS. WOODS: Absolutely not. If there is no
10 finding there is no dispositional hearing.

11 JUDGE GARCIA: Isn't that what we said in Tammie
12 Z.? I mean in upholding the standard, didn't we say that
13 if you lose in the Article 10 the child immediately goes
14 back?

15 MS. WOODS: Absolutely. And that's how the court
16 - - -

17 JUDGE GARCIA: And that's how we justified
18 upholding the standard of proof in that case?

19 MS. WOODS: Exactly.

20 JUDGE RIVERA: So during the period of the stay,
21 that's when DSS can act if it feels that the child is in
22 some kind of danger?

23 MS. WOODS: Exactly. The DSS - - -

24 JUDGE RIVERA: And what - - - what exactly are
25 the - - - is the recourse available to DSS?



1 MS. WOODS: DSS can file an immediate appeal and
2 request an ongoing stay pending the outcome of that appeal.
3 And they could also file a new neglect petition
4 articulating these new concerns they have and seek
5 placement under that new docket. And indeed, in that case,
6 eventually the Department did bring a new neglect petition.

7 JUDGE RIVERA: And before the petition is denied
8 or before the judge decides it they can also seek to amend
9 the petition?

10 MS. WOODS: Absolutely. And that is a common
11 practice to amend the pleadings to conform to the proof.

12 JUDGE RIVERA: Is that the error here?

13 MS. WOODS: I would argue that no neglect
14 occurred on behalf of Michelle C. However, I think it
15 would be a fair reading to say that the court perhaps
16 should have permitted pleadings to be conformed to the
17 proof.

18 JUDGE STEIN: In - - - in all fairness, didn't
19 the family court repeatedly tell DSS to amend their
20 petition before trial?

21 MS. WOODS: Yes.

22 JUDGE WILSON: Can you shed any light on why it
23 took more than a year from the removal to the fact-finding
24 hearing?

25 MS. WOODS: That timeline is not uncommon for



1 these cases for many factors. This type of litigation
2 tends to be slow. Docket congestion can often lead to that
3 issue.

4 CHIEF JUDGE DIFIORE: Counsel, is there any
5 significance to the fact that Article 10 is silent as to
6 when placement is terminated when the underlying 1022
7 neglect petition is dismissed?

8 MS. WOODS: No. I think - - - I think the idea
9 of - - - of what happens after the dismissal of any
10 petition is so basic to the practice of law that it is
11 unnecessary to even state. Nowhere in the Family Court Act
12 at all does it say what you do when a dismiss - - - when a
13 petition is dismissed because it's obvious. The court no
14 longer has the authority to act.

15 JUDGE STEIN: In - - - in this particular case
16 was the termination petition that has been since filed
17 based at all on the duration of the time that the child has
18 been in foster care?

19 MS. WOODS: It - - - there's an obligation on the
20 county to bring a termination petition when a child has
21 been placed in foster care for twelve of the most recent
22 fifteen months.

23 JUDGE STEIN: So if - - - if - if the court is
24 allowed to continue jurisdiction under these circumstances
25 that could lead to a finding of permanent neglect without



1 the parent ever having been found neglectful or abusive?

2 MS. WOODS: Absolutely. Your Honor mentions the

3 Tammie Z. case and I think that particular analysis is

4 illum- - - - is illuminating this case, and I would also

5 point the court towards the matter of Marie B. In that

6 case the court held unconstitutional Section 1039 of the

7 Family Court Act which held that - - - which stated that:

8 "Upon violation of an adjournment on contemplation of

9 dismissal, there would be an automatic finding of neglect."

10 And in finding that unconstitutional this court articulated

11 - - - and I can just read briefly from the decision: "That

12 legislation authorizing the removal of a child from the

13 parent without the requisite showing of abandonment,

14 surrender, persisting neglect, unfitness, or other like

15 behavior evincing utter indifference and irresponsibility

16 of the child's well-being constitutes an impermissible

17 abridgement of fundamental rights - - - of fundamental

18 parental rights and that a constructive finding of neglect

19 is constitutionally inadequate in terms of a justification

20 for this." The analysis is the same in this case, but the

21 posture is even more extreme. Here we reach the merits.

22 There was a finding, a finding of no neglect. And to - - -

23 and to then say that placement can continue past that flies

24 in the face of all the precedent that - - - that has come -

25 - -



1 JUDGE FEINMAN: So - - - so assuming you're
2 interpreting Article 10 correctly, what do we - - - you
3 know, in terms of the dismissal of the petition, what do we
4 with this plain language in 1022: "The case shall remain
5 on the court calendar and the court shall maintain
6 jurisdiction over the case under the child - - - until the
7 child is discharged." Alright. And that's from Article
8 10-A.

9 MS. WOODS: Yes.

10 JUDGE FEINMAN: What do we do with that plain
11 language?

12 MS. WOODS: The court is referencing the - - -
13 the language from 1088.

14 JUDGE FEINMAN: Um-hmm. Yeah. I'm sorry. I
15 meant 1088.

16 MS. WOODS: That's okay. So there's - - -
17 there's two ways to think about this. One is that it
18 states only that the court continues jurisdiction. 1088
19 continues jurisdiction. It does not create it.
20 Jurisdiction to place a child in foster care exists - - -

21 JUDGE FEINMAN: So - - - so we would focus on
22 that maintain? Maintain implies it is already there?

23 MS. WOODS: Right. Something has to be
24 inexistence for it to be continued. And jurisdiction to
25 place a child exists only in two places in Article 10 and



1 that's temporary placement pending a final order of
2 dismissal, which is exactly as it's articulated in the
3 statute, or an order of disposition following a finding.
4 But we can even look further. At 1088 it says: "Until the
5 child is discharged from placement." And pursuant to this
6 court's holding in Matter of Tammie Z., we know that when a
7 petition is dismissed the child is - - - is discharged from
8 placement.

9 I would say just - - - just to wrap up the
10 Department in this case is seeking a solution to a problem
11 that doesn't exist. There is no danger of children being
12 returned to unsafe homes. The Fourth Department's decision
13 does nothing to extend protections that are already
14 afforded to children in this article - - - in this statute.
15 All it would serve to do would be unleash absolute chaos in
16 the family courts across the state of New York. We ask the
17 court to reverse.

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 MS. WOODS: Thank you.

20 CHIEF JUDGE DIFIORE: Counsel.

21 MR. BENNETT: Your Honor, Gary - - - Gary Bennett
22 for DSS.

23 CHIEF JUDGE DIFIORE: Mr. Bennett?

24 MR. BENNETT: Yes.

25 CHIEF JUDGE DIFIORE: I'm struggling. What is



1 the predicate finding that allows the State to hold this
2 child in its custody?

3 MR. BENNETT: Well, my - - - I believe the Fourth
4 Department dissent thought it was the - - - was the removal
5 but it wasn't. We had a first permanency hearing order.

6 CHIEF JUDGE DIFIORE: The first what?

7 MR. BENNETT: The first permanency hearing order
8 continued the child in foster care. And frankly, the
9 problem we have in this case is at the time the neglect was
10 dismissed the child was what I'll call on the Article 10-A
11 track. She - - - the child was placed under 10-A.

12 JUDGE STEIN: Wasn't 10-A enacted in the first
13 place as a corollary to - - - in other words to track the
14 placement of children who have been placed under Article
15 10? Can - - - how is it possible to view - - - where else
16 do you get any support for your - - - for your argument
17 that 10-A is some separate track - - -

18 MR. BENNETT: Because - - -

19 JUDGE STEIN: - - - from Article 10?

20 MR. BENNETT: Because the problem from a practice
21 point is they - - - when they created 10-A they - - - they
22 took the extension out of Article 10 where it was forever,
23 and they created this whole new Article 10-A, a whole
24 separate section of the Family Court Act. And they - - -
25 and they created that language in 1088 that says the court

1 has subject matter jurisdiction. My understanding of the
2 appellant's appeal is that she's arguing the court didn't
3 have subject matter jurisdiction, but my thought is if you
4 read 1088, it say - - - it clearly says the court has
5 subject matter jurisdiction.

6 JUDGE WILSON: So your theory is that if the
7 fact-finding had actually occurred - - - fact-finding
8 hearing had occurred and the disposition or that hearing
9 had occurred in February of 2015 you would not have
10 jurisdiction now. Is that right? It's only because it
11 happened after the first permanency hearing - - -

12 MR. BENNETT: Right. The - - -

13 JUDGE WILSON: - - - that you have jurisdiction.

14 MR. BENNETT: What - - -

15 JUDGE WILSON: If it happened before you wouldn't
16 have it?

17 MR. BENNETT: Right. What - what - what would
18 have happened or could have happened if the neglect
19 petition was dismissed - - - and there was no order from
20 the court saying return the kid under Article 10. The
21 court never issued such an order. All the Article 10 order
22 said is that the neglect was dismissed but - - -

23 JUDGE RIVERA: Well, that was my question before.
24 Why - - - why is an order required?

25 MR. BENNETT: Well, I'm not sure - - -



1 JUDGE RIVERA: If - - - if your petition is - - -

2 MR. BENNETT: I'm not sure - - -

3 JUDGE RIVERA: - - - denied - - -

4 MR. BENNETT: I'm not sure an order is required,
5 but I think - - -

6 JUDGE RIVERA: Well, I thought that's what you
7 just said.

8 MR. BENNETT: The Department's remedy, I think,
9 would have been if the neglect was dismissed, there was no
10 prior Article 10-A order, we could have, I think under this
11 case, asked for a new removal order or asked for a stay.
12 But I think - - - I mean that - - - that would be our
13 remedy for that. But - - -

14 JUDGE STEIN: And what's wrong with that remedy?

15 JUDGE FEINMAN: Yeah. What's wrong with that
16 remedy now, though?

17 MR. BENNETT: Well, I think the problem is if you
18 - - - if you take what I call the legal snapshot at the
19 time - - - at the time the neglect was dismissed there was
20 an order placing the child under Article 10-A that the
21 mother had agreed to. That was a final order of
22 disposition of the Wayne County Family Court. You just - -
23 - you just can't ignore that order.

24 CHIEF JUDGE DIFIORE: Could they - - - could the
25 Department have filed a new neglect petition?



1 MR. BENNETT: Well, we did - - - we did
2 eventually, but honestly, the reason that was filed is,
3 frankly, we didn't know what the Appellate Division was
4 going to do with this case, and we wanted there - - - that
5 there for what I'll call insurance. And we just finished
6 the fact-finding trial on - - - on that neglect hearing,
7 and we expect to have a decision in a month or two. So
8 that's - - - that's been done. That's been filed, done,
9 and litigated.

10 JUDGE STEIN: When I looked at the record and - -
11 - and at the form orders for an order of fact-finding or
12 disposition on an order of fact-finding in - - - in an
13 Article 10 proceeding, there are all these sort of boxes to
14 check and things like that.

15 MR. BENNETT: Yes.

16 JUDGE STEIN: And - - - and in the area where it
17 provides for a date for the next permanency hearing, the
18 footnotes say that if - - - if the petition is dismissed
19 you don't put another date in - - - in that box or on that
20 line. So is - - - does that tell us anything about the
21 legislative intent?

22 MR. BENNETT: I don't think so because I don't
23 believe the - - - the legislature drafts those form orders,
24 and I think - - -

25 JUDGE STEIN: But is - - - but is that how it's



1 usually done? I mean is this sort of an exceptional case
2 because - - - because the court refused to allow DSS to
3 amend the petition to conform with the proof?

4 MR. BENNETT: This is an exceptional case. And I
5 think honestly what happened is the - - - the judge did say
6 to DSS, to one of my attorneys, you should have amend - - -
7 you should amended the petition. Okay. I think he was
8 upset that we didn't, but I think - - -

9 JUDGE STEIN: Right.

10 MR. BENNETT: - - - on one hand generally courts
11 are very liberal in allowing oral amendments. We've done
12 that for - - - this is probably the first case where a
13 judge has not allowed us to do an oral amendment even when
14 he's sort of said you should do that because this is a case
15 where the judge, he knew - - -

16 JUDGE WILSON: You could have appealed that,
17 right?

18 MR. BENNETT: He knew - - - because the neglect
19 was about the first seven days. He knew what the other
20 information that he had before him that justified keeping
21 this child in foster care.

22 JUDGE STEIN: Well, but that's my point. If - -
23 - if, you know, for whatever reason, it didn't happen here,
24 but if, as you say, in most cases it would have been
25 allowed then presumably you would have had additional



1 evidence to support your position that the child was in
2 danger. And which sort of leads me to my next question
3 which is the standard of proof in an Article 10-A
4 permanency hearing is different from the standard of proof
5 to either get a temporary order of removal or to - - - for
6 a finding of abuse and neglect. And doesn't that lead to
7 some absurd results that somehow the - - - the State ends
8 up keeping children in care when they - - - when they
9 couldn't have removed them or - - - or - or provided a
10 basis for that in the first place?

11 MR. BENNETT: I don't think between the two
12 Articles - - - the judges don't give a lot - - - a lot of
13 weight to hearsay in permanency hearings. I think,
14 frankly, we put the same proof in at both hearings, and the
15 court - - - I think the court doesn't really treat these
16 any differently.

17 JUDGE STEIN: Well, it's not just - - - it's not
18 just, well, but they're allowed to. And it's - - - it's
19 not just the evidentiary rules but it's also whether
20 there's imminent risk of harm, whether there's, you know,
21 some risk and it's in their best interest. I mean there
22 are so many differences here. It just seems to me that
23 it's a lot easier to maintain the child in - - - in the
24 custody of the State while an Article 10 proceeding is
25 pending or after a finding of abuse or neglect than it



1 would be to keep the child while there is no such basis on
2 - - - on the other side of the - - - on the - - -

3 MR. BENNETT: That's true. But also, a lot of
4 these cases we have non-respondent parents and we're
5 keeping the child from them, too, because the judge has
6 enough concerns on the record for that to happen. So even,
7 you know - - -

8 CHIEF JUDGE DIFIORE: Thank you, counsel.
9 Counsel.

10 MR. HINMAN: May it please the court, James
11 Hinman on behalf of James and Jennifer Ryan, the foster
12 parents. The thing about the Family Court Act is that it's
13 structured in articles. Article 3 deals with custody and -
14 - - no, that's Article 6. Article 8 deals with family
15 events. Article 10 deals with abuse and neglect. And the
16 legislature created a new whole article, Article 10-A. It
17 is - - - if they meant to provide protections under Article
18 10, they would have added subsections to Article 10, but
19 they didn't. They created a whole new article, Article 10-
20 A, and they gave the court independent jurisdiction. The
21 jurisdictional grant to the family court under Article 10-A
22 is entirely separate from the jurisdictional grant to the
23 court under Article 10.

24 JUDGE GARCIA: So your view is they created this
25 entirely separate proceeding with an entirely separate



1 standard from Article 10 that operates - - - even though
2 it's triggered initially in the context of this Article 10
3 proceeding, continues to have a life of its own - - -

4 MR. HINMAN: Yes. It does.

5 JUDGE GARCIA: - - - even after the - - -

6 MR. HINMAN: Because to get into the Article 10-A
7 there has to be an order from the court removing the child
8 or one of two sections of the Social Services Law.

9 JUDGE GARCIA: You just bring an Article 10-A
10 proceeding, like, hey, I'm going to bring an Article 10-A
11 proceeding?

12 MR. HINMAN: Can't.

13 JUDGE GARCIA: Right. So doesn't that tell you
14 it's tied to some other article?

15 MR. HINMAN: It's tied to the Social Services Law
16 and Article 10-A. What's it tied to is the location of the
17 children. When the children are in placement, doesn't
18 matter whether they're there under the Social Services Law
19 or under Article 10. That's when Article 10-A kicks in
20 after six months. As Judge Wilson observed, if the
21 petition had been dismissed in February, we wouldn't be
22 here.

23 JUDGE STEIN: Doesn't that potentially - - -
24 potentially - - - create some constitutional problems? And
25 if that's the case and if there are two possible



1 interpretations of Section 1088 shouldn't we avoid that
2 possible constitutional infirmity?

3 MR. HINMAN: In a properly preserved case I would
4 agree with you that that's appropriate. That's not
5 preserved here. What was - - -

6 JUDGE GARCIA: Isn't that a rule of construction
7 we apply all the time? We have to preserve it. It says a
8 rule of construction. I mean if there are two
9 interpretations of the statute and one of them is going to
10 lead to some type of unconstitutional result, don't we, as
11 a general matter - - - you don't have to raise it, but as a
12 general matter we would apply the interpretation that
13 preserves the statute.

14 MR. HINMAN: That doesn't apply to the facts of
15 this case. This child was removed prior to the filing of
16 the petition.

17 JUDGE STEIN: But we're not just - - - we're not
18 just interpreting this statutory scheme for this case.
19 We're interpreting it for every case. So if that's what
20 we're doing then don't - - - don't we have to follow these
21 rules of statutory interpretation?

22 MR. HINMAN: I have no problem with that, but the
23 - - - the facts of this case don't fall under an
24 unconstitutional interpretation of the statute. This child
25 was removed with all of the protections afforded to the



1 mother under Article 10. The mother had the right to ask
2 for a hearing to determine whether or not the child was at
3 imminent risk. The mother forewent that opportunity.

4 JUDGE STEIN: So should we make it easier for the
5 State to keep a child from a parent or at least equally
6 difficult to have a parent return a child who has - - - if
7 the parent has not been found to have done anything
8 neglectful or abusive as it is for a parent who has been
9 found to have abused or neglected the child. Does that
10 make any sense? In other words - - -

11 MR. HINMAN: I'm trying to understand the
12 question.

13 JUDGE STEIN: Well, the question is is according
14 to your interpretation, the State's ability to keep a child
15 from his or her parents is at least the same as it is for
16 parents who have been found to have neglected or abused
17 that child as for a parent who has been found not to have
18 abused or neglected that child.

19 MR. HINMAN: Correct. Once the child is in
20 foster care. And the provisions of Article 10-A are
21 applicable.

22 JUDGE STEIN: That doesn't make sense. What if -
23 - - what if a completely frivolous petition has been filed
24 and an ex parte order of temporary removal is given. Okay.
25 And as has been said here, typically it may take up until -



1 - - up to a year for that petition to finally come - - -
2 see the light of day, have a hearing, and find that there's
3 no basis for this petition at all. And in that case,
4 you're saying that the court has jurisdiction to continue
5 placement?

6 MR. HINMAN: If the statutory criteria is met,
7 that return of the child to that parent would place that
8 child at risk of harm and whether or not it's in the best
9 interest of the child. No claim has ever been made in this
10 case that the mother is capable of caring for this child.
11 In fact, the findings throughout have been to the contrary
12 other than the dismissal of the neglect case.

13 JUDGE STEIN: Well, those findings are not before
14 us, right?

15 MR. HINMAN: Yes. One of them is in the first
16 permanency hearing. The second one is the order that's
17 appealed from. The court made a finding.

18 JUDGE STEIN: I thought the first permanency
19 hearing was on consent?

20 MR. HINMAN: It was, and it included a finding
21 that the mother consented to that return of the child would
22 not be in the child's best interest and would pose a risk
23 of danger to the child. The second testimony was taken
24 that clearly established that, and then the mother came
25 back and consented reserving only the court's authority

1 under subject matter jurisdiction to make the order. And
2 since then, the court has even determined that it's unsafe
3 for the child to have a two-hour supervised visit in the
4 mother's home.

5 So this is not a case where a child - - - the
6 State is using Article 10-A to keep a child from a parent
7 that's capable of providing care for the child. It is a
8 extremely exceptional case that comes from the fact that
9 the Department was not allowed to amend the petition and
10 allowed to go into further proof. But they have at
11 subsequent hearings and all of the due process protections
12 have been afforded to the mother throughout the facts of
13 this case and the way it has progressed. So a due process
14 argument that might exist in theory and may apply to the
15 practice of - - - of the folks in New York City, as in the
16 amici brief, that's not what's at issue here. All of the
17 protections were afforded to the mother here, and the court
18 clearly had subject matter jurisdiction under 115(c).
19 Thank you very much.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 Counsel.

22 MR. LAIR: May it please the court, Sean Lair on
23 behalf of the minor child, Jamie J. My comments - - - I'd
24 like to focus my comments with regards to the time. We had
25 a question with regards to the year and is this standard,



1 is this customary? And I would say it is when you're
2 wearing that defense hat, when you have the mom and she's
3 not in a good spot. She can't take care of this child.
4 That is a move that defense counsel makes.

5 JUDGE WILSON: But my - - - my question really
6 was geared at the following. Does it make sense that the
7 jurisdiction of the family court turns on how quickly the
8 fact-finding hearing is held?

9 MR. LAIR: Well, I would suggest it - - - it
10 should because in this case you have a seven-day-old child
11 who's then in the care and custody of foster parents for
12 eight months, the same - - - the same foster parents.
13 Those are the only parents this child knows. So now
14 because mother hasn't asked for the 1027 removal hearing,
15 she hasn't brought a motion to dismiss if it's frivolous,
16 she has not demanded a fact-finding hearing - - -

17 JUDGE RIVERA: But DSS didn't meet their burden.
18 So how - - - aren't there already, as counsel has said,
19 other ways to protect the child. But - - - but DSS filed a
20 petition. They didn't meet their burden. Now they've got
21 to do something else if they think, indeed, that the child
22 is in danger. Except that we have an Article 10-A order.
23 Plain reading of the statute says - - -

24 JUDGE RIVERA: But my question is aren't there
25 other way - - - forget the Article 10-A for one moment.



1 Are there not other ways to protect the child that already
2 exist?

3 MR. LAIR: Well, I would suggest you're right,
4 there are but for - - - for both sides of the aisle.
5 There's other - - - defense counsel have done things that
6 she didn't do it. She didn't, again, bring the 1027
7 request.

8 JUDGE RIVERA: But it's DSS' petition, and they
9 didn't meet their burden.

10 MR. LAIR: But now we're one year into this child
11 being in foster care. And at some point, I would suggest
12 the focus has to be on the child, not necessarily just the
13 parent and what's in the parents' rights.

14 JUDGE RIVERA: But that's what I'm saying. If
15 there are other ways - - - and you've said that there are,
16 and we've already heard them laid out for us. There are
17 other ways to protect the child if, indeed, the child is in
18 danger.

19 MR. LAIR: And - - - and I agree with you. I
20 think DSS could have done something different, and my point
21 is there was things a mother could have done different to
22 not let it get to the twelve-month period. But - - - but
23 what was going on in the background was she - - - as the
24 10-A hearing pointed out, she's not stable. She's making
25 bad choices personally. She's making bad choices with



1 regards to her medical care.

2 JUDGE RIVERA: Well, that may support these other
3 opportunities or ways that DSS can protect the child, no?
4 But it's not about whether or not there's jurisdiction once
5 the petition's denied.

6 MR. LAIR: I agree with you. There are other
7 ways. But I also think under the current scheme what they
8 did was proper.

9 JUDGE WILSON: But also - - -

10 JUDGE FAHEY: How - - - how long have you been
11 attorney for the child?

12 MR. LAIR: Since her seventh day of life.

13 JUDGE FAHEY: So since November 2014?

14 MR. LAIR: Yes.

15 JUDGE FAHEY: And has - - - has the child had the
16 same foster parents?

17 MR. LAIR: Yes.

18 JUDGE FAHEY: I see. Thank you.

19 CHIEF JUDGE DIFIIORE: Thank you, counsel.

20 MR. LAIR: Thank you.

21 CHIEF JUDGE DIFIIORE: Ms. Woods.

22 MS. WOODS: Counsel described this as an
23 extremely exceptional situation. I would say that's an
24 understatement. This is literally the only time this
25 situation has occurred anywhere in the state of New York as



1 far as we can tell, and anecdotally, I'm unaware of any
2 situation in Wayne County where this has been raised at all
3 as well. This is truly novel.

4 And certainly, if the legislature had intended
5 this, what we all agree, is an incredibly dramatic shift in
6 how Article 10 functions, not only would we see it
7 happening, but we would see it reflected in the legislative
8 history of this - - - of this statute. And it's just not
9 there. There's not a single mention of a desire to create
10 a separate track that can keep a child in foster care in
11 perpetuity based on allegations that has been subsequently
12 dismissed.

13 CHIEF JUDGE DIFIORE: What could DSS have done
14 when the petition was not sustained? What would - - - what
15 should they have done?

16 MS. WOODS: They could have appealed the fact
17 that the petition was dismissed.

18 CHIEF JUDGE DIFIORE: With a stay.

19 MS. WOODS: And there - - - there's the automatic
20 stay. They had time to do that. They could have brought -
21 - - the petition that they eventually brought almost a year
22 later, they could have brought that much sooner and held
23 the child under that - - - under that petition. Instead,
24 they elect to bend the law to suit their purposes here.
25 And we would ask the court to reject that.



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CHIEF JUDGE DIFIORE: Thank you, counsel.

MS. WOODS: Thank you.

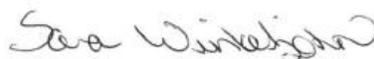
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Jamie J., No. 118 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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