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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF JOSHUA J.,

Appellant,

-against-

NO. 43

WESTCHESTER COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Respondent.

20 Eagle Street
Albany, New York
April 8, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

GEORGE E. REED, JR.
LAW OFFICES OF GEORGE E. REED JR.
Attorney for Appellant
222 Mamaroneck Avenue
White Plains, NY 10605

WILLIAM W. HORWITZ
THE BRIARCLIFF MANOR
Attorney for Joshua J.
PO BOX 2515
Briarcliff Manor, NY 10510

JOAN IACONO
IACONO LAW
Attorney for Christopher J.
81 Pondfield Road
Suite 8
Bronxville, NY 10708



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JUSTIN R. ADIN
WESTCHESTER COUNTY LAW DEPARTMENT
Attorney for Respondent
148 Martine Avenue
White Plains, NY 10601

Brandon Deshawn
Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Matter of Joshua J. v. Westchester County Department of
3 Social Services.

4 MR. REED: May it please the court. My name is
5 George Reed, and I represent the appellant, mother, in this
6 matter. Appellant respectfully requests nine minutes for
7 main argument and one minute for rebuttal, Your Honor.

8 CHIEF JUDGE WILSON: One for rebuttal. Yeah.
9 Just hold on a second. Give counsel the chance to settle
10 in.

11 MR. REED: Certainly.

12 CHIEF JUDGE WILSON: Just wait a minute.

13 MR. REED: There's no question that the statute -
14 - -

15 JUDGE RIVERA: Counsel, I'm sorry to - - -

16 MR. REED: Yes, Your Honor.

17 JUDGE RIVERA: - - - interrupt you so early, but
18 just - - - I think it will affect the way I'm able to
19 approach the rest of your argument. And I'm not trying to
20 be cute. What is exactly the remedy you are seeking?

21 MR. REED: Well, I mean, this case is, in fact,
22 unusual compared to anything else I can remember arguing
23 because, usually, I come into a courtroom knowing exactly
24 what I want, and it's just one thing. I mean, I actually
25 see three possibilities here, and I think that probably a

1 combination of them would work the best. The first
2 possibility, which wouldn't even involve mootness, this is
3 to expedite the appeal, but there's so many ways that could
4 go wrong because - - - to get it all done in six months.
5 The second one is the one that I focused on in - - -

6 JUDGE CANNATARO: I'm sorry.

7 MR. REED: Yes.

8 JUDGE CANNATARO: You said six months. What's
9 six months?

10 MR. REED: Okay.

11 JUDGE CANNATARO: I thought we had sixty days to
12 decide the appeal.

13 MR. REED: Oh, well, the entire appeal from the
14 date the permanency hearing is decided in family court - -
15 -

16 JUDGE CANNATARO: Yes.

17 MR. REED: - - - to - - -

18 JUDGE CANNATARO: Until the next permanency
19 hearing, right?

20 MR. REED: Well, that's right.

21 JUDGE CANNATARO: Are those six months or sixty
22 days? I might be confused.

23 MR. REED: Oh, no. Oh, it's - - -

24 JUDGE CANNATARO: They are - - - they're every
25 six months.

1 MR. REED: I'm not sure what the sixty-day period
2 would be, but the six months is - - -

3 JUDGE CANNATARO: That's a concept I introduced,
4 which may be a product of my misunderstanding.

5 MR. REED: Oh, no. Okay. The six months - - -

6 JUDGE TROUTMAN: So the permanency hearings and -
7 - -

8 MR. REED: Yes.

9 JUDGE TROUTMAN: And when we normally think of
10 permanent, we think we're done. But these are reoccurring
11 hearings, a number of them. Every six months they happen,
12 correct?

13 MR. REED: Right. The word permanency here
14 refers to the reason for those hearings that the federal
15 government wanted people not to languish in family - - - in
16 foster care.

17 JUDGE TROUTMAN: And things change during the
18 time. So they want them timely decided so that there's
19 some finality with respect to the circumstances of the
20 parties involved?

21 MR. REED: Right. They're trying to avoid a
22 situation where somebody actually goes through their entire
23 eighteen years in foster care, which can be extended to
24 twenty-one voluntarily.

25 JUDGE TROUTMAN: Okay. So what's the second

1 thing that you're looking for?

2 MR. REED: Well - - -

3 JUDGE TROUTMAN: You were giving - - - you were
4 answering my colleagues question - - -

5 MR. REED: Right. The second - - -

6 JUDGE TROUTMAN: - - - of - - -

7 MR. REED: - - - one was - - - was an exception
8 to mootness, which I - - -

9 JUDGE TROUTMAN: And why does the current
10 standards applied with respect to the - - - an exception to
11 the mootness doctrine? Why are they inadequate for the
12 circumstances here?

13 MR. REED: I'm not sure what's the current
14 standard, Your Honor.

15 JUDGE TROUTMAN: Why can't the Appellate Division
16 apply their discretion and deal with cases as they come
17 before them? Why does your client need a different rule?

18 MR. REED: Because it's been a total failure for
19 the twenty years since this law was initiated. It would
20 begin 2005, and by 2007, we had the first Appellate
21 Division's victim.

22 JUDGE TROUTMAN: So what would your rule be?

23 MR. REED: And so what I was saying was that - -
24 - that there should be an exception to mootness. And the
25 third thing that I was saying - - -

1 JUDGE TROUTMAN: So every case would be heard?

2 MR. REED: Well - - -

3 JUDGE TROUTMAN: Every six months, you can - - -

4 MR. REED: It's most likely to - - - okay. It's
5 most likely to come up in cases which are incremental
6 because if - - - to say some other cases aren't incremental
7 in the subsequent hearing because the - - - the - - -

8 JUDGE HALLIGAN: Can you explain what you mean by
9 that distinction before you continue? Some are incremental
10 and some are not?

11 MR. REED: Well, because what I'm saying is that
12 the permanency hearings, the problem that comes up - - -
13 the reason the Appellate Divisions dismiss these appeals is
14 because they say there's already been another permanency
15 hearing since then. Now, if that permanency hearing
16 results in the return of the child, it's unlikely the
17 parent is going to be persisting with the appeal. This
18 case is a little unusual because somebody had to get the to
19 the Court of Appeals after all these years. But - - - and
20 the mother does want to - - - I want to make it clear, the
21 mother wanted this appeal to go ahead. It's not a question
22 of my just deciding to take it. As a matter of fact, there
23 was a prior appeal, I think it was Peter T. It's one of
24 the ones in the case - - - we didn't discuss it in the
25 briefs because it didn't really matter, but one of the - -

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JUDGE CANNATARO: Counsel, I'm sorry to interrupt, but do you have any idea of what the consequences of a judicially created mootness exception would be as a practical matter? Because there are a lot of these permanency orders issued every day in courts all around the state, and I - - - granted if the result of the permanency hearing is returned to the parent, you're not going to get an appeal, but I would think that there are a lot of them that don't end up that way, and there might be a lot of parties who want to appeal them. So I'm just thinking from an operational perspective that that second option could be kind of cataclysmic?

MR. REED: It's - - - well, I can't - - - I can't call it cataclysmic. I call it burdensome. And I know it's burdensome on this side of the bench. And I - - - although I don't understand exactly how the Appellate Division handles cases, I know there are a lot of clerks working there, a lot of people have to do different steps that I'm not involved in. So I know it's tough to do something in six months. Election appeals are faster than six months. The - - - you know, issues - - -

JUDGE TROUTMAN: But they're also impacted by the parties. The parties - - - we started out the question in the other case about an expedited appeal. And even if one

1 were to file an expedited appeal, the Appellate Division is
2 limited by the parties actually perfecting their appeals
3 and being ready. People ask for extensions, et cetera.
4 And because of the number of these cases, and the Appellate
5 Division hears a number of family court cases, they would
6 be flooded with the ability - - - and hampered in their
7 ability to resolve cases expeditiously.

8 MR. REED: Well, except that that flood isn't
9 occurring because - - - I mean, I did the math without the
10 statistics, and I could figure out there had to have been,
11 you know, thousands over these eighteen years, let's say,
12 thousands of permanency hearings that resulted in extension
13 of placement where the parent was aggrieved. And then - -
14 -

15 JUDGE TROUTMAN: But you're saying, change the
16 rule. So change the rule in a limited circumstance, and
17 they have to have aggrievement, and then they would get
18 them or - - -

19 MR. REED: Well, aggrievement is - - -

20 JUDGE TROUTMAN: - - - what are you saying?

21 MR. REED: If the parent doesn't agree, then
22 there's no appeal, I mean - - - you know. So it would be
23 aggrieved, meaning the parent doesn't like the result and
24 wants to appeal, right?

25 JUDGE RIVERA: So is the basis for the mootness

1 exception simply, regardless of the merits, the fact that
2 there's a particular time period during which you move from
3 one permanency hearing to possibly the next permanency
4 hearing, six months is just not going to be enough time, so
5 they'll always be beyond the six-month period? Is that the
6 argument for the mootness exception - - -

7 MR. REED: That's what - - -

8 JUDGE RIVERA: - - - or is it about the merits
9 also?

10 MR. REED: Well, that's what's been happening
11 historically, except I happen to be lucky in that one case.

12 JUDGE RIVERA: But I'm asking you because I asked
13 you at the - - -

14 MR. REED: Right.

15 JUDGE RIVERA: - - - beginning what was the
16 remedy that you were seeking, right? And you told me
17 three.

18 MR. REED: I haven't - - -

19 JUDGE RIVERA: And we're - - - we're - - -

20 MR. REED: - - - given the third one yet.

21 JUDGE RIVERA: - - - up to two.

22 MR. REED: Right.

23 JUDGE RIVERA: The second one - - -

24 MR. REED: That's right, Your Honor.

25 JUDGE RIVERA: - - - was the mootness exception.

1 So I just want to clarify that your argument on the
2 mootness exception is that there's just not enough time
3 because it's a six-month window, so you've always got to
4 apply the exception so you can always hear. It's very much
5 what Judge Troutman is asking you. Or are you also making
6 an argument that it depends on the merits of the claims on
7 this appeal - - -

8 MR. REED: No. I mean, the - - -

9 JUDGE RIVERA: - - - that affect the - - -

10 MR. REED: - - - the legislature says that
11 there's a right to appeal in every permanency case. And so
12 I'm not asking - - - and I don't think it'd right for the
13 court to say, well, these are going to be burdensome, so
14 therefore you're going to have to make a stronger showing
15 of the merits. I don't think - - - at the Appellate
16 Division - - -

17 JUDGE GARCIA: Counsel, I'm - - - I'm sorry.

18 MR. REED: Yes.

19 JUDGE GARCIA: I thought your second point, and I
20 - - - maybe I just have this wrong, was that they
21 misapplied the mootness exception here - - - existing
22 mootness exceptions. Is that not the case?

23 MR. REED: They just - - - they categorically
24 said they're all moot. Every single case says it.

25 JUDGE GARCIA: But if it's moot - - -

1 MR. REED: Yes.

2 JUDGE GARCIA: - - - they can still apply an
3 exception.

4 MR. REED: Well, and they did that too.

5 JUDGE GARCIA: Are you arguing that it was an
6 error of law for them not to apply an existing exception
7 here, or are you not arguing that?

8 MR. REED: The - - - right. They didn't - - -
9 well, the - - - except - - - I only know one existing
10 exception, which is the test of Hearst and - - - but
11 Hearst, they just kept - - - simply dismissed that out of
12 hand. And - - -

13 JUDGE HALLIGAN: But I took you to be maybe
14 arguing something broader, which is, I thought Hearst
15 required a, you know, novel legal question, right?

16 MR. REED: Well, this is very novel, because it's
17 been so many years and nobody has addressed it, you know.

18 JUDGE HALLIGAN: Wait. Wait. Just let me
19 finish, if I can.

20 MR. REED: Sure.

21 JUDGE HALLIGAN: I thought you were arguing that,
22 in addition to whatever exception Hearst provides, I
23 thought you were saying that there should be essentially a
24 blanket exception and that there should be no consideration
25 of mootness across all of these cases. Do I have that

1 wrong?

2 MR. REED: Well, I - - - I mean, I think it's
3 just simply that if it can't be done in the six months,
4 that that's - - - I'm not calling it a blanket, but it
5 should - - - it should feed over into the second category I
6 created saying that - - - well, not created, but the last
7 category.

8 CHIEF JUDGE WILSON: Could I ask you to get to
9 the third?

10 MR. REED: And I'd like to, if I can. Okay. So
11 the third category or the third way of proceeding, which
12 would be to allow the Appellate Division to get an update.
13 This is not a Michael B. situation where they look at and
14 say it has to go back to family court. It's going back to
15 family court anyway, you know, for another hearing. But
16 what I'm saying, we need appellate review, not just more
17 family court reviews. And that, as I say, the - - - the
18 situations where the - - - on one extreme, the parent has
19 returned, we're not going to hear about that because the
20 parents are very unlikely to pursue the appeal.

21 JUDGE TROUTMAN: And - - - and - - -

22 MR. REED: And the other is - - -

23 JUDGE TROUTMAN: - - - when you say - - -

24 MR. REED: Yes.

25 JUDGE TROUTMAN: - - - to explain how the process

1 would work, the Appellate Division would get an update. Is
2 that affecting whether it's deemed moot or it has merit?
3 How is that third exception going to apply by getting the
4 update? What does the update do?

5 MR. REED: Well, the update has to be generated
6 by the fact that there's another permanency hearing.
7 Because if, for some reason, the permanency hearing hasn't
8 taken place yet, like my one COVID case where it took a
9 year because of the governor and state, everything, you
10 know, then you don't have a mootness problem. But in all
11 the other ones, you do. So the mootness is generated
12 according to the Appellate Division by the fact there was a
13 subsequent permanency hearing. So what you'd be doing is,
14 assuming it would be what I call incremental, in other
15 words, it didn't result in the return of the child, it
16 didn't result in termination of parental rights, you know,
17 that that didn't happen. So it - - - the whole area in
18 between, where they are just - - - that's sort of
19 incremental, and the question is, you know, should the
20 family court have returned the child on that latest
21 permanency hearing or in the previous permanency hearing?
22 Basically, you're just updating, you know, what the court
23 had already had. And it is not - - -

24 CHIEF JUDGE WILSON: I just want to - - -

25 MR. REED: - - - it doesn't - - - these days - -



1 - it doesn't tell you - - -

2 CHIEF JUDGE WILSON: I just want to understand
3 what - - -

4 MR. REED: Yes.

5 CHIEF JUDGE WILSON: So - - - but you're saying,
6 I think - - -

7 MR. REED: Yes.

8 CHIEF JUDGE WILSON: - - - but something wrong is
9 that there's permanency hearing number 1. There's an
10 appeal taken from that.

11 MR. REED: Right.

12 CHIEF JUDGE WILSON: And before that appeal is
13 decided, there's permanency hearing number 2. And by
14 update, you mean that the record in permanency number 2
15 would be added to the appeal on number 1? That's the
16 update?

17 MR. REED: Right. The - - - what they could do
18 is, they could - - - the transcript isn't very hard to get
19 quickly, anyway - - -

20 CHIEF JUDGE WILSON: You know, but how do we - -
21 - how do we do that?

22 MR. REED: The clerk's office in the family court
23 sends the new record, which is - - -

24 CHIEF JUDGE WILSON: No. No. I don't mean - - -
25 I didn't mean mechanically. I mean, where's our authority

1 to do that?

2 MR. REED: Well, it's basically just - - - it's
3 working on the original record. So it isn't, like, a whole
4 new appeal. It's just saying, here's the original record.
5 And on a subsequent hearing, we heard that the mother had -
6 - -

7 JUDGE RIVERA: Well, how does - - -

8 MR. REED: - - - was doing better, whatever.

9 JUDGE RIVERA: - - - that affect the right to
10 appeal on appeal number 2 on - - - on permanency hearing
11 number 2?

12 MR. REED: What about the right to appeal on
13 permanency?

14 JUDGE RIVERA: I'm saying, what happens if
15 there's some complaint that perhaps, in this example, the
16 mother has regarding the decision in the second permanency
17 hearing? Do they file yet another appeal?

18 MR. REED: Well, they should. I mean, they
19 should, but then the - - -

20 JUDGE RIVERA: And then on that appeal, is the AD
21 bound by whatever it decides in the appeal regarding the
22 first permanently - - - permanency hearing if somehow it
23 references the second permanency hearing?

24 MR. REED: Well, there could - - - there could be
25 a sequence of appeals. And then, of course, the mother

1 isn't going to say that she's been totally taken care of on
2 the first appeal, so she's going to try, but I - - -

3 JUDGE RIVERA: It sounds like a usurpation of the
4 family court's role here, to do that. When you say
5 updates, you're really saying you're overseeing this
6 process in family - - -

7 MR. REED: Well - - -

8 JUDGE RIVERA: - - - court - - -

9 MR. REED: - - - except that the - - -

10 JUDGE RIVERA: It is not what the AD is supposed
11 to do.

12 MR. REED: Except the problem is that the
13 appeals, you know, have generally been - - - you know, the
14 practice has been based on civil cases and criminal cases.
15 Civil cases, you have one, you know, promissory notes.
16 It's unpaid. Criminal case, you have one murder. Yeah,
17 you could have another one, but usually, and so then it's
18 over. But family court, that second hearing is a lot like
19 the first. So it's a really different situation. And
20 family court is always, you know, sort of like the fifth
21 wheel because it's not the big court. It's important to
22 this court, I know, but it's not the biggest court in terms
23 of the number of - - -

24 JUDGE TROUTMAN: And so are you - - -

25 MR. REED: Yeah.



1 JUDGE TROUTMAN: - - - saying here, with the
2 current exceptions, that the - - - that exists, the
3 Appellate Division is never allowing these cases - - -
4 using its discretion and applying the exception, they are
5 never allowing any of these cases to proceed on the merits?

6 MR. REED: Well, I - - - the only one - - -
7 actually, the one I know - - - I noticed, which
8 unfortunately is not in the briefs because I - - - it was
9 only discovered by Mr. Horwitz, another attorney who's
10 going to argue next, but there was a case in the Fourth
11 Department, Kevin R. in 1998. So this was before the six-
12 month rule started. This was back when it was a year. And
13 it wasn't so difficult when it was a year. I had an appeal
14 myself to this court, which was perfected and on the
15 calendar for argument back when it was the one year. But
16 this court never decided because the - - - the County of
17 Westchester decided to change their policy at the last
18 second. So it mooted it that way, not because it's past
19 the time, but because they changed their policy. But what
20 - - - the reason that Kevin R. was interesting was because
21 there, there was no six-month rule, but it happened that
22 the county there on the Fourth Department had - - - had - -
23 - had decided to file for an extension placement every six
24 months on their own. They kept on doing it.

25 JUDGE RIVERA: So with respect - - - I know your

1 red light is on, but - - -

2 MR. REED: Yeah.

3 JUDGE RIVERA: So with respect to your client,
4 her particular situation, what - - - what remedy could be
5 granted? It goes back to the AD and they have to consider
6 the - - - the - - -

7 MR. REED: Well, no. Well, the first time you
8 get to - - -

9 JUDGE RIVERA: - - - the decision at the first
10 permanent - - - or I'm sorry, at the permanency hearing,
11 there was two?

12 MR. REED: You know, the first time a case gets
13 on this - - - any issue, gets to the Court of Appeals, you
14 know, things are likely to be pretty old by the time it
15 gets there. And we're now on a tenth appeal. I filed
16 ninth and tenth appeals in the Appellate Division there.
17 But you know, it's - - - it - - - right. I admit the court
18 here can't, on this record, say it's obvious the mother
19 should have gotten the children back. I'm sending the
20 children back now. It's not - - - I mean, this is
21 basically getting the Appellate Division door open. And
22 yes, it has been a passage of a lot of time. I just - - -
23 there's one thing I left out of those when I said the
24 things that could - - - you know, the third remedy - - -
25 the other thing that I would say in the third remedy was

1 that the - - - there could be supplemental letter briefs.
2 Now, this court has letter briefs. I don't know if the
3 Appellate Division is used to doing that, but basically, a
4 short time for somebody to make - - - to make the comments
5 on the changes, and that would enable the Appellate
6 Division to proceed with appeal number 1, so to speak, you
7 know, after the second permanency hearing had taken place.

8 CHIEF JUDGE WILSON: Thank you.

9 MR. REED: Thank you, Your Honor.

10 MR. HORWITZ: Good afternoon, Your Honors.

11 William Horwitz for Joshua J., the child and one of the
12 children in this case. I apologize to the court for coming
13 late. Jumping to - - - right to the - - - to where you
14 left off, in answer to Judge Troutman's query, my client's
15 been in placement for seventy-eight months, six and a half
16 years. And although he didn't appeal every time, yes, the
17 Appellate Division can be expected to turn down every one
18 of those appeals, not because we are looking at what is
19 wrong with the - - - not we're - - - we're looking at - - -
20 the novelty decision that they made was correct for now,
21 there was no novelty to this issue.

22 JUDGE TROUTMAN: So how would you fix it?

23 MR. HORWITZ: Well, I'll jump to the end of what
24 I was going to talk about. I think we have to lower our
25 expectations about what we can get out of the legislature's

1 intent to have these appeals heard on the merits. And I
2 think that we have to acknowledge that asking the Appellate
3 Division to adjudicate some factual issues which I think
4 the county has raised is a valid issue, just as the issue
5 of judicial resources is valid. I don't think - - -

6 JUDGE CANNATARO: Counsel, is it possible that
7 the solution here is not really a judicial one but a
8 legislative one?

9 MR. HORWITZ: Well, I think there is a judicial -
10 - - if we do lower our expectations and look to
11 prospective, the - - - the statutory regime of the
12 permanency hearings is an unusual one. And it - - -

13 JUDGE TROUTMAN: But isn't the - - -

14 MR. HORWITZ: - - - it sets up - - -

15 JUDGE TROUTMAN: But weren't they created so that
16 kids wouldn't languish and they'd be brought back before
17 the court so that relevant information could be heard, and
18 if circumstances change, they could change - - -

19 MR. HORWITZ: Fine. That - - - that's fine.

20 JUDGE TROUTMAN: - - - what the goal is?

21 MR. HORWITZ: That's exactly what it was for, but
22 - - -

23 JUDGE TROUTMAN: That's what they originally - -
24 -

25 MR. HORWITZ: - - - there should be an appellate



1 review of what the family court - - -

2 JUDGE TROUTMAN: Is - - - is that what the change
3 - - - wait.

4 MR. HORWITZ: I'm sorry.

5 JUDGE TROUTMAN: But is that what originally this
6 change to the six months was for? There was a complaint
7 before about, well, when it was a year, you could perhaps
8 have more of a chance to get an appellate review, but then
9 that arguably necessarily impacts negatively upon a child,
10 or a parent who has their child placed, the ability to have
11 final resolution sooner rather than later.

12 MR. HORWITZ: Well, the idea of the permanency
13 hearing being every six months is great, and it does do
14 that.

15 JUDGE TROUTMAN: Theoretically, it's great.

16 MR. HORWITZ: But - - - but - - -

17 JUDGE TROUTMAN: Yes.

18 MR. HORWITZ: - - - the view of the - - - the
19 assumption that is being made that the final order - - -
20 that the - - - the order of - - - that comes out of a
21 permanency hearing is a final order has nothing to do with
22 anything else that happens later. Its controversy is
23 finished as soon as it's over. Unfortunately, as soon as
24 that controversy is over, the other one is resurrected
25 right after it - - - immediately or after.

1 JUDGE HALLIGAN: Can you take a - - -

2 MR. HORWITZ: So there's a continuity between the
3 - - - the controversy as it goes forward. So we can look
4 to, here, lowering our expectations and doing - - - if I -
5 - -

6 JUDGE HALLIGAN: Can you - - -

7 MR. HORWITZ: Yeah.

8 JUDGE HALLIGAN: Can you take a step back, if you
9 would, and help me understand the interplay between Article
10 10 and Article 10(a) proceedings?

11 MR. HORWITZ: Well, the court ruled in Jamie J.
12 that the Article 10(a) proceedings are contingent, are on
13 the Article 10 fact finding for the existence of
14 jurisdiction.

15 JUDGE HALLIGAN: But just as a practical matter,
16 how does that work itself out?

17 MR. HORWITZ: Well, it worked itself out one time
18 in Jamie J., where the court held that the dismissal of the
19 fact finding disintegrated the Article 10 procedure. I
20 think that that principle should be applied, the principle
21 that it is an entire procedure where the controversies are
22 repeating themselves by such - - -

23 JUDGE HALLIGAN: When you say it is an entire
24 procedure, do you mean all of the - - - you just said it is
25 an entire procedure. Do you mean all of the permanency



1 hearings, one after the other?

2 MR. HORWITZ: Yes, the sequence.

3 JUDGE GARCIA: And so each time that came up, so
4 if this case were to come up after we ruled your way, if we
5 were to do that, it would not be considered moot? If the -
6 - -

7 MR. HORWITZ: Well - - -

8 JUDGE GARCIA: - - - same proceeding came up
9 after that ruling.

10 MR. HORWITZ: It would be considered an exception
11 to mootness. I mean, you could go as far as saying it's
12 not moot. I don't - - -

13 JUDGE GARCIA: So would - - -

14 MR. HORWITZ: - - - think that's necessary.

15 JUDGE GARCIA: So you would say it would be an
16 exception to mootness automatically because of the nature
17 of the proceeding, not because of any issue within the
18 proceeding?

19 MR. HORWITZ: Some qualification on the word
20 automatic. But I go back to the idea that if these
21 hearings occur one after another with the same controversy
22 coming up and they only appear in family court, the
23 likelihood that error is going to be repeated is
24 heightened. And with the appeal being evaded, I mean, you
25 are set up - - -



1 JUDGE GARCIA: But then the way I understand this
2 works now, it comes up, it's considered moot. The
3 Appellate Division can look at the issues within the
4 proceeding and decide whether or not to apply an exception.
5 Is that accurate?

6 MR. HORWITZ: I'm sorry. Can you say that again?

7 JUDGE GARCIA: If this comes up now under the
8 current rule - - -

9 MR. HORWITZ: With novelty.

10 JUDGE GARCIA: - - - like this case came up to
11 the Appellate Division, the Appellate Division - - - and
12 maybe I'm wrong on this, but my understanding is they
13 consider it moot, but on a case-by-case basis, they can
14 apply an exception depending on what the underlying issues
15 in the proceeding.

16 MR. HORWITZ: They can, but it has to be novel.

17 JUDGE HALLIGAN: So in a case where you have a
18 decision that is being made and perhaps there is an error
19 that recurs from one proceeding to the next, but it is not
20 something that turns on a novel legal question, is there
21 room for the Appellate Division to nonetheless proceed and
22 find that there's an exception to mootness there?

23 MR. HORWITZ: Yes. If you remove novelty, there
24 is. And the way that I suggest it is - - -

25 JUDGE CANNATARO: No. But - - -

1 JUDGE HALLIGAN: No. No. I'm - - -

2 JUDGE CANNATARO: - - - I think we want to know -
3 - -

4 JUDGE HALLIGAN: I'm asking - - -

5 JUDGE CANNATARO: - - - under the current regime.

6 JUDGE HALLIGAN: - - - under the current
7 doctrine, is novelty required? I thought that it was.

8 MR. HORWITZ: Yes. I'm sorry. I'm sorry. I
9 misunderstood that.

10 JUDGE HALLIGAN: And so if there is - - - so the
11 flip side of that, it seems to me, is, if there is a
12 proceeding where there's an error made and it's not a novel
13 legal error but a garden variety error, and it repeats one
14 proceeding to the next, there's no opportunity, I take it
15 there, for that error to be corrected on appeal; is that
16 right?

17 MR. HORWITZ: That's - - - I think that's exactly
18 the problem.

19 JUDGE RIVERA: What - - - what - - -

20 MR. HORWITZ: So - - -

21 JUDGE RIVERA: - - - about the argument regarding
22 the referee's determination that they couldn't grant the
23 return home?

24 MR. HORWITZ: I'm sorry. My hearing is a little
25 - - -



1 JUDGE RIVERA: What about the referee's
2 determination that they could not grant the children's
3 return to the parent?

4 MR. HORWITZ: Well - - -

5 JUDGE RIVERA: Why does that not create a basis
6 for the mootness exception to be applied in this case?

7 MR. HORWITZ: That would be a novel issue, I
8 would think. I - - - as far as I can see, it hasn't been
9 litigated, but that would fall under novelty.

10 JUDGE CANNATARO: So in the - - - in this case,
11 the Appellate Division could have held in its discretion
12 that the referee's determination that they were not allowed
13 to change the placement at that stage would have created a
14 novel legal issue that they may have granted leave on.

15 MR. HORWITZ: Sure.

16 JUDGE CANNATARO: They chose not to - - -

17 MR. HORWITZ: Sure.

18 JUDGE CANNATARO: - - - but they could have.

19 MR. HORWITZ: Right. Absolutely.

20 JUDGE CANNATARO: So - - -

21 CHIEF JUDGE WILSON: But I take it, your point is
22 that if they had taken it - - - sorry, right in front of
23 you - - - if they had taken it and said, this is a novel
24 legal issue, we apply the mootness exception, this was an
25 error, and we sent it back, that subsequent courts, family

1 courts, could continue to make that same error and it would
2 then be unreviewable. We would no longer be novel.

3 MR. HORWITZ: That's correct. That's correct.
4 And then they wouldn't stop - - -

5 CHIEF JUDGE WILSON: So earlier you had mentioned
6 lowering our expectations.

7 MR. HORWITZ: Here's what that - - -

8 CHIEF JUDGE WILSON: What did you mean?

9 MR. HORWITZ: The relief that could be granted if
10 one of these appeals was free to be heard on the merits. I
11 would do it the following way. I would require - - - you
12 don't have to get rid of novelty across the board in
13 Hearst. That's a straw man. You just have to get rid of
14 novelty for these types of hearings which have this
15 particularly unique procedure. Then the appellant would
16 come - - -

17 CHIEF JUDGE WILSON: Right. These types of
18 hearings, meaning permanency?

19 MR. HORWITZ: The Article 10(a), particularly the
20 ones that continue placement. That's where the - - - the
21 nexus comes.

22 JUDGE TROUTMAN: And so are you saying now that
23 there's no Appellate Division that ever exercises its
24 discretion to do what you're asking?

25 MR. HORWITZ: If they want to ignore novelty, I

1 imagine if that's considered kosher, that the - - -

2 JUDGE SINGAS: And do you think we have the
3 authority to do that as opposed to the legislature?

4 MR. HORWITZ: Yes, I do. Because the legislature
5 was, first of all, silent on how this was going to be
6 enacted. And second of all, the legislature was very clear
7 in its - - - in what it put in its - - - in the statutory
8 language that it wanted some kind of appeal, but it didn't
9 say what kind of appeal that it wanted and get detailed
10 about that. So I think the -- - that the - - -

11 JUDGE CANNATARO: How many different kinds of
12 appeal are there that - - -

13 MR. HORWITZ: Well - - -

14 JUDGE CANNATARO: I don't understand what the
15 significance is there.

16 MR. HORWITZ: Of - - - there are appeals - - -
17 like you said, there are appeals that - - - for instance,
18 there's a change of goal. That is allowed to be heard
19 because of the enduring consequences of a change of goal.
20 I'm arguing that there are enduring consequences because of
21 the heightened probability that these appeal - - - these
22 appeals will go on unheard that - - - that they should be
23 given an exception here.

24 JUDGE CANNATARO: Does a change of permanency
25 plan create a novelty, in your view, that would allow the

1 Appellate Division to grant under the existing framework?

2 MR. HORWITZ: Well, that's the way the - - - it
3 stands now. And yes, I have no objection to that. In that
4 case, the same problem could occur with the continuation of
5 placement, which is probably what happened in that case
6 because courts often separate out the part of the
7 permanency order that relates to placement and say, we're
8 ruling on - - - just on the continuation of placement, and
9 we're addressing other issues.

10 JUDGE CANNATARO: So the class of problematic
11 order is here, and quite clearly, it seems to me, are those
12 ones where you have a permanency hearing, the court says,
13 diligent efforts are being made, and the placement
14 continues. That's really what you're trying to get at?

15 MR. HORWITZ: Exactly. Continuation of
16 placement.

17 JUDGE CANNATARO: If there's a change in the
18 permanency plan or any other dispositional movement, that
19 results in an appealable - - - in a mootness exception that
20 you can get an appeal from?

21 MR. HORWITZ: Right. Well, the - - - this - - -
22 this court has decided that changes of goal are acceptable
23 as they don't - - - they don't qualify for mootness. I'm
24 sorry, I don't know if it's mootness or exception for
25 mootness, but they are allowed.

1 JUDGE CANNATARO: I'm not sure either.

2 MR. HORWITZ: Okay. If I could just get to the
3 solution that I propose on that. If we lower our
4 expectations and we look - - - and we consider mostly the
5 prospective relief going forward because it will go
6 forward, that is the nature of the proceeding, that the
7 appellant come to court, get a certification from the
8 family court that placement is in fact continuing, and then
9 have the burden of showing a change of circumstance from
10 the previous appeal that was heard on the merits. That - -
11 - and now that, assuming the court agrees with the Second
12 Department on the motion to open the record to other - - -
13 to some things that are the whole of the record - - - the
14 previous hearings, that relieves the problem of the - - -
15 of factual adjudication by the Appellate Division. Because
16 we're not looking - - - as in Michael B., we're not looking
17 for what's happening now. We are admittedly looking for
18 what happened before because our goal is to stop it
19 happening from - - - again. Not to address what's
20 happening contemporaneously, but just to give the message
21 to the family court, don't do this again.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. HORWITZ: Thank you.

24 MS. IACONO: Good afternoon, Your Honors. My
25 name is Joan Iacono, and I represent Christopher J. in this

1 matter. The issues raised in this appeal and by Appellant
2 highlight the need to - - - for this court to draw a
3 distinction between dispositional orders that take place in
4 Article 10(a) hearings that - - - that occur during - - -
5 during the course of the Article 10 proceeding and those
6 that occur after. We're asking the court to take a more
7 common sense approach to this. Specifically, the facts of
8 this case really limit the inquiry to the permanency
9 hearing held after the adjudication of neglect and before
10 the dispositional hearing. This court said in Jamie G. - -
11 - J. that the Article - - - Article 10(a) can't be looked
12 at in a vacuum, and that, in fact, the provisions - - -

13 CHIEF JUDGE WILSON: Well, let's - - - counsel,
14 let's - - - sorry. Let's just - - - let me stop you for a
15 sec. Suppose, hypothetically, that there are errors of law
16 in the second permanency hearing. There's a couple that
17 they've identified; it doesn't matter for the purpose of my
18 hypothetical which one it is. Suppose, though, it's - - -
19 everybody agreed that there's an error of law. How can
20 someone get that reviewed?

21 MS. IACONO: Your Honor, if there is a
22 substantial error of law that will affect the child or the
23 family, then it will meet the test of Hearst, and there
24 will be an exception to mootness.

25 JUDGE HALLIGAN: But what if it's not novel?



1 What if it's an error of law that's not novel? I thought
2 Hearst also looked at whether the question was novel.

3 MS. IACONO: Whether its novel and significant.
4 Significant goes with the - - -

5 JUDGE HALLIGAN: Novel or, or novel and?

6 MS. IACONO: Or novel or significant.

7 JUDGE RIVERA: Well, it's novel. It's just in
8 the application of the law to the facts. And it's - - -
9 and you might argue that it's an erroneous application.

10 MS. IACONO: That's right, Your Honor. But if it
11 doesn't - - - if it's not - - - if it's not an error that
12 makes a difference, then the next permanency hearing will,
13 in fact - - -

14 JUDGE TROUTMAN: What does that mean, an error
15 that doesn't make a difference? It results in a
16 continuation of the placement which the parent doesn't
17 want.

18 MS. IACONO: But, Your Honor, if that placement
19 is continued during the course of the Article 10 and before
20 the dispositional hearing in the Article 10 - - -

21 JUDGE CANNATARO: Yeah.

22 MS. IACONO: - - - then a return to Parent would
23 be subject to a 1028 standard and a 1028 review, where
24 we're looking at whether or not the parent puts - - - it
25 would be the parent's obligation to raise the issue of



1 returning the child, and the issue would be whether there's
2 an imminent risk of - - - to the child.

3 JUDGE CANNATARO: So the issue here or the
4 problem here is that the continuation of the placement
5 wasn't challenged by the parent? I thought that was
6 assumed.

7 MS. IACONO: Your Honor, there's a different
8 focus in Article 10(a) and Article 10, and they can't be
9 looked at in a vacuum. Article 10(a) is to protect the
10 children, and Article 10(a) is to review placement. The
11 focus of Article 10(a) is really on the process of the
12 placement, and the focus is on the agency's efforts. In an
13 Article 10 disposition - - -

14 JUDGE CANNATARO: So are you saying that if you -
15 - - if the parent really wanted the child back, they
16 shouldn't be making the request at the permanency hearing?
17 They should make some sort of 1028-based request?

18 MS. IACONO: They can make the request during the
19 permanency hearing, but then that would trigger Article
20 1028. And if there's already been a 1028 hearing, then
21 they would have to show that there's a substantial change
22 in circumstance.

23 JUDGE CANNATARO: So you're saying there's no
24 problem here because it's - - - to the extent that there's
25 an aggrievement, it's - - - it's happening in the wrong

1 place?

2 MS. IACONO: Your Honor, I don't see that there
3 is any aggrievement to the mother or to the child here
4 because, in fact, there's never been a disposition under
5 Article 10. And if the court draws a distinction between
6 Article 10(a) dispositional hearings and Article 10
7 dispositional hearings, then most of these issues will be
8 clarified. The record - - -

9 JUDGE TROUTMAN: So what relief could the mother
10 - - - if we were to do what's being asked by appellants - -
11 -

12 MS. IACONO: Yes.

13 JUDGE TROUTMAN: - - - what relief could she get
14 if the Appellate Division, instead of doing what it did and
15 didn't moot it, what relief would they then be ordering for
16 her? Since, as you say, children - - - the child cannot be
17 returned until you go through the - - - a subsequent step.

18 MS. IACONO: Your Honor, I don't mean to imply
19 that a child cannot be returned. My point is only that the
20 focus during a permanency hearing is not on the return of
21 the child, necessarily. It's on the process of the
22 placement and on the foster care status.

23 JUDGE TROUTMAN: So here, what relief would she
24 be getting during that process?

25 MS. IACONO: She may not be getting any relief.

1 If she, in fact, wanted the child returned to her or the
2 children returned to her, then it would have been - - -
3 excuse me - - - incumbent on the referee to apply the
4 standards of the 1028 hearing and to look at it in that
5 way. And then the appeal - - -

6 JUDGE TROUTMAN: Well, what about here, as Judge
7 Rivera asked earlier, where the referee says, I have no
8 authority?

9 MS. IACONO: That was honest - - - that was
10 admittedly an error on the part of the referee, but - - -

11 JUDGE RIVERA: So why can't that come before the
12 Appellate Division? Why isn't that a basis for exercising
13 a mootness exception to resolve that - - - to address that
14 question?

15 MS. IACONO: Because - - -

16 JUDGE RIVERA: So everybody seems to think it was
17 the error.

18 MS. IACONO: Your Honor, there hadn't - - -

19 JUDGE RIVERA: Why didn't AD address that?

20 MS. IACONO: Your Honor, it was an error, but I
21 believe it was a harmless error because - - -

22 CHIEF JUDGE WILSON: Was there an order of
23 reference to the referee? Is that in the record anywhere?

24 MS. IACONO: I don't - - - Your Honor, I haven't
25 seen an order of reference.

1 CHIEF JUDGE WILSON: And how about a stipulation
2 by the parties?

3 MS. IACONO: There was none, Your Honor.

4 CHIEF JUDGE WILSON: Can a referee act without
5 one - - - without either of those two things?

6 MS. IACONO: Your Honor, it's our position that,
7 in fact, the - - - all the parties continued to act in
8 front of the referee, and the appellant continued with the
9 proceeding. Your Honor, there have been a number of
10 problems with this case - - - a number of problems. The
11 fact that the dispositional hearing in the Article 10
12 hasn't yet been concluded in seven years - - -

13 CHIEF JUDGE WILSON: Yeah. Isn't that actually
14 more common than you might think?

15 MS. IACONO: It's not that common, Your Honor.

16 CHIEF JUDGE WILSON: No?

17 MS. IACONO: It's not that common, but needless -
18 - -

19 JUDGE RIVERA: What's more - - -

20 MS. IACONO: - - - but - - -

21 JUDGE RIVERA: - - - common? Four years?

22 MS. IACONO: Judge, they take a long time, and
23 they truly do. But to substitute the dispositional order
24 in a permanency hearing and limit the record to the
25 permanency report and anything that transpires afterwards

1 would do an injustice and perhaps a disservice to the
2 children affected by that order.

3 JUDGE HALLIGAN: But here's what I'm struggling
4 with. Take what we have here. Suppose there are a series
5 of mistakes made in one permanency hearing after another
6 like the one here, which you said, you know, it was an
7 error with regard to the referee's view about whether they
8 have authority to return the child.

9 MS. IACONO: Yes.

10 JUDGE HALLIGAN: And so that happens. If there
11 is not an appeal that lies from that, then how does that
12 ever get corrected? And that could go on for years and
13 years.

14 MS. IACONO: Your Honor, by construing these two
15 articles.

16 JUDGE HALLIGAN: Well, just stick with the
17 permanency hearing - - - with - - -

18 MS. IACONO: Okay.

19 JUDGE HALLIGAN: - - - for a moment, if you
20 would. If your view is that an appeal would not lie here,
21 then a mistake like that could recur one permanency hearing
22 after another, and there won't even be a determination, it
23 seems to me, about whether or not it is, in fact,
24 appropriate to return a child; is that right?

25 MS. IACONO: Your Honor, the issues here and the

1 mistakes made in my opinion, were, in fact significant and
2 novel in that it was one after another.

3 JUDGE HALLIGAN: And that should give rise to an
4 appeal under Hearst? No?

5 MS. IACONO: It should. Exactly.

6 JUDGE HALLIGAN: So you agree that an appeal does
7 lie here under that partic - - - for that particular - - -

8 MS. IACONO: I believe that - - - yes, because of
9 the repeated number of mistakes made with respect to the
10 reference and the referee's determination, yes. I do
11 believe an appeal would lie.

12 JUDGE CANNATARO: So are we just talking about
13 whether or not the Appellate Division abused its discretion
14 in applying a mootness exception?

15 MS. IACONO: You could look at it that way, Your
16 Honor. I think that to eliminate the majority of these
17 issues, if this court would draw a distinction between the
18 Article 10(a) and Article 10(a) - - - 10 proceedings, those
19 issues would disappear.

20 CHIEF JUDGE WILSON: What do you mean by a - - -

21 MS. IACONO: - - - because - - -

22 CHIEF JUDGE WILSON: - - - distinction between
23 the two? I mean, the statute allows for expedited appeals
24 in 10(a) proceedings expressly, right?

25 MS. IACONO: It does. But in Article - - -

1 CHIEF JUDGE WILSON: And it says that you have to
2 request the transcript within ten days. It says the
3 transcript has - - - you have to perfect the appeal in
4 thirty days of receipt of the transcript - - -

5 MS. IACONO: Yes.

6 CHIEF JUDGE WILSON: - - - and so on.

7 MS. IACONO: In Article 10 - - - I'm sorry. A
8 1028 hearing and an appeal from a 1028 disposition gets an
9 automatic stay. There can be an argument made to return
10 the children pending the - - - during the pendency or
11 whatever other argument appellant would like to make. But
12 there's a different standard; under 10(a), the focus is on
13 the agency. Under Article 10, the focus is on the
14 appellant and on the actions of the appellant and whether
15 or not there's been any rehabilitation. The record is
16 expound - - -

17 JUDGE RIVERA: Was there - - - was there any - -
18 - under the statute - - -

19 MS. IACONO: Yes.

20 JUDGE RIVERA: - - - pick whatever article you
21 want right now. Was there any path for her to have gone to
22 the family court judge to seek corrective action so that
23 the referee would know the expanse of their authority,
24 understanding that an appeal will take a long time at best
25 - - -

1 MS. IACONO: Your Honor - - -

2 JUDGE RIVERA: - - - if it's not mooted out.

3 MS. IACONO: She could have requested a return to
4 parent under Article 1020(a) - - - 1028 which would have
5 brought the matter back to the IAS judge.

6 CHIEF JUDGE WILSON: But I thought you were
7 saying she could do that under Article 10(a) as well?

8 MS. IACONO: No, under Article 10. What I'm
9 saying is - - -

10 CHIEF JUDGE WILSON: But when you - - - sorry.

11 MS. IACONO: - - - you have to look at what - - -

12 CHIEF JUDGE WILSON: When you said the referee
13 made a mistake in stating the referee had no power to
14 return the child, that was in the permanency hearing?

15 MS. IACONO: That was in a permanency hearing,
16 exactly.

17 CHIEF JUDGE WILSON: Which is a 10(a).

18 MS. IACONO: Which is 10(a). I think - - -

19 CHIEF JUDGE WILSON: And that - - - if that's - -
20 -

21 MS. IACONO: - - - there's a higher standard that
22 has to be applied in a 10(a) hearing that's held during the
23 pendency of the Article 10 because - - -

24 JUDGE RIVERA: Okay. So in that context, could
25 she have gone to the judge? What is your answer to that?

1 MS. IACONO: She could have, not in an appellate
2 manner, but - - -

3 JUDGE RIVERA: No. No. I understand that.

4 MS. IACONO: But she could have requested a 1028
5 hearing return to parent. Your Honor, I see that my time
6 has expired. Would you like me to continue? Would - - -
7 are there other questions?

8 CHIEF JUDGE WILSON: No. Thank you.

9 MS. IACONO: Thank you very much, Your Honor.

10 MR. ADIN: Good afternoon, Your Honors. May it
11 please the court. Justin Adin, for the respondent,
12 Department of Social Services.

13 JUDGE SINGAS: Can I just ask a question to get
14 the landscape here? Is the mootness exception never
15 applied, or is it applied regardless of novelty? Like,
16 what goes on in practice?

17 MR. ADIN: Mootness exception is applied in
18 permanency hearing cases. And I do apologize, it's not in
19 our brief, but, you know, I did look. There have been
20 cases among various departments, and we would be happy to
21 supplement, you know, later to the court, if you want, a
22 list of some of them. But the - - -

23 JUDGE HALLIGAN: And those are cases where
24 there's no novelty argument that's made at all?

25 MR. ADIN: Where there is usually a novel issue.



1 JUDGE HALLIGAN: Okay. And so I - - - to pick up
2 Judge Singas' question, are you aware of Appellate Division
3 cases where the mootness exception is applied in the
4 absence of a novel question?

5 MR. ADIN: I am not aware where it's been applied
6 in the absence of a novel question.

7 JUDGE HALLIGAN: Thank you.

8 MR. ADIN: However - - -

9 JUDGE RIVERA: Was there a novel question in this
10 case?

11 MR. ADIN: There is potentially a novel question,
12 as I think, you know, the court and everyone else has
13 alluded to with respect to the referee issue. The
14 Department believes that that does not necessarily warrant
15 an exception in this case under Hearst because - - - and
16 this is - - - this is the way it is in Westchester, as
17 normally, when you have these pre-dispositional permanency
18 hearings, they're in front of the family court judge. For
19 whatever reason, there were a couple of hearings here that
20 happened in front of the referee predisposition. But then
21 they went back - - - the - - - they started before the
22 family court Judge. They went to the referee. They went
23 back to the family court judge, and they've gone back. So
24 you don't have the likelihood of repetition going forward
25 with these parties - - -

1 JUDGE RIVERA: Could - - -

2 MR. ADIN: - - - because of - - -

3 JUDGE RIVERA: Same question I asked counsel.
4 Could - - - is there some path that she could have asked
5 once the referee says this is not within the scope of my
6 authority, that she could have sought the family court
7 judge to take corrective action or to have corrected that
8 misunderstanding?

9 MR. ADIN: Yes. First, you can ask the judge - -
10 - the family court judge for a conference and say, we had
11 this issue come up. The second thing would be, the next
12 time you're in front of the referee, the appellant could
13 have said, we do not consent to proceeding in front of you.
14 And at that point in time, the referee would have to refer
15 back to the family court judge.

16 JUDGE RIVERA: That would be six months later?

17 MR. ADIN: No. Before the - - - it would - - -
18 at the time of that - - - of the first permanency hearing -
19 - -

20 JUDGE RIVERA: Yes.

21 MR. ADIN: - - - you potentially have an issue
22 because you're already in the middle of the permanency
23 hearing. But when it came to the following permanency
24 hearing, it wouldn't have been six months later. It's - -
25 - we're not consenting to this permanency hearing being in

1 front of you, and then it has to go back to the family
2 court judge, and they have to hold the permanency hearing
3 at that time.

4 JUDGE RIVERA: Would that delay the hearing at
5 all?

6 MR. ADIN: It would depend on the judge's
7 schedule, but generally, with the - - - with permanency
8 hearings, they do - - - there's statutory time frames.

9 JUDGE RIVERA: Yes.

10 MR. ADIN: So they get them on the calendar.

11 JUDGE CANNATARO: It couldn't be six months
12 later?

13 MR. ADIN: It couldn't be six months later.
14 Could it be that, you know, there's a couple of weeks
15 before you have - - - before you get in front of the judge,
16 that's always possible. But it wouldn't be - - -

17 JUDGE RIVERA: Faster - - -

18 MR. ADIN: - - - the next - - -

19 JUDGE RIVERA: Faster than waiting for an appeal?

20 MR. ADIN: Yes. It's really faster than - - -

21 CHIEF JUDGE WILSON: So in your experience, is it
22 unusual to have six, eight, ten permanency hearings in a
23 case?

24 MR. ADIN: Permanency hearings a case, no. It's
25 - - - I would say it's unusual to have this many permanency

1 hearings before a disposition order. I don't believe - - -

2 CHIEF JUDGE WILSON: But there's ten here so far,
3 more than that now?

4 MR. ADIN: I believe it is around ten so far in
5 this case. It - - - that's not necessarily abnormal. You
6 have all kinds of things that can cause there to be
7 extended permanency hearings, particularly when you're
8 dealing - - - if you're dealing with a termination of
9 parental rights case. And so the permanency hearings
10 continue until there's an adoption, and the adoptions don't
11 happen until appeals on the TPR. And so those can be
12 extended periods of time where you have - - -

13 JUDGE RIVERA: But it's the numerosity before the
14 disposition hearing that you say is unusual here?

15 MR. ADIN: Correct. I would say that more
16 typical experience is after fact finding, disposition, you
17 know, typically be completed within two years. Here, we're
18 four years plus on disposition after the consent fact
19 finding. So this is a very unusual situation both in the
20 length of time that we've been at disposition, in the case
21 going to the referee prior to - - - prior to disposition.
22 But that does not mean that there should be this blanket
23 exception to mootness in all permanency hearing appeals,
24 which is really what appellant has been asking for in this
25 case. I think the Hearst test is correct in - - -

1 JUDGE RIVERA: So do you agree there's a problem?
2 That it's impossible to actually hear an appeal given the
3 time frame?

4 MR. ADIN: I don't know - - -

5 JUDGE RIVERA: That that vitiates the right to
6 the appeal as a consequence?

7 MR. ADIN: I don't believe that that is
8 necessarily true. Well, it is difficult to get an appeal
9 heard in expedited time frame. But as Appellant's counsel
10 even acknowledged, the attorneys who are representing the
11 appellants in these cases have problem getting the briefs
12 done because they have other cases. You have a limited
13 pool.

14 JUDGE HALLIGAN: But let's suppose that we were
15 to decide the question about the referee's authority, and
16 then in a subsequent case, the same thing happens, and the
17 referee takes the view that they lack authority. That's
18 not a novel question anymore, right? And you know, what
19 Hearst says is it has to be significant or important, not
20 previously passed on. So in that circumstance, I would
21 guess that, absent some other play in the joints, that
22 there would be no way for that to be remedied in that
23 particular case on appeal; is that right? Because there's
24 no novelty. At that point, it's decided.

25 MR. ADIN: There's no novelty. I would generally

1 suspect that the Appellate Division, in applying the
2 significant and novel tests, is probably using a balance,
3 right? The more significant, maybe a little - - - you
4 know, could be a little less novel in - - - you know, in
5 the way they're - - -

6 JUDGE HALLIGAN: Well - - -

7 MR. ADIN: - - - looking at it, but - - -

8 JUDGE HALLIGAN: So you think that perhaps in
9 these cases, the Appellate Division - - - I read - - - I
10 read Hearst as fairly stringent. It says in Hearst itself,
11 the case presents no questions, the fundamental underlying
12 principles of which have not already been declared by this
13 court, so therefore no exception. But it - - - are you
14 saying your experience is that the Appellate Division is
15 more flexible, and maybe if it's significant to the family,
16 but not novel with respect to the legal question, they
17 might invoke the exception?

18 MR. ADIN: It may be that it's not novel to the
19 legal question entirely, but novel to the legal question as
20 its applied in a specific case.

21 JUDGE HALLIGAN: So I thought - - -

22 MR. ADIN: And it could be nuanced there.

23 JUDGE HALLIGAN: In an earlier exchange, I
24 thought that you had indicated that there - - - you weren't
25 aware of Appellate Division cases. I'm just trying to

1 understand what's actually happening, right? You weren't
2 aware of Appellate Division cases where the mootness
3 exception was triggered, but there was not a novel
4 question.

5 MR. ADIN: The decisions reference issues being
6 novel.

7 JUDGE HALLIGAN: Uh-huh. I see. Okay.

8 MR. ADIN: It's a - - - I don't - - - I can't say
9 necessarily how novel or how they're determining how novel
10 it is in those decisions.

11 JUDGE GARCIA: It seems to me, a lot of the
12 decisions I've seen from the Appellate Division don't say
13 anything other than, under these circumstances, the
14 mootness exception doesn't apply. I don't see a lot
15 saying, it's a novel.

16 MR. ADIN: I do agree that often, the Appellate
17 Division, when they are saying that something is moot, they
18 don't go into great detail as to why they don't believe the
19 exception applies.

20 JUDGE CANNATARO: And you think that that's maybe
21 because they're keeping their powder dry so in the next
22 case, even if it's maybe not a so novel a question, it's
23 significant enough that they'll - - - they'll say that a
24 mootness exception does apply? Is that the game plan here?

25 MR. ADIN: It's certainly a possibility. I would

1 not speculate to that degree that, you know, they're trying
2 to keep the powder dry.

3 JUDGE RIVERA: But I would take it, based on your
4 response to my earlier questions, that if indeed - - -
5 let's stay with the quote, unquote, "novel question" of the
6 referee's error here regarding the expanse, the scope of
7 their authority, if that had been resolved - - - the AD
8 took and resolved, for whatever reason, maybe we resolve
9 it, that if in another permanency hearing - - - it's not -
10 - - let's not even say it's the same referee. It's a
11 different referee, who, for whatever reason, is not aware.
12 I would think that counsel, before running to the
13 courthouse to file a notice of appeal, would print out the
14 copy of the decision and give it to the referee.

15 MR. ADIN: I would agree, Your Honor. I think
16 that that would be - - -

17 JUDGE RIVERA: Or go to the - - - or go to the
18 family court judge, right? So that even - - - even
19 something that may not be novel in the sense of it's an
20 open question - - - let me put it that way - - -
21 substantial yet open question in the appellate courts, once
22 that's decided, counsel, if it's favorable to their
23 position and for their client, would rely on that, as we do
24 with all kinds of legal questions, no?

25 MR. ADIN: Yes, Your Honor. I would certainly

1 expect that this - - - as soon as the referee says, I can't
2 change the goal, that they would come and say, actually,
3 the Court of Appeals said you can. Here's the decision on
4 that. I would suspect that that would be the more frequent
5 thing, or to go - - - then go to the family court judge if
6 the referee still says, can't do anything for you.

7 JUDGE RIVERA: I don't read it that way.

8 MR. ADIN: Yes. And they would go to the family
9 court judge on that.

10 JUDGE SINGAS: And if we decide that it was an
11 abuse of discretion not to apply the mootness exception,
12 what happens? Does it get remanded back to the Appellate
13 Division or do we decide the merits?

14 MR. ADIN: To the extent the court - - - this
15 court wants to reach the merits on the referee issue as
16 opposed to sending it back and then potentially coming back
17 up here again, it is a question of law as to the scope of
18 their authority. I think it could be decided here in the
19 first instance on that. I am out of time, but if I could
20 just address one more thing, and this is to a point, Judge
21 Rivera, I think you had made with Ms. Iacono, which is,
22 let's say this court does rule on the referee issue and
23 says that was an error. There's no relief for the mother
24 in this case, you know. First, as identified, there have
25 been subsequent permanency hearings. There have been a

1 number of them. They're back in front of the family court
2 judge. So you're not in the - - -

3 CHIEF JUDGE WILSON: Well, in cases - - - in
4 cases that meet the mootness exception, that's always true,
5 isn't it?

6 MR. ADIN: That is generally, yes, always true,
7 but just as - - - but just to - - - as a note that that is
8 - - - that there isn't any relief here for the mother by
9 hearing this, which is why, if this is an exception to
10 mootness on these limited issues, that makes sense. But
11 this general, let's just make all permanency hearings
12 exempt from mootness doesn't because there's not going to
13 be meaningful relief from so many of these appeals,
14 particularly where most of them are just, we disagree with
15 the conclusion that there were reasonable measures taken
16 and the placement should continue.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. ADIN: Thank you.

19 MR. REED: Your Honors, I have to respectfully
20 disagree with the court. There is no provision for going
21 to the judge over the head of the referee. That happens in
22 child support. The support magistrate, you go on
23 objections to the judge, then you come to the Appellate
24 Division. But from referees, the appeal goes directly to
25 the Appellate Division. And we can't, you know, not we - -

1 - and it's the attorneys, not the judge. The judge - - -
2 the courts can certainly do this, but the judge - - - the
3 attorneys cannot create a remedy of going to the judge - -
4 -

5 JUDGE TROUTMAN: Can a court correct its own
6 error?

7 MR. REED: Oh, certainly. As a matter of fact, I
8 thought, because I might take a lot of appeals. I mean,
9 the court knows I'm going to appeal anything that moves.
10 And I thought that for sure the - - -

11 CHIEF JUDGE WILSON: That might not have - - -

12 MR. REED: - - - judge - - -

13 CHIEF JUDGE WILSON: - - - been the argument you
14 wanted to make.

15 MR. REED: The judge would, you know, hear about
16 this and would say, no, you can't do that, so you know.
17 And I thought that either that would happen or - - - well,
18 just that. The - - - they would tell the referee, all
19 right, this time you have to - - - not only you can't say
20 that you're not capable of doing option number one, which
21 is return to parent, but also the referee's deference
22 towards the judge. The whole idea of a referee is that
23 they make a speech that they're - - - they have the same
24 experience as a sitting judge and all that, and then they
25 say, but I have to defer to the judge. I mean, that's - -

1 - that is totally inconsistent with the whole referee
2 arrangement.

3 JUDGE TROUTMAN: Can you make an application to
4 the referee to ask for reconsideration?

5 MR. REED: I mean, I argued it. I'm not - - -
6 you know, I'm not bashful. I argued. I made it very
7 clear, this is totally wrong. Statute is very clear. And
8 the referee wasn't going to budge. And I even asked the
9 referee the second time, are you still standing by this
10 position? Said, yes. Because I really thought by now, six
11 months later, she would have, you know, gotten a memo from
12 the judge, but it didn't happen.

13 JUDGE RIVERA: And your view is that, contrary to
14 what counsel has said, that if you had then sought for the
15 family court judge to correct this error, that the family
16 court judge would basically say you have your appeal to the
17 Appellate Division?

18 MR. REED: Right. I mean, judges don't want you
19 creating new procedural avenues. The avenue goes to the
20 Appellate Division. So I would not expect to get anywhere
21 with that. The - - - I've been hearing discussion about
22 novel or substantive - - - substantial. I didn't check the
23 language of Hearst, but I checked the language of City of
24 New York v. Maul, which is this court's decision thirty
25 years later, where this court says what it had done in Maul

1 - - - in Hearst. And it says that we have consistently
2 applied an exception to the mootness doctrine, where the
3 issues are substantial or novel. Now, I maintain it's
4 both, but it's or novel. It's not and novel.

5 And in fact, and I think somebody - - - some
6 questions alluded to this, the Appellate Division doesn't
7 seem to be following that rule. The Appellate Division
8 seems to be doing things categorically. They have
9 categorically said, all changes of goal, we're going to
10 reach; all extensions of placement, we're not going to
11 reach. And that's the way it's being done. And I imagine
12 it's a judicial economy situation. And I thought it was so
13 significant. I'm sorry I didn't know about the Kevin R.
14 case, but that - - - that Kevin R., you know, back in 1998
15 when they didn't know anything about six months' rule, that
16 just happened that the county had said - - - had come back
17 every six months and - - - and the Fourth Department in
18 that case at that time said, look, this is going to happen
19 forever. We got to do something. This is not fair. You
20 can't keep on coming back in six months and knocking the
21 personnel of the Appellate Division. But when it came to
22 the point where all the cases were six months, then the
23 Fourth Department went along with the others and said, you
24 know, no, this is moot and no exception.

25 CHIEF JUDGE WILSON: Thank you, counsel.

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MR. REED: Thank you, Your Honor.

(Court is adjourned)



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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Joshua J. v. Westchester County Department of Social Services, No. 43 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: April 17, 2025

