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COURT OF APPEALS

STATE OF NEW YORK

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IN THE MATTER OF MARIAN T.

LAUREN R., et al.

Respondents,

-against-

No. 49

MARIAN T.,

Appellant.

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20 Eagle Street  
Albany, New York  
October 14, 2020

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

Appearances:

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Sharona Shapiro  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this  
2 afternoon's calendar is appeal number 49, the Matter of  
3 Marian T. Let's just wait a moment until counsel clears  
4 out.

5 Okay. Good afternoon, counsel.

6 MS. BRENNAN: Good afternoon. I'm Cailin Connors  
7 Brennan. I would like to reserve two minutes for rebuttal,  
8 if I may.

9 CHIEF JUDGE DIFIORE: Of course.

10 MS. BRENNAN: This case involves the adoption of  
11 an adult woman who is not capable of providing consent to  
12 the adoption. We take the position - - -

13 JUDGE WILSON: Well, wait, how do we know that?

14 MS. BRENNAN: The - - -

15 JUDGE WILSON: The court - - -

16 MS. BRENNAN: - - - respondent - - -

17 JUDGE WILSON: - - - couldn't make a finding  
18 about that, right?

19 MS. BRENNAN: Your Honor, with respect, I believe  
20 that, you know, all of the lower courts, you know, both the  
21 trial court, the Surrogate's Court, and the Appellate  
22 Division did conclude that Marian does not have consent - -  
23 - does not have the capacity to give consent for this. I  
24 honestly don't think that that's an issue on this record,  
25 and I don't - - - I think that, you know, looking at the



1 facts of this case, whether or not she has that capacity is  
2 not one of the - - - one of the problems before the court.

3 JUDGE STEIN: Well, this surrogate did an  
4 investigation, if you will, into that question, correct?

5 MS. BRENNAN: There was some investigation done  
6 into that question.

7 JUDGE STEIN: There were experts that gave  
8 reports and - - - and so on?

9 MS. BRENNAN: That's correct. There were two  
10 psychologists who did examinations and provided reports.  
11 The court also did do its own - - - had a meeting with - -  
12 - the Surrogate's Court did have a meeting with respondent  
13 to assess for himself whether or not he believed she had  
14 other capacity to provide the consent. The guardian ad  
15 litem also offered an opinion that - - - that she didn't  
16 have capacity to provide consent. And she has been, for  
17 her whole life, diagnosed with profound intellectual  
18 disability.

19 JUDGE RIVERA: Did I misunderstand the record? I  
20 thought Fox had said she had consented. Am I wrong about  
21 that?

22 MS. BRENNAN: Dr. Fox attempted to distinguish  
23 between her lack of capacity in all other areas and her  
24 ability to consent to an adoption. He attempted to say  
25 that, although she lacks the capacity to consent to routine



1 medical procedures, she does have the capacity to say yes  
2 if somebody asks her whether or not she wants to be  
3 adopted. I - - - I don't believe that his opinion was  
4 really worthwhile, and it wasn't explored during the  
5 hearing. Neither of the experts testified at the hearing,  
6 and there was no direct or cross-examination of their  
7 opinions.

8 I think the court essentially moved on after  
9 receiving those reports. And everybody agreed that, you  
10 know, the consent issue was - - - her capacity to provide  
11 consent was agreed upon; she did not have that capacity.  
12 What the surrogate court then did was subsume her capacity  
13 - - - her consent into the best-interest analysis, and then  
14 also seemingly accepted a - - - a consent on her behalf  
15 that the guardian ad litem actually never provided. So it  
16 was the issue of - - -

17 JUDGE STEIN: Can I ask you a question about  
18 that, because I know that that's one of the main points of  
19 contention here is - - - is when the ability to consent  
20 comes - - - is explored, or in what context. So it's a  
21 process, right? So if - - - if you - - - if you say that  
22 consent - - - ability to consent has to be determined  
23 first, okay - - - and again, this is assuming that the  
24 court can dispense with that consent - - - then - - - then  
25 you have to go through this whole process, right, whatever



1 that may be, to determine her ability to consent. And then  
2 - - - and then, let's say the court finds that she doesn't  
3 have the ability to consent, and then moves on to the best  
4 interest, what difference does it make, if it's all done at  
5 once, as long as the ability to consent is a required  
6 finding in the process? Why - - - you know, why does it  
7 make such a difference whether we call it a threshold  
8 determination or whether it's just part of the overall  
9 determination?

10 MS. BRENNAN: Well, Your Honor, part of the  
11 problem would be that notice of the proceeding is only  
12 required, by the statute, to be given to those who - - -  
13 whose consent is required. So if - - - if the consent of -  
14 - - of an adult - - -

15 JUDGE STEIN: But how could you determine if her  
16 consent was required unless you determined whether she was  
17 capable of giving consent? So wouldn't that presume some  
18 notice and some involvement of - - - of her and - - - and  
19 people around her who know?

20 MS. BRENNAN: So petitioners could submit an  
21 application to - - - a petition to the court for adoption,  
22 support it with the opinion of an expert and some  
23 documentation that - - - that the individual to be adopted  
24 lacks the capacity to provide consent and ask the court to  
25 dispense with the consent and proceed without any notice or



1 any further examination of the issue.

2 They have - - - the court would have in front of  
3 it an expert opinion and other documentation supporting the  
4 fact that there's - - - you know, this person lacks  
5 consent, lacks the ability to provide consent, and so we  
6 don't need to - - - we don't need to visit that issue;  
7 let's move on to the best interest.

8 JUDGE STEIN: Well, so in this particular  
9 situation, she was in the custody of the State of New York,  
10 correct?

11 MS. BRENNAN: That's correct.

12 JUDGE STEIN: So does the State have to be given  
13 any notice?

14 MS. BRENNAN: Not under the adoption statute.

15 JUDGE STEIN: Well, how - - -

16 MS. BRENNAN: It doesn't - - -

17 JUDGE STEIN: How did she end up getting a  
18 lawyer?

19 MS. BRENNAN: I believe that she ended up getting  
20 a lawyer because the surrogate had never been faced with  
21 such a situation, had no idea how to proceed with such a  
22 situation, and had a good relationship with the Mental  
23 Hygiene Legal Service attorney who covered that area, and  
24 decided that he needed to bring her in and have her - - -

25 JUDGE STEIN: So would it, arguably, be an abuse



1 of discretion not to somehow get the - - - the alleged  
2 incapacitated person to be heard in some fashion?

3 MS. BRENNAN: I think what - - - what is an abuse  
4 of discretion is dispensing with the consent of an adult.  
5 I think that that's - - - that's the ultimate abuse of  
6 discretion in this case.

7 JUDGE GARCIA: But counsel, if she could not  
8 consent, and we can't dispense with consent, then anyone in  
9 this situation, over the age of eighteen, could not be  
10 adopted.

11 MS. BRENNAN: If there's not an ability to  
12 provide consent - - -

13 JUDGE GARCIA: Right.

14 MS. BRENNAN: - - - and there's no way to, you  
15 know, support their decision-making and - - - and educate  
16 them and get them to be able to consent, then no, they  
17 can't - - -

18 JUDGE GARCIA: No matter what procedure, no  
19 matter the best interest of the child, there's just a bar,  
20 so if you start a petition before, and the person's  
21 seventeen, but you don't get a ruling, they turn eighteen,  
22 you're done, it's over, you can't - - - you can't consent,  
23 you're eighteen, we're - - - we dismiss, you can never get  
24 adopted.

25 MS. BRENNAN: Not under the current statute.



1 This - - - this court would be creating a whole new  
2 statutory scheme to allow something like that happen.

3 JUDGE GARCIA: Actually, we'd be reading the  
4 statute in a way that you don't agree with, but I don't  
5 think we would be creating a new scheme.

6 JUDGE STEIN: How can such a person consent to  
7 being in the care and custody of the State?

8 MS. BRENNAN: She actually was placed into the  
9 care and custody of the State by her biological parents  
10 when she was still a child.

11 JUDGE STEIN: So but she never had the right,  
12 when she became eighteen, to make a different choice,  
13 right?

14 MS. BRENNAN: She could have; she never did. You  
15 know - - -

16 JUDGE STEIN: Well, how could she have if she  
17 doesn't have the capacity, the mental capacity to - - - to  
18 make that determination?

19 MS. BRENNAN: Well, it is a voluntary program,  
20 and people can sign themselves out. If someone - - - if  
21 she attempted to sign herself out, and somebody believed  
22 that that was dangerous and that she lacked capacity to be  
23 able to do that, then again, the legislature has created a  
24 large statutory scheme in order to deal with this through  
25 guardianships. And practically anybody can bring a





1 guardianship proceeding to try and protect the interest of  
2 a vulnerable adult, either under a Surrogate's Court  
3 procedure, Act 17-A - - -

4 JUDGE RIVERA: Okay. So - - -

5 MS. BRENNAN: - - - or under Mental Hygiene Law  
6 81.

7 JUDGE RIVERA: - - - your red light is on. To be  
8 clear, what - - - very quickly, what is your position on  
9 what should have happened here? Since you're starting from  
10 the point that she couldn't consent, what should have  
11 happened?

12 MS. BRENNAN: The petition should have been  
13 dismissed. It couldn't go forward. She couldn't provide  
14 consent; it can't go forward.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 Counsel?

17 MR. ELDRIDGE: Yes, that's the worst of it. A  
18 whole class of people are excluded, people who are the most  
19 vulnerable, least protected, unable to articulate their own  
20 desires, not even asked. Marian wasn't asked if she wanted  
21 an attorney. Marian wasn't asked if she wanted to appeal  
22 her case to the Appellate Division. Marian didn't send me  
23 here. Marian hasn't - - - Marian believes that she should  
24 have the ability to be autonomous and make decisions, but  
25 Marian cannot articulate, in a conventional fashion, a



1 consent - - - a legally cognizable consent because she  
2 can't talk that way.

3 JUDGE RIVERA: Can she communicate that in some  
4 other way?

5 MR. ELDRIDGE: Yes, she - - -

6 JUDGE RIVERA: Are you saying she actually could  
7 consent but just not verbally?

8 MR. ELDRIDGE: Absolutely. That's exactly right.

9 JUDGE RIVERA: Okay. So then if - - -

10 MR. ELDRIDGE: Which is why - - -

11 JUDGE RIVERA: Let me just - - - please, to  
12 clarify. Is it your position that there was not a finding  
13 that she couldn't consent? Sorry for the double negative.

14 MR. ELDRIDGE: I draw a distinction, Judge - - -

15 JUDGE RIVERA: Okay.

16 MR. ELDRIDGE: - - - between the consent that she  
17 can give and the consent that the court was looking for.  
18 The Court was looking for an understanding of the adoption  
19 process and what that meant. And Marian doesn't understand  
20 that, I don't believe. But Marian does very clearly  
21 understand the family that she's a part of, that she's been  
22 adopted into, what they mean to her, that she was very  
23 insecure when she was removed from that family by the State  
24 who was in control of her life then.

25 JUDGE RIVERA: So then is your position - - - I



1 think it's along the lines of what Judge Garcia was asking  
2 about before that if an - - - an adult individual cannot  
3 give consent, given the nature of their disability, is not  
4 able, as you're saying with this description, able to  
5 appreciate what adoption means, therefore cannot really  
6 give legal consent, that a judge or the surrogate should  
7 dispense with the consent requirement and move forward with  
8 the petition?

9 MR. ELDRIDGE: I think that's what the courts  
10 have concluded. They did take a convoluted route to get  
11 there. I'm not sure that that's required. But ultimately,  
12 if they determine that someone cannot consent, they can  
13 look all around at the other components of the decision-  
14 making process, the best interest of the child - - -

15 JUDGE RIVERA: But if a judge chooses not to do  
16 that, would it be an abuse of discretion?

17 MR. ELDRIDGE: If the judge chooses to find no  
18 consent and - - -

19 JUDGE RIVERA: If a judge concludes - - -

20 MR. ELDRIDGE: - - - but says - - -

21 JUDGE RIVERA: - - - this person cannot consent,  
22 but I'm not going to dispense with the consent requirement,  
23 I'm going to dismiss the petition, would that be an abuse  
24 of discretion?

25 MR. ELDRIDGE: I think without more, I think he



1 has to examine - - -

2 JUDGE RIVERA: He or she, yeah.

3 MR. ELDRIDGE: - - - the situation to determine  
4 what the best interests of the child are. Otherwise you  
5 would have this automatic preclusion of the entire class of  
6 vulnerable people.

7 JUDGE RIVERA: So you're saying under this  
8 particular factual scenario, a judge cannot conclude that  
9 they do not want to exercise their discretion in a way to  
10 dispense with consent?

11 MR. ELDRIDGE: I think the judge can exercise his  
12 - - - his discretion - - -

13 JUDGE RIVERA: His or her.

14 MR. ELDRIDGE: - - - to not dispense - - - his or  
15 her - - - to dispense with the consent requirement based on  
16 facts that he has to support such a decision. He can look  
17 behind the petition. He, as they did here, call witnesses,  
18 examine Marian - - -

19 JUDGE RIVERA: Okay.

20 MR. ELDRIDGE: - - - talk to the guardian ad  
21 litem. All of that was done here, and I think that is  
22 appropriate in determining the best interests - - -

23 JUDGE FAHEY: Let me ask you a question, if I  
24 could. If - - - if Marian hadn't been removed from the  
25 home, and there had been - - - I guess it was a Justice



1 Center that did an investigation; is that right?

2 MR. ELDRIDGE: The State - - -

3 JUDGE FAHEY: It was an agency of the State; I  
4 don't know which one it was. I thought it was the Justice  
5 Center.

6 MR. ELDRIDGE: Well, what do they call it, the  
7 local entity of - - -

8 JUDGE FAHEY: Okay.

9 MR. ELDRIDGE: - - - the - - -

10 JUDGE FAHEY: If that hadn't taken place, would  
11 we be here today with this adoption petition?

12 MR. ELDRIDGE: Yes.

13 JUDGE FAHEY: Well, how so?

14 MR. ELDRIDGE: Well, I hope we wouldn't be here.  
15 We would have been - - -

16 JUDGE FAHEY: Fair enough.

17 MR. ELDRIDGE: - - - in the adoption.

18 JUDGE FAHEY: How would this have gone forward in  
19 the absence of that?

20 MR. ELDRIDGE: The adoption petition preceded the  
21 removal by the State component.

22 JUDGE FAHEY: I see. Now, taking it to the next  
23 level, it's clear, even in - - - in the record that we do  
24 have, that there is a loving bond between Marian and - - -  
25 and the petitioners here.



1 MR. ELDRIDGE: Absolutely.

2 JUDGE FAHEY: I think that's clear, and the court  
3 understands that. I guess my question to you is consent to  
4 adoption isn't the same for an adult as a loving bond. You  
5 can certainly have a loving bond, and have it strongly, but  
6 not necessarily say or agree that you want to be adopted.  
7 How are we to reconcile those two things?

8 MR. ELDRIDGE: I think that's where the exercise  
9 of discretion comes in and why the statute plainly says the  
10 judge can - - -

11 JUDGE FAHEY: So are we saying that perhaps  
12 something similar to Bennett v. Jeffreys, kind of an  
13 extraordinary-circumstances evaluation that needs to take  
14 place, and then you look at the best interests of the  
15 person?

16 MR. ELDRIDGE: Yes. It is an unusual  
17 circumstance. I'm not sure it amounts to extraordinary,  
18 but yes.

19 JUDGE FAHEY: And - - -

20 MR. ELDRIDGE: Look underneath the petition and  
21 see it. There was a case out of Chemung County last year  
22 where the petition was found to be based on a malicious  
23 motive, and that was not - - - the adoption wasn't allowed  
24 to go forward. This is entirely different. There is no  
25 evidence that there is any untoward aspect of this family,



1 and Marian has been part of it for more than a decade.

2 JUDGE FEINMAN: I want to change tracks for a  
3 moment. Over here. And it's a statutory interpretation  
4 question. So why isn't an interpretation of 111(1)(a),  
5 that limits the definition of adoptive child to minor  
6 children between fourteen to seventeen, why isn't that the  
7 most consistent interpretation with the legislative history  
8 that underlies that provision?

9 MR. ELDRIDGE: I can't explain the operations of  
10 the legislature. I don't know.

11 JUDGE FEINMAN: Okay. Fair enough.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.  
13 Counsel?

14 MS. BRENNAN: Yes. So two things, if I may. I  
15 want to address the - - - the concerns - - - the stated  
16 concerns that an entire class of people would lose out on  
17 the ability to be adopted. And I want to point out that,  
18 you know, the risk of adopting out people who are not able  
19 to object to that adoption is so much greater. Those  
20 people will have all of their family ties, all of their  
21 biological family ties cut, and a whole new family  
22 structure put in place.

23 JUDGE STEIN: But isn't that true of anyone  
24 subjected to an adoption? And isn't that why there's a  
25 best-interest determination to be made in every adoption



1 case, whether it's a child, whether it's an adult?

2 MS. BRENNAN: But Your Honor, there's also  
3 consents required in every other adoption case, either the  
4 - - -

5 JUDGE GARCIA: But your rule - - -

6 MS. BRENNAN: - - - consents of the parents - - -

7 JUDGE GARCIA: Your rule - - - to follow up on  
8 Judge Stein's point, your rule - - - and this is something  
9 the court, in many contexts, has been very hesitant to do -  
10 - - your rule is reading the best interests of the child or  
11 adult out of the adoption process, right?

12 MS. BRENNAN: You still get there after you get  
13 through the consent. The legislature simply has not put  
14 into place - - -

15 JUDGE GARCIA: But you're making consent - - -

16 MS. BRENNAN: - - - a structure to allow  
17 something like this to happen.

18 JUDGE GARCIA: You're making consent a bar to  
19 that - - - reaching that issue. I mean, in your rule you  
20 never get to best interest because you can't get through  
21 the consent doorway, right?

22 MS. BRENNAN: Under the particular circumstances  
23 here of this - - - this vulnerable class of adults who are  
24 not able to provide the requisite consent.

25 JUDGE GARCIA: And why isn't this vulnerable





1 class of adults even more in need of a best-interest type  
2 analysis than - - - than anyone else?

3 MS. BRENNAN: But what they're in need of is  
4 protection from being adopted over their objection, or if  
5 they may have - - -

6 JUDGE GARCIA: But they can - - -

7 MS. BRENNAN: They may object - - -

8 JUDGE GARCIA: - - - object or consent.

9 MS. BRENNAN: - - - or they may not. But we  
10 don't know, which is why they need to be protected from  
11 their assets being distributed, even during their lifetime,  
12 let alone after they've passed on.

13 JUDGE GARCIA: And I think that is a legitimate  
14 concern, of course, and I - - - I thought, from this  
15 record, that that was one of the things that the  
16 Surrogate's Court went into.

17 MS. BRENNAN: I don't know that there was really  
18 very much examination. The - - - the examination into the  
19 best interests really involved whether or not Marian was  
20 going to lose a lot of services that are currently avail -  
21 - - that were available to her. She's not going to lose a  
22 lot of services. She loses a lot of oversight. She  
23 potentially, and her family members potentially lose the  
24 distribution of assets. She also cannot inherit from any  
25 of her other family members after being adopted.



1 JUDGE STEIN: She could inherit from her adoptive  
2 parents. And again, that's true of any adoption. I mean,  
3 there are certainly infants that are adopted possibly from  
4 very wealthy families to not as well-off families.

5 MS. BRENNAN: But consents have been given.  
6 Consents have been obtained from - - -

7 JUDGE STEIN: From the parents.

8 MS. BRENNAN: From the biological parents.

9 JUDGE STEIN: Biological parents, not by the  
10 adoptee.

11 MS. BRENNAN: But we're talking about an adult,  
12 not a child, and that's why the adult - - - an adult  
13 adoptee provides their own consent.

14 JUDGE STEIN: But neither the child nor the adult  
15 in this situation is capable of consent.

16 MS. BRENNAN: But she's still an adult, and her  
17 interests are still different, and she's still an  
18 individual with all of the rights, privileges, and  
19 obligations of any other adult. And she needs to be able  
20 to make those decisions for herself. And if she can't,  
21 nobody should be able to impose a new legal family  
22 structure on her, all of the legal - - -

23 JUDGE STEIN: But - - -

24 MS. BRENNAN: - - - trappings that come along  
25 with an adoption.



1 JUDGE RIVERA: So then what - - - over here. So  
2 then what - - - does she then get a guardian? If she's not  
3 adopted, she remains in this home and has a separate  
4 guardian?

5 MS. BRENNAN: She could get a guardian. She  
6 doesn't have to. There are many people who don't have - -  
7 - you know, live in these circumstances that don't have  
8 guardians, but she certainly can have a guardian, if  
9 somebody wanted to apply. And through the guardianship  
10 statutes that have been put in place thoughtfully by the  
11 legislature, there are all kinds of protections there to  
12 make sure that her assets are not, you know, dispensed  
13 with, that she is, you know, getting all of the services  
14 that she's entitled to. There's, you know, reporting to  
15 the court to make sure that the guardian is following  
16 through with their duties. They have fiduciary duties,  
17 much different - - -

18 JUDGE RIVERA: If I could just quickly interrupt  
19 you. I see the red light is on.

20 MS. BRENNAN: I'm sorry.

21 JUDGE RIVERA: So right now your position is  
22 based on statutory interpretation. You're not making some  
23 argument that the legislature couldn't change the statute  
24 to - - -

25 MS. BRENNAN: That's correct.



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JUDGE RIVERA: - - - to allow for this best-interest analysis to apply, as opposed to the result that you describe, which is if you can't provide consent, they can't be adopted.

MS. BRENNAN: That's correct. If there's a hole, it's a hole for the legislature to fill.

JUDGE RIVERA: Um-hum. Okay.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)



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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Lauren R., et al. v. Marian T., No. 49, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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