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### Matter of Anthony "S"

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## SUPREME COURT, APPELLATE DIVISION

### THIRD DEPARTMENT

In the Matter of Anthony “S”<sup>1</sup>  
(decided April 5, 2001)

The Family Court of Schuyler County held that Anthony “S” and Olivia “S” were permanently neglected by their mother and, consistent with that ruling, terminated her parental rights.<sup>2</sup> The respondent, Ruth “S”, the children’s mother, appealed that ruling and claimed she was denied procedural due process guarantees inherent under the Federal<sup>3</sup> and New York<sup>4</sup> Constitutions.<sup>5</sup> Specifically, respondent argued that Social Services Law § 384-b(7)(a)<sup>6</sup> was unconstitutionally vague because it failed to provide the necessary “definitional guidelines” to explain the phrase “to plan for the future of the child.”<sup>7</sup> The Appellate Division, Third Department, affirmed the family court’s ruling and held that the phrase is indeed defined in the statute and further, that other New York courts have interpreted that section of the statute on numerous occasions.<sup>8</sup>

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<sup>1</sup> 282 A.D.2d 778, 723 N.Y.S.2d 251 (3d Dep’t 2001).

<sup>2</sup> *Id.*

<sup>3</sup> U.S. CONST. amend. XIV § I states in pertinent part: “[N]or shall any State deprive any person of life, liberty or property, without due process of law. . . .”

<sup>4</sup> N.Y. CONST. art I § 6 states in pertinent part: “No person shall be deprived of life, liberty of property without due process of law.”

<sup>5</sup> *Anthony “S”*, 282 A.D.2d at 779, 723 N.Y.S.2d at 253.

<sup>6</sup> N.Y. SOC. SERV. LAW § 384-b(7) (McKinney 2000). The statute provides in pertinent part:

“permanently neglected child” shall mean a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency’s diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child. . . .

<sup>7</sup> *Anthony “S”*, 282 A.D.2d at 779, 723 N.Y.S.2d at 253.

<sup>8</sup> *Id.* at 779, 723 N.Y.S.2d at 254.

Anthony "S" was born in 1990 and Olivia "S" in 1993.<sup>9</sup> In January of 1995, the Schuyler County Department of Social Services brought an action in family court to have Anthony "S" and Olivia "S" adjudicated neglected by their mother.<sup>10</sup> The court held the children were neglected, but allowed Olivia to remain in her mother's care, under the supervision of the Department of Social Services.<sup>11</sup> Anthony, however, was put into the custody of social services and as a result, he was placed in foster care.<sup>12</sup> In February of 1995, while in her mother's custody, Olivia broke her leg.<sup>13</sup> Shortly thereafter, in April of that year, Olivia was also placed in foster care pursuant to a family court ruling.<sup>14</sup> Both children remained in foster care, and in November 1998, the Department of Social Services, pursuant to Social Services Law § 384-b, sought to have the children adjudicated permanently neglected by their mother. The family court found the children were permanently neglected by Ruth "S" and her parental rights were terminated with respect to Anthony and Olivia.<sup>15</sup>

On appeal, Ruth "S" argued the portion of Social Services Law § 394-b (7), which requires a parent to "plan for the future of the child," was unconstitutionally vague because it fails to "provide definitional guidelines."<sup>16</sup> The court held Social Services Law § 394-b (7) defines a permanently neglected child, and also provides requirements for such a determination.<sup>17</sup> In addition, the court noted that other New York courts have consistently interpreted and applied that section of the statute.<sup>18</sup>

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<sup>9</sup> *Id.* at 778, 723 N.Y.S.2d at 253.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Anthony "S"*, 282 A.D.2d at 778, 723 N.Y.S.2d at 253.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Anthony "S"*, 282 A.D.2d at 778, 723 N.Y.S.2d at 253.

<sup>18</sup> *Id.* See also *In the Matter of the Guardianship of Star Leslie W.*, 63 N.Y.2d 136, 470 N.E.2d 824, 481 N.Y.S.2d 26 (1984) (affirming a lower court's ruling terminating parental rights pursuant to Social Services Law § 384-b (7)). The New York Court of Appeals discussed that before terminating parental rights, the state must try to reunite the parent with her child. It is when the parent fails to either "substantially and continuously or repeatedly maintain contact with or plan for the future of the child although physically and financially able to do

In *People v. Foley*,<sup>19</sup> the New York Court of Appeals articulated the standard for determining whether a statute is unconstitutionally vague.<sup>20</sup> Foley challenged Penal Law § 235.22,<sup>21</sup> which penalizes the dissemination of indecent material to minors as unconstitutionally vague. In particular, he argued that the section of the statute that defines the prohibited conduct, “importunes, invites or induces” and the phrase “sexual conduct for his benefit” fails to provide adequate notice of what is being prohibited and also allows for the arbitrary and discriminatory application of the law.<sup>22</sup> The court stated the standard it will use to strike down a statute for vagueness; if it “fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and it is written in a manner that permits or encourages arbitrary or discriminatory enforcement.”<sup>23</sup> Additionally, the court noted that it will not hold a statute unconstitutional for vagueness simply because the language is “imprecise.”<sup>24</sup> Rather, its constitutionality will be upheld if the language “conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and

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so,” the court may find the parent permanently neglected the child. The court noted that this construction was consistent with the common law rule of abandonment. When a parent abandons a child, that parent has no right to preclude the child’s adoption. *Id.*

<sup>19</sup> 94 N.Y.2d 668, 731 N.E.2d 123, 709 N.Y.S.2d 467 (2000).

<sup>20</sup> *Id.*

<sup>21</sup> N.Y. PENAL LAW § 235.22 (McKinney 2000). The statute provides in pertinent part:

A person is guilty of disseminating indecent material to minors in the first degree when: 1. Knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs . . . . 2. By means of such communication he importunes, invites or induces a minor to engage in sexual intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit.

<sup>22</sup> *Foley*, 94 N.Y.2d at 673, 731 N.E.2d at 126, 709 N.Y.S.2d at 469 (2000).

<sup>23</sup> *Id.* at 681, 731 N.E.2d at 130, 709 N.Y.S.2d at 474.

<sup>24</sup> *Id.*

practices.”<sup>25</sup> In light of the standard articulated, the court held the statute was not vague and that every term being challenged either had a plain and ordinary meaning, or was defined in the statute itself.<sup>26</sup> In support of its holding, the court discussed the term “benefit” as being defined in the statute as “any gain for advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.”<sup>27</sup> The court also stated that although “importune,” “invite” and “induce” were not defined within the statute, “a person of ordinary intelligence would reasonably know that the statute is meant to prevent the intentional luring of minors to engage in sexual conduct through the dissemination of harmful, sexual images.”<sup>28</sup> Accordingly, the court held the statute precisely defined the terms and elements contained therein.<sup>29</sup> As such, the defendant’s concern that the statute would be arbitrarily enforced was unfounded.<sup>30</sup>

In *People v. Shack*,<sup>31</sup> the New York Court of Appeals was faced with the question of whether New York’s aggravated harassment statute, Penal Law § 240.30 (2),<sup>32</sup> was unconstitutionally vague in violation of the defendant’s due process rights because the statute did not provide the defendant with adequate notice.<sup>33</sup> In *Shack*, the defendant claimed the statute failed to provide adequate notice of what conduct was being proscribed and also that it allowed for “arbitrary and

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<sup>25</sup> *Id.* (citing *People v. Shack*, 86 N.Y.2d 529, 538, 658 N.E.2d 706, 634 N.Y.S.2d 660 (1995)).

<sup>26</sup> *Foley*, 94 N.Y.2d. at 681, 731 N.E.2d at 130, 709 N.Y.S.2d at 474.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 682, 731 N.E.2d at 129, 709 N.Y.S.2d at 473.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> 86 N.Y.2d at 529, 658 N.E.2d at 706, 634 N.Y.S.2d at 660.

<sup>32</sup> N.Y. PENAL LAW § 240.32 (2) (McKinney 2000). The statute provides in pertinent part: “A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he . . . [m]akes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication.”

<sup>33</sup> *Shack*, 86 N.Y.2d at 529, 658 N.E.2d at 706, 634 N.Y.S.2d at 660 (stating that a statute will be held unconstitutionally vague if it does not provide notice to “a person of ordinary intelligence . . . that his contemplated conduct is forbidden by the statute,” quoting *United States v. Harris*, 347 U.S. 612 (1954)).

discriminatory enforcement.”<sup>34</sup> The defendant alleged that the terms “legitimate,” and the phrase “no purpose of legitimate communication” could not be precisely defined.<sup>35</sup> The court looked at the phrase “no purpose of legitimate communication,” and found that it is understood to mean “the absence of expression of ideas or thoughts other than threats and/or intimidating or coercive utterances.”<sup>36</sup> With respect to the notice requirement, the court found the statute did give notice to a “person of ordinary intelligence.”<sup>37</sup> The court further held it did not foresee any problem with arbitrary enforcement of the statute because the statute was clear and the conduct being proscribed was adequately defined in the statute.<sup>38</sup> Thus, the New York Court of Appeals upheld the statute as constitutional.<sup>39</sup>

In the case of *In re Carl N.*,<sup>40</sup> the Family Court of Schenectady County was presented with the question of whether Social Services Law § 384(b) was unconstitutionally vague.<sup>41</sup> The parents argued that the section of the statute, “to plan,” does not give adequate notice of what they must do to avoid having their parental rights terminated.<sup>42</sup> The court held that the statute’s plain language notifies a parent of their duty to “participate in the formulation of a program of action which will realistically tend to accomplish the desired goals of the statute, namely, the return of the child to their custody with adequate care on a permanent, stable basis.”<sup>43</sup>

Similarly, in *United States v. Harris*, the defendant alleged portions of a federal statute were unconstitutionally vague, and

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<sup>34</sup> *Id.* 86 N.Y.2d at 538, 689 N.E.2d at 712, 634 N.Y.S.2d at 666 (quoting *Harris*, 347 U.S. at 617).

<sup>35</sup> *Id.* (noting that when there is a specific intent requirement in a statute, as there is here, it removes the possibility that a defendant would not know his conduct is criminal).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* 86 N.Y.2d at 539, 658 N.E.2d at 712, 612 N.Y.S.2d at 666.

<sup>38</sup> *Schack*, 86 N.Y.2d at 539, 658 N.E.2d at 712, 612 N.Y.S.2d at 666.

<sup>39</sup> *Id.*

<sup>40</sup> 91 Misc.2d 738, 398 N.Y.S.2d 613 (Fam. Ct. Schenectady County 1977).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 743, 398 N.Y.S.2d at 618.

therefore violated his right to due process.<sup>44</sup> In determining the statute's constitutionality, the United States Supreme Court held if the "statute fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" it will be held unconstitutional.<sup>45</sup> Additionally, in *United States v. Petrillo*, the Supreme Court noted that imprecise language will not be determinative of a statute's vagueness if the "language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."<sup>46</sup>

New York courts use virtually the same analysis as the federal courts when determining whether a statute is unconstitutionally vague. Under both the Federal and New York Constitutions a person is to have notice of the conduct being proscribed. The underlying principle for holding statutes unconstitutionally vague is that a person should not be held legally responsible for conduct he or she cannot understand is forbidden.<sup>47</sup> This philosophy adheres to our notions of due process, which is demanded by both the Federal and New York State Constitutions.

*Deborah A. Monastero*

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<sup>44</sup> 347 U.S. at 612.

<sup>45</sup> *Id.* at 617.

<sup>46</sup> 328 U.S. 1, 8 (1947).

<sup>47</sup> *Id.*