THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2011 TERM

NOVEMBER SESSION

No. 2011-0647

IN RE: CHRISTIAN M.
IN RE: ALEXANDER M.

BRIEF OF LARRY M. AND SONIA M.
(NATURAL PARENTS OF CHRISTIAN M. AND ALEXANDER M.)

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QUESTION PRESENTED

DOES THE DUE PROCESS CLAUSE OF THE NEW HAMPSHIRE CONSTITUTION (PART 1, ARTICLES 2 AND 15) REQUIRE THE APPOINTMENT OF COUNSEL FOR AN INDIGENT PARENT FROM WHOM THE STATE SEEKS TO TAKE CUSTODY OF A MINOR CHILD BASED ON ALLEGATIONS OF NEGLECT OR ABUSE?[1]

STATEMENT OF THE CASE AND FACTS

This is an interlocutory transfer of a question of law raised by Larry M. and Sonia M., the natural parents of Christina M. and Alexander M., in the Sullivan County Superior Court. The question, transferred without ruling by said court (Tucker, J.) on August 31, 2011, is as follows:

> Does the due process clause of the New Hampshire Constitution (Part 1, Articles 2 and 15) or the 14th Amendment of the Federal Constitution require the appointment of counsel for an indigent parent from whom the State seeks to take custody of a minor child based on allegations of neglect or abuse?

Statement of Interlocutory Transfer Without Ruling Filed Pursuant to Supreme Court Rule 9 (hereafter "Transfer Statement"), paragraph C, p. 5. By order dated September 29, 2011, this Court accepted the transfer from the Superior Court.[2]

On April 14, 2011 Larry M. and Sonia M. ("the parents") were served with petitions pursuant to RSA 169-C:7, by which the State of New Hampshire, Department of Health and Human Services, Division for Children, Youth and Families ("DCYF"), sought custody of

[1] Because the due process requirements of the State Constitution are at least as protective of individual liberties as those requirements of the 14th Amendment of the United States Constitution consideration of the latter is not necessary. In re Shelby R., 148 N.H. 237, 239 (2002); In re Tracy M., 137 N.H. 119, 122 (1993).

[2] All of the facts set forth below are taken from the Transfer Statement.

their two minor children (Transfer Statement, paragraph 2, p. 2). Two days earlier the Newport Family Division, pursuant to an ex parte petition, had granted custody of the parents' minor children to DCYF. See RSA 169-C:6. The order was issued based upon allegations that the parents were neglecting their children by failing to provide adequate care for them. The gravamen of DCYF's claim against the parents is that they failed to provide a safe and sanitary home for the children, failed to adequately supervise the children and exposed the children to some degree of domestic violence in the form of threatening intimidating behaviors by the father. (Id., paragraph 3, p. 3.)

The parents appeared at a preliminary hearing, which was held on April 15, 2011. See RSA 169-C:15. At the preliminary hearing the court found reasonable cause that the children were neglected and, pursuant to RSA 169-C:10, appointed counsel to represent each of the parents. The court determined that the ex parte order granting custody of the children to DCYF should continue. An adjudicatory hearing was held on May 12, 2011 pursuant to RSA 169-C:18. At the hearing the parents were represented by appointed counsel. After the hearing the court found that both parents had neglected the children and the order granting legal custody to DCYF was continued. (Id., paragraphs 4, 5, p. 2.)

On June 13, 2011 a dispositional hearing was held pursuant to RSA 169-C:19. At the dispositional hearing the parents were represented by appointed counsel. Following the hearing, a dispositional order was issued maintaining legal custody of the children with DCYF, and directing the parents to undertake certain measures before the children may be safely returned to them. (Id., paragraph 6, p. 3.) Following the issuance of the dispositional order, counsel for each parent filed a timely appeal to Superior Court pursuant to RSA 169-

C:28, where a de novo hearing was originally scheduled for August 4, 2011. (Id., paragraph 7, p. 3.)

Pursuant to Laws 2011, 244:77, the Legislature amended RSA 169-C:10, II abolishing the statutory right to counsel for a parent alleged to have abused or neglected his or her child. The amendment became effective July 1, 2011. (Id., paragraph 8, p. 3.) The parents each filed a motion to continue court-appointed counsel in the Superior court. In light of the recent amendment to RSA 169-C:10, II, DCYF objected. In their motions the parents assert that appointment of counsel for indigent parents in child abuse or neglect proceedings is constitutionally mandated under Part 1, Articles 2 and 15 of the New Hampshire Constitution and the Fourteenth Amendment of the Federal Constitution. (Id., paragraph 9, p. 3.)

Sonia M., age 26, is the natural mother of Christian M. and Alexander M. She suffers from severe depression and additionally received special education services in school. She did complete high school, with appropriate accommodations, and later completed coursework necessary to obtain a Licensed Practical Nurse certificate. (Id., paragraph 10, p. 3.) Larry M., age 28, is the husband of Sonia M. and the natural father of Christian M. and Alexander M. He is at least partially disabled and receives Social Security Disability benefits. He is blind in one eye and also received special education services prior to leaving school after the tenth grade. (Id., paragraph 11, p. 4.) Until recently, respondents shared the same household. Their total monthly household income is limited to the father's disability benefits. The mother currently has no income at all. Their entire monthly income is used to provide the basic necessities of life. They have less than $25.00 in the bank and own no assets that they can liquidate to pay for counsel. (Id., paragraph 12, p. 4.)

The parents know of no free counsel available to represent them in this matter beyond the limited representation that current attorneys are providing in connection with assisting them in obtaining court-appointed counsel. (Id., paragraph 13, p. 4.) The parents do not have experience representing themselves in court proceedings. They are not familiar with the governing law and have never prepared a case for trial. They have no experience eliciting testimony from witnesses directly or on cross-examination. The parents do not have the financial resources or any experience determining whether to retain an expert witness. (Id., paragraph 14, p. 4.) At the de novo trial held pursuant to RSA 169-C:28, DCYF will be represented by counsel, who will likely present testimony by social workers, licensed counselors and other professionals. (Id., paragraph 15, p. 4.) Unless this Court answers the transferred question in the affirmative, the parents will have to represent themselves.

SUMMARY OF THE ARGUMENT

For over thirty years indigent parents accused of abusing or neglecting their children had an unquestioned statutory right to the appointment of counsel to represent them in proceedings brought by the State pursuant to RSA Chapter 169-C. This right was clearly given Constitutional status by this Court's ruling in In re Shelby R. in 2003 when this Court ruled that under the due process provisions of the New Hampshire Constitution an indigent *step-parent* has a right to appointed counsel in abuse and neglect cases. In disregard of this Court's constitutional precedent, the New Hampshire Legislature, in 2011, amended RSA 169-C and attempted to eliminate this right.

Developments in child welfare law since this Court's decision in Shelby R. have increasingly linked abuse and neglect cases with proceedings to terminate parental rights brought pursuant to RSA Chapter 170-C by: 1) imposing tight time limits for family reunification in Chapter 169-C cases; 2) giving preclusive effect to judicial findings made in Chapter 169-C proceedings which can be outcome determinative in termination cases; and 3) allowing the same judicial officer, who in the RSA 169-C proceedings ordered the State to file a petition to terminate parent rights, to preside over the termination case regarding the same family that was the subject of the abuse or neglect case. Such developments have made all proceedings under RSA 169-C a critical part of the termination process and makes this Court's ruling in Shelby R. more compelling than ever.

The action by the Legislature is totally at odds with decades of this Court's rulings which have recognized the natural, inherent, and fundamental rights of parents to the care and custody of their children. Moreover, it forces laypersons, who often suffer from educational, developmental, and emotional handicaps, to represent themselves against a State armed with specialized lawyers, professional social workers, and reports and letters from medical and mental health experts, police, and others that are filled with second and third hand information. This fundamentally unfair process confronts parents throughout the State of New Hampshire with a constitutionally unacceptable risk of erroneous deprivation of their custodial rights. In light of the State's record of effectively providing counsel for parents for over thirty years there is no reason to believe that the State faces a heavy enough fiscal burden to justify an abrogation of such a fundamental right. Finally, the Legislature's repeal of the indigent parent's right to counsel places New Hampshire completely outside of the mainstream of other jurisdictions.

I. THE DUE PROCESS CLAUSE OF THE NEW HAMPSHIRE CONSTITUTION REQUIRES THE APPOINTMENT OF COUNSEL FOR INDIGENT PARENTS WHEN THE STATE SEEKS TO TAKE CUSTODY OF THEIR CHILDREN.

In 1979 the legislature enacted RSA 169-C and its companion statutes 169-B and D, thereby creating a comprehensive and integrated system of juvenile justice. From that time until July 1, 2011, parents accused of neglecting or abusing a child could rely on their right to counsel as provided in RSA 169-C:10. That right has now been eliminated by the legislature. However, it is a right not merely of statutory, but of constitutional dimensions rooted in the due process requirements of Part 1, Articles 2 and 15 of the New Hampshire Constitution.

A. This Court Has Already Recognized Parents' Constitutional Right To Counsel.

Analysis of Mr. and Mrs. M's due process claim requires this Court to first determine whether they have a legally protected interest and, if so, to then decide whether due process requires the appointment of counsel as an appropriate procedural safeguard to protect that interest. In re Shelby R., 148 N.H. 237, 239 (2002); Petition of Preisendorfer, 143 N.H. 50, 52 (1998). In considering the rights of step-parents, who clearly have a lesser legal status than natural parents, this Court has already correctly answered both inquiries in the affirmative. In re Shelby R., 148 N.H. 237.

In coming to its conclusion that the due process requirements of the State Constitution mandate the appointment of counsel for indigent step-parents accused by the State of abuse or neglect, this Court in In re Shelby R, started with the deeply rooted proposition that "a natural parent's role in family life is a fundamental liberty interest under Part 1, Article 2 of the State Constitution." Id. at 239, citing to Stanley D. and Deborah

D.,„124 N.H. 138, 142 (1983). See also, In re Father, 155 N.H. 93, 95 (2007); In the Matter of Jeffrey G., 153 N.H. 200, 203 (2005); Nelson & Horsley, 149 N.H. 545, 547 (2003); In re Guardianship of Brittany S., 147 N.H. 489, 491 (2002); In re Bill F., 145 N.H. 267, 272 (2000); Petition of Kerry D., 144 N.H. 146, 149 (1999). This Court then observed that counsel for the *step-parent* is required to prevent the erroneous deprivation of the step-parent's fundamental interests due largely to: (1) "the relatively low 'preponderance of the evidence' standard mandated by RSA 169-C:13"; and (2) the use of "expert medical and psychiatric testimony which few parents [or step-parents] are equipped to understand and fewer still to confute." In re Shelby R., 148 N.H. at 241 (citations omitted).

Finally, relying on the statutory purpose to "establish a judicial framework to protect the rights of *all* parties involved…" RSA 169-C:2, I (emphasis added), this Court in Shelby R. rejected the argument that the appointment of counsel for step-parents would result in an undue fiscal burden on the State. Id., at 241-242. It came to this conclusion notwithstanding the fact that providing counsel to indigent step-parents would *add to the existing cost of appointed counsel for natural parents.* Thus under this Court's ruling in Shelby R. the fiscal burden of appointing counsel for natural parents cannot be regarded as a constitutionally acceptable reason for the State's refusal to provide counsel for indigent parents in abuse and neglect proceedings.

B. Post "Shelby" Developments Confirm Its Vital Importance.

Since this Court decided Shelby R., developments in the law pertaining to neglect and abuse cases have only made a more compelling case for the appointment of counsel. In 1997, the United States Congress enacted the Adoption and Safe Families Act, Pub.L., 105-

89, known generally as "ASFA." This required all states, including New Hampshire, to make sweeping changes in their laws governing child abuse and neglect, and RSA 169-C was amended in 1999 to effectuate these changes. The changes in the law were designed to provide for a genuine time limitation on these proceedings and, as codified, provide that the Court must require the State to file a Petition for the Termination of Parental Rights if a child has been in an out-of-home placement for a designated period of time. RSA 169-C: 24-a. AFSA also required the states to hold the permanency hearings discussed below to determine whether the state should be ordered to file a petition for termination of parent rights. RSA 169-C:24-b.

The impact of these ASFA-mandated changes was to provide a direct linkage between proceedings under RSA 169-C and RSA 170-C where a frequently utilized ground for termination of parental rights is the parent's failure to correct conditions that led to a finding of abuse or neglect. Just this year this Court in In Re Michael E., et al., (Docket #2011-115, decided September 22, 2011) held that the finding of abuse or neglect in a case brought under RSA 169-C had a collateral estoppel effect in a subsequent proceeding for termination of parental rights. Logically, the court's prior determination that DCYF made "reasonable efforts" called for in RSA 169-C:24-b, III, would likewise have the same preclusive effect when the court that must rule on termination applies the statutory criterion set forth in RSA 170-C: 5, III (failure to correct the conditions leading to the finding of neglect and abuse "despite *reasonable efforts* under direction of the district court") (emphasis added). Thus, the risk of deprivation of the parents' fundamental right to custody of their children on a *permanent* basis is nearly a certainty based on adverse findings against a parent who cannot afford representation at the permanency hearing or prior phases of the

proceedings held pursuant to RSA 169-C. It is also important to note that the same judicial officer who has already made required findings of "reasonable efforts" and "failure to correct" in neglect and abuse proceedings may also preside over the proceedings to terminate parental rights that he or she has ordered the state to commence.[3] This makes counsel's role in the earlier neglect and abuse proceedings even more vital to the protection of the parent's interests.

In the case before the Court, the parents both have intellectual limitations, are unable to adequately defend themselves, are indisputably indigent, and yet will only have representation when the State files its RSA 170-C petition to terminate their parental rights. By then the attorney would be *unable* to effectively intervene as, based on this Court's recent rulings, the relevant determinations could not be challenged. Thus, the deprivation of counsel at the inception of an abuse or neglect case renders almost meaningless the right to counsel at a subsequent termination of parental rights case, based upon the same facts. The increasing melding of the statutory processes of RSA 169-C and RSA 170-C serves to reinforce and highlight the validity of this Court's ruling in Shelby R. The natural and fundamental rights of a parent, protected by Part 1, Articles 2 and 15 of the New Hampshire Constitution, require that the State restore its long standing practice of providing counsel when an attorney is most necessary, and continuing throughout a process where each step can create an irreversible record leading to the potential total loss of that protected interest.

Finally, it should be noted that Shelby R. not only is consistent with the previous jurisprudence of this Court, but has been followed by this Court on several occasions. In In

[3] The process whereby the same judicial officer presides over both 169-C and 170-C proceedings involving the family was apparently endorsed by the Court in an unpublished, but widely circulated decision.

re Father, 155 N.H. 93, 95 (2007), while reaching a conclusion that a non-accused parent did not have a constitutional right to counsel, this Court repeatedly and approvingly cited its holding in Shelby R. This Court also cited to Shelby R. in Nelson and Horsely, 149 N.H 545, 551 (2003), and again as recently as last year in State v. Furgal, 161 N.H. 206 (2010). Certainly, this Court would not rely on a decision it did not fully endorse as binding precedent.

The very roots of our legal structure compel this Court to follow Shelby R. Writing over 230 years ago, in his Commentaries, Blackstone states:

> For it is an established rule to abide by former precedent, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.

1 Blackstone Commentaries 69.

This Court has repeatedly endorsed Blackstone's reasoning, noting that "[t]he doctrine of stare decisis demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results." Kalil v. Town of Dummer Zoning Board of Adjustment, 159 N.H. 725, 731 (2010). Based on its ruling in Shelby R., this Court must rule that Part 1, Article 2 of the New Hampshire Constitution requires the appointment of counsel for indigent parents when the State seeks to take custody of their children pursuant to RSA Chapter 169-C.

II. THE DUE PROCESS REQUIREMENTS OF THE STATE CONSTITUTION REQUIRE THE APPOINTMENT OF COUNSEL FOR PARENTS AT *EVERY STAGE* OF PROCEEDINGS UNDER RSA 169-C.

The correctness of this Court's decision in Shelby R. is further evident through an even closer examination of the state-initiated process by which parents can and do lose their fundamental right to the care and custody of their children. In determining the parameters of the parental right to counsel embedded in the due process requirements of the State Constitution, it is necessary to apply the Court's three –pronged balancing test to the entirety of proceedings held pursuant to RSA 169-C. These factors are: (1) the private interests that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value of, if any, additional or substitute procedural safeguards; and (3) the government interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." In re Shelby R., 148 N.H. 237, 240 (2002); In re Father, 155 N.H. 93, 95 (2007); In re Guardianship of Brittany S., 147 N.H. 489, 419 (2002).

A. As Natural Parents Mr. & Mrs. M. Have A Fundamental Liberty Interest In The Care And Custody Of Their Children.

As pointed out in Argument I, *supra.,* at 6-7*,* this Court has long recognized that "the right of biological and adoptive parents to raise and care for their children is a fundamental right protected by Part I, Article 2 of the New Hampshire Constitution." In re Father, 155 N.H. 93, 95 (2007); In the Matter of Jeffrey G., 153 N.H. 200, 203 (2005); Nelson & Horsley, 149 N.H. 545,547 (2003); In re Shelby R. 148 NH 237 (2002); In re Guardianship of Brittany S., 147, N.H. 489, 491(2002); In re Bill F., 145 N.H. 267, 272 (2000); Petition

of Kerry D. 144 NH 146, 149 (1999); Stanley D. & Deborah D., 124 N.H. 183, 142 (1983). Recognizing that "the loss of one's children can be viewed as a sanction more severe than imprisonment" this Court, over thirty years ago, affirmed that "[t]he role of parents in the rights of the family home have attained the status of a human right and liberty," and are among the "natural, essential, and fundamental rights" protected by the New Hampshire Constitution. State v. Robert H., 118 N.H. 713, 716 (1978).[4] Indeed it would be difficult to identify a liberty interest that is more thoroughly woven into the fabric of the due process requirements of the New Hampshire Constitution than parents' right to the care and custody of their children. Yet without counsel for the parents, these fundamental liberty interests are threatened at every phase of abuse and neglect proceedings.

B. The Failure To Appoint Counsel For An Indigent Parent Creates An Unreasonable Risk Of Erroneous Deprivation Of Her Fundamental Right To Care, Custody, And Control Of Her Child.

1. The Adjudicatory Hearing.

The second prong of the due process analysis adopted by this Court is whether the procedures at issue create the risk of an erroneous deprivation of a protected liberty interest, and the probable value, if any, of additional or substitute procedural safeguards. In re Shelby R., 148 N.H. at 240; In re Father, 155 N.H. at 95; Petition of Preisendorfer, 143 N.H. 50, 53 (1998).

As set forth in Argument I, *supra., at 7,* this Court in Shelby R., identified two factors which make this risk especially dangerous in adjudicatory proceedings held pursuant to RSA

[4] In this case the Court ruled in a proceeding to terminate parental rights that Part 1, Article 2 of the New Hampshire Constitution required the State to prove its case beyond a reasonable doubt. Robert H., 118 N.H. at 716.

169-C:18: (1) "the relatively low 'preponderance of the evidence' standard mandated by RSA 169-C:13"; and (2) the use of "expert medical and psychiatric testimony which few parents or step-parents are equipped to understand and fewer still to confute." In re Shelby R., 148 N.H. at 241 (citations omitted).

While Mr. and Mrs. M. are in complete agreement with the Court's conclusion that the above-cited factors are sufficient to meet the second prong of the Court's due process test, they also submit that the absence of the technical rules of evidence is not, as the Court suggested, a mitigating factor, but rather elevates the risk of erroneous deprivation. More specifically, the admissibility of hearsay can be, and is regularly used by the State to substitute for live testimony of witnesses who allegedly saw or heard acts of which the parent is accused. When social workers and guardians ad litem give narrative testimony and submit affidavits filled with the results of interviews with police, neighbors, relatives, parenting aids, or other social service providers, the parent has no reasonable likelihood of ascertaining the accuracy of the out-of-court declarants' perception and memory, or to examine their biases or ulterior motives. Such narratives and affidavits are difficult for experienced and skilled attorneys to dissect through cross-examination. For the lay person it is almost impossible. Moreover when the information of the medical expert or police is presented through the State's attorney, GAL, or social worker, it becomes clothed with the credibility of the professionals who are in court, often to the detriment of the unsophisticated parent. At the very least, the common use of hearsay to support the State's allegations of neglect or abuse neutralizes any mitigation of the risk of erroneous deprivation that the lack of technical rules of evidence might provide.

In proceedings under RSA 169-C, it should also be noted that the legislature itself has stated that a purpose of the law is "[t]o provide effective judicial procedures through which the provisions of this chapter are executed and enforced and which recognize and enforce the *constitutional and other rights* of the parties and assures them a fair hearing." RSA 169-C:2, II (c) (emphasis added).

A "fair hearing" in this context requires knowledge of a complex and highly technical legal framework. The very language of RSA 169 ("Adjudicatory Hearing," "Dispositional Hearing," "Protective Custody," Legal Supervision") is, to say the least, unfamiliar. Moreover, several basic features of our judicial system are even more problematic for the unrepresented, usually unsophisticated parents. First, this Court has ruled in several neglect and abuse cases that it will "uphold factual findings of the trial court unless they are unsupported by the evidence or are legally erroneous." In re Gina D., 138 N.H. 697, 705 (1994); Tracy M., 137 N.H. 119, 125 (1993). Fact finding by the trial court is therefore essentially final. Thus in addition to overcoming the extraordinary difficulty of cross examining experts and hearsay evidence described above, pro se parents accused of neglect or abuse must also know how to effectively and concisely elicit relevant facts from their own witnesses ***and they must know how to argue them.*** Additionally the pro se parents must know how to preserve issues for appeal, a requirement of which even experienced lawyers often run afoul. In re Jack L., 161 N.H. 611, 615 (2011); In re Adam M., 148 N.H. 83, 85-86 (2002). And issues on appeal must be briefed. See Samantha L. 145 N.H. 408, 411 (2000). It is extraordinarily rare for a parent accused of neglect or abuse to have the knowledge and skills to perform any of these tasks with even minimal competence.

2. The Risk of Erroneous Deprivation Beyond the Adjudicatory Hearing.

In order to fully appreciate the critical importance of counsel in protecting the fundamental right of a parent to the care and custody of the natural child, it is essential to closely examine the statutory scheme as a whole. The inescapable conclusion of such an examination is that the deprivation of parental rights by the State of New Hampshire is a process of multiple hearings held over a period of twelve months (or more) from the date of a finding of neglect or abuse at the adjudicatory hearing. For most parents who are caught up in proceedings pursuant to RSA 169-C, the role of counsel at the dispositional hearing, the review hearings, and the permanency hearing, is at least as important in preventing erroneous deprivation of parental rights as it is at the adjudicatory hearing.

a. Dispositional Hearing.

Within thirty days after a finding of neglect or abuse the court must hold a hearing on disposition (RSA 169-C:18, VII) at which the court reviews the social study, the report and recommendations of DCYF and the Guardian ad Litem (GAL), and makes critically important decisions as to where the child should reside, and who will get legal custody of the child. RSA 169-C:21. If the child is placed out of the home, the court sets the terms and conditions for visitation with parents and siblings and the services the child placing agency must provide. Not infrequently, contact is limited to supervised visits outside of the home which can severely disrupt the parent-child relationship.

The dispositional order must identify all of the problems that need to be addressed to meet the needs of the child and each parent, and must include "conditions the parents shall meet before the child is returned home." RSA 169-C:21, II. See also "*Protocols Relative to Abuse and Neglect Cases and Permanency Planning*, New Hampshire District Court Improvement Project in Cooperation with The Family Division and New Hampshire Probate Court (2003) ("*Protocols*"), Chapter 8, Protocol 10. New Hampshire Rules of Court, Volume 1 - State, 2011 (hereinafter "Rules"), p. 508.

Before the court issues its dispositional order it must review a statutorily required social study conducted by DCYF. This study must include:

(1) home conditions;
(2) family background;
(3) financial assessment;
(4) school record; and
(5) mental, physical and social history of the family, including sibling relationships and residences for appropriateness of preserving relationships between siblings who are separated as a result of placement.

A social study may also include an assessment for child maltreatment, domestic violence, substance abuse and a criminal background check.

RSA 169-C:18, V. *Protocols*, Chapter 6, Protocol 4A, Rules, p. 497.

At the adjudicatory hearing the Court must also review a report from DCYF and its recommendations as to placement, services, and requirements for family reunification. RSA 169-C:21, II; *Protocols*, Chapter 8, Protocol 6, Rules, p. 505. The court must also "identify a specific plan which will outline what each parent must do to correct the conditions which led to the finding of abuse and/or neglect." *Protocols*, Chapter 8, Introduction, Rules, p. 507. The Court Appointed Special Advocate (CASA), who is the GAL, is also authorized to file a report. *Protocols*, Chapter 8, Protocol 3, Rules, p. 504.

When DCYF undertakes its detailed social study, it is almost inevitable that it will unearth mental health, behavioral, developmental, environmental, medical, educational, or other issues involving the parents that adversely affect their parenting. Once issues are identified, it is logical for DCYF to recommend, and the court to order, that all such issues be addressed. When such issues are identified and corrective measures are set forth in the dispositional order they become the benchmarks for family reunification regardless of whether or not they were a significant factor leading to the abuse of the child, or are *necessary* for the safe return of the child to her home. As the protocols recognize, "a key decision for the court to make at the dispositional hearing is whether to approve, disapprove, or modify the case plan proposed by DCYF." *Protocols*, Chapter 8, Protocol 7, Rules, p. 507. Unfortunately, few parents in the system have the sophistication and ability to parse the social study, GAL report, and case plan to ensure that they do not contain significant barriers to family reunification that go beyond what is *necessary* to protect the health of, safety of the child. Usually it is to the benefit of all parties to encourage parents to deal with as many of the identified issues as possible. But the task can easily overwhelm the parent. Moreover, as this Court has noted, "[t]he fundamental liberty interest of natural parents in the care, custody and management of the child does not evaporate simply because they have not been model parents…" Jeffrey G., 153 N.H. at 204; In re Bill F., 145 N.H. at 275 (2000). Unless the dispositional order is carefully vetted to ensure that the focus on the fundamental needs of the child, there is a significant risk that will place "undo emphasis on parental conduct rather than any harm to the child." See Robert H., 118 N.H. at 718.

Since the dispositional order becomes the road map for family unification, it is essential that parents have counsel to assist them and the court in separating the desirable

from the essential, and to make certain that only the latter is required of the parent as a condition of recovering custody of his/her child.

b. Review Hearings.

A periodic review hearing is required within three (3) months of the dispositional hearing to review the status of all dispositional orders. RSA 169-C:24, I. The protocols require an additional review hearing nine (9) months from the dispositional hearing and "strongly encourages" a six-month review as well. *Protocols*, Chapter 10, Protocol 1, Rules p. 510. A critical function of the review hearings is to "examine the progress made by the parties since the conclusion of the dispositional hearing or the last review hearing." *Protocols*, Chapter 10, Introduction, Id. pp. 509-510.

At each review hearing DCYF submits a detailed report stating its view on such issues as….

> (6) whether there is a need for continued placement of the child. In deciding whether the child can be safely reunited, the following should be considered:
>
> (a) the extent to which each parent has engaged in and benefited from the services outlined in the case plan;
>
> (b) the capacity and willingness of each parent to care for the child;
>
> (c) the extent to which changed parental behavior allows for the child's safe return home;
>
> (d) the extent to which parental behavior may continue to endanger the child;
>
> (e) the appropriateness of interactions between each parent and child during visitation; and
>
> (f) the recommendations of service providers.

Protocols, Chapter 10, Protocol 5B, Rules, p. 512

Mental health clinicians and other social services providers are encouraged to provide full reports to DCYF and to the court. *Protocols,* Chapter 10, Protocols 3, 4, Rules, p. 511. Letters or reports from foster parents, pre-adoptive parents, or relatives may also be submitted to the court, without the appearance of the author. *Protocols*, Chapter 10, Protocol 6, Rules, p. 512. As in all professions, however, mental health clinicians run the gamut from excellent to mediocre (or worse), and like many professionals, they bring certain pre-existing judgments or biases to any given case.[5] Relationships between parents and DCYF case workers easily become contentious and may negatively influence the case worker's recommendations. Foster parents, pre-adoptive parents, and relative caregivers can offer valuable insights for the court, but each can be deeply affected by their judgments about or personal relationships with the natural parent, and/or their desire to adopt or obtain guardianship over the child. Since the rules of evidence do not apply to these proceedings (RSA 169-C:12), hearsay contained in all of the reports submitted to the court is generally admissible. A lawyer is therefore essential to afford the disproportionately undereducated, disabled, and/or unsophisticated parents any meaningful opportunity to question the reliability of the hearsay reports that are submitted to the court at each review hearing. The lack of such an opportunity significantly adds to the chance that the children will be erroneously maintained in the custody of the State.

c. <u>The Permanency Hearing</u>.

[5] It should not go unnoticed that RSA 169-C:19-c requires "wherever and to the extent possible" all of court-ordered services are to be performed by providers who are certified by the State pursuant to RSA 170-G:4, XVIII.

For a child who has been in an out-of-home placement for 12 or more months the court must hold a permanency hearing within twelve months of the finding of neglect or abuse. RSA 169-C:24-b, I.[6] It is at the permanency hearing that the court determines when the child will be returned to the parent pursuant to RSA 169-C:23; RSA 169-C:24-b, II. If the standard for return pursuant to RSA 169-C:23 is not met, the court must choose another option for permanency including: termination of parental rights, surrender and adoption, guardianship with a relative, or another planned permanent living arrangement. RSA 169-C:24-b, III. The court must also determine whether DCYF has made "reasonable efforts to finalize the permanency plan that is in effect" (the plan submitted at a prior review hearing) and "whether services to the family have been accessible, available and appropriate." Id.

Indigent parents who are facing the *permanent* loss of the care and custody of their children seldom have any clue about the standards by which to evaluate the reasonableness of DCYF's efforts to finalize the existing plan, or what services should have been accessible, available, and appropriate for a reunification plan. But most problematic is the subtle, yet potentially devastating, results of the statutory standards for return of child to her home. The statute provides as follows:

> **169-C:23. Standard for Return of Child in Placement.** In the absence of a guardianship of the person of the minor, governed by the terms of RSA 463, before a child in out-of-home placement is returned to the custody of his or her parents, the parent or parents shall demonstrate to the court that:
>
> I. They are in compliance with the outstanding dispositional court order;
>
> II. The child will not be endangered in the manner adjudicated on the initial petition, if returned home;

[6] If the child enters an out-of-home placement subsequent to a finding, the permanency hearing is held 12 months from the date the child enters out-of-home placement.

> III. Return of custody is in the best interests of the child. Upon showing the ability to provide proper parental care, it shall be presumed that a return of custody is in the child's best interests.

RSA 169-C:23 (emphasis added).

A thorough reading of the statute reveals three critically important factors which an unsophisticated, uneducated, or otherwise limited parent would be extraordinarily unlikely to understand: (1) that custody of the child may not be returned to the parent for reasons totally unrelated to the original neglect or abuse finding. (e.g. a finding by the court that returning the child to the home is not in his/her best interests, RSA 169-C:23, III); (2) that the child may not be returned to the parent even if the parent is in compliance with the outstanding dispositional order, Id.; and (3) that the *parent* has the burden of proof on all three elements of the statute ("the parent or *parents shall demonstrate to the court* that…" RSA 169-C:23) (emphasis added). Without the guidance of counsel, an unsophisticated parent will seldom be prepared to focus on issues beyond the realm of the neglect or abuse finding as set forth in the original dispositional order, and subsequent court orders that have issued at review hearings. The parent will not likely be able to deal with entirely new issues that may only have been identified in reports filed only days before the review hearing. While "the best interests of the child" is the primary interest of the child protection act, In re Tracy M., 137 N.H. 119, 124 (1993), this standard, as well as the "ability to provide proper parental care" standard, which are embedded in RSA 169-C-23, III cast a very large net in which the uncounseled parent can become ensnared. This defeats the other essential purpose of RSA 169-C: "the State's interest in protecting the rights of all parties." In re Shelby R., 148 N.H. at 241; In re Father, 155 N.H., 93, 97 (2007). The obligation placed on the parent to carry the burden of proof on these issues without the benefit of counsel, in

itself creates an unreasonable risk that the permanency hearing will result in an erroneous and *permanent* deprivation of the parent's fundamental rights.

Finally, as discussed in Argument I, pp. 8-9, *supra.,* the fact findings that the court makes at the permanency hearing with regard to the parent's "failure to correct" and the State's "reasonable efforts" can be outcome determinative in a subsequent proceeding to terminate parental rights. This makes counsel at least as important at this stage of the proceedings as it is in termination cases, in which appointment of counsel for indigent parents is a statutory requirement. RSA 170-C:10.

d. The Confidentiality Requirement Further Enhances the Risk of Erroneous Deprivation.

Although the essential role of counsel in protecting parents from erroneous deprivation of their custodial rights is clear enough from the argument set forth above, Mr. & Mrs. M. urge this Court to consider an additional statutory provision that, without counsel, bars the parents from obtaining any assistance whatsoever in their contest with the State for the care and custody of their child. RSA 169-C:25 makes it a crime for the parent or any other party to a proceeding under RSA 169-C "to disclose any information concerning the hearing without the prior permission of the court." RSA 169-C:25, II. Case records are similarly protected. Thus, at every stage of the proceeding a parent, who has now been deprived of the right to appointed counsel, cannot even seek the assistance of a more sophisticated or experienced friend or relative (unless she has the wherewithal to read the statute and file a motion with the court). Under such circumstances, without restoration of the right to appointed counsel, most parents will face the State -- armed with its lawyers, social workers, experts, and police investigations -- utterly alone.

e. Specialized Lawyers Provide a Further Advantage to the State.

In recognition of the complex and multifaceted nature of child welfare litigation the courts of the State recognize the need and desirability of having attorneys specifically trained in this area. Significantly, the only legal specialty acknowledged and registered in New Hampshire is a "Child Welfare Law Specialist" (See Exhibit A, pp. 29, 30, *infra*). Not surprisingly the majority of such specialists are employed by the New Hampshire Department of Health and Human Services. Id. This is indicative of yet another advantage the State has over the parent since an "ordinary" attorney may be outmatched by a specialized and informed attorney. Without a lawyer of any kind, however, the average lay person will be grossly overmatched thereby adding to a constitutionally unacceptable risk of erroneous deprivation of the parent's fundamental rights.

C. The State's Interests Are Insufficient to Justify Deprivation of Indigent Parents' Custodial Rights Without Affording Them Appointed Counsel.

While recognizing the "primary interest" of Chapter 169-C in the protection of children, this Court has taken serious note of the Act's other essential purpose which is "to establish a judicial framework to protect the rights of *all* parties involved in the adjudication of child abuse or neglect cases." RSA 169-C:2, I (2002) (emphasis added); Jeffrey G., 153 N.H. at 204; In re Shelby R., 148 N.H. at 438-39. For the reasons set forth above, counsel for indigent natural parents accused of neglecting or abusing their children is absolutely necessary to reasonably address the State's interest in providing *all* parties a fair hearing.

In addressing the fiscal and administrative burdens that will be imposed on the State if this Court re-affirms the right of indigent parents to appointed counsel, this Court should consider three salient facts: First, although the cost of appointing counsel for indigent parents is not insignificant,[7] this is a cost that the State has been undertaking for over thirty years, without unduly burdening the State Treasury. Second, since the State was paying for counsel for indigent parents for more than three decades, it clearly has procedures in place to do it. There is no reason to believe that the re-introduction of appointed counsel for indigent parents should place any new administrative burdens on the State. Third, even in these times of strained state budgets, thirty-six states, plus the District of Columbia, still provide counsel to indigent parents as a right in child protection cases.[8] As a relatively affluent state[9] there is no reason why New Hampshire cannot bear the financial and administrative burden that the great majority of other states are shouldering so that all parents can retain their most fundamental rights.

D. There Are No "Additional or Substitute Measures" To Protect Parent's Rights.

Having established that counsel for parents facing the loss of custody of their children is prima facie necessary to protect their fundamental rights, this Court must still examine "the probable value, if any, of additional or substitute procedural safeguards that

[7] $1,286,857.17 in FY 2010, and $1,051,416.27 in FY 2011, Interlocutory Appeal Statement, paragraph 16, p. 4.

[8] See Exhibit B, pp. 31-33, *infra* for complete list of authorities from other jurisdictions

[9] New Hampshire's Median Household Income the 7th highest in the United States. See 2009 American Community Survey 1-Year Estimates, United States Census Bureau, Exhibit C, pp. 34, 35, *infra.*

the State has provided." In re Shelby R., 148 N.H. at 240. The simple truth is that in abrogating the indigent parent's statutory right to appointed counsel, the General Court provided absolutely nothing in the way of "additional or substitute procedural safeguards." The "procedural safeguards" left to indigent parents -- the lack of the formal rules of evidence, the closed courtroom, and the lack of a jury -- were all available to step-parents accused of abuse or neglect when this Court ruled in In re Shelby R. that the appointment of counsel is constitutionally required. Nothing has been added to protect the parents' fundamental rights. The pre-existing procedures are no more adequate than they were when this Court recognized their inadequacy in In re Shelby R., Id.

Finally, it is instructive to note that from 1999 to the present, no less than fifteen abuse or neglect cases have been appealed by the parent, fully argued before this court (all by counsel) and decided by a full, formal opinion.[10] At least five have resulted in reversals favorable to the appellant parent, three on *constitutional grounds*. See In re Shelby R., *supra.*; Bill F., *supra.;* Petition of Kerry D., *supra.*; In re Juvenile 2004-637, 152 N.H. 805 (2005) (non-constitutional ruling); In re Juvenile 2002-511-A and 511-B; 149 N.H. 592 (2003) (non-constitutional ruling). This attests to the variety and complexity of the issues that arise from cases arising under Chapter 169-C and the vital role played by counsel in preventing erroneous deprivation of the natural, inherent rights of natural parents to custody of their children.

[10] In re Cierra L., 161 N.H. 185 (2010); In re Father 2006-360, 155 N.H. 93 (2007); In re Juvenile 2004-637, 152 N.H. 805 (2005); In re Juvenile 2003-604-A, 151 N.H. 719 (2005); In re Juvenile 2002-511-A and 2002-511-B, 149 N.H. 592 (2003); In re Juvenile 2002-209, 149 N.H. 559 (2003); In re P. Children, 149 N.H. 129 (2003); In re Juvenile 2002-098, 148 N.H. 743 (2002); In re Shelby R., 148 N.H. 237 (2002); In re Adam M., 148 N.H. 83 (2002); In re Diane R., 146 N.H. 676 (2001); In re Samantha L., 145 N.H. 408 (2000); In re Bill F., 145 N.H. 267 (2000); In re Craig T. and Megan T., 144 N.H. 584 (1999); Petition of Kerry D., 144 N.H. 146 (1999).

CONCLUSION

This Court has stated that where a constitutionally protected liberty interest, such as a parent' s right to the care and custody of her children, is implicated "the due process inquiry focuses on fundamental fairness." Bill F., 145 N.H. at 272.

> "[a] fundamentally unfair adjudicatory procedure is one… that gives a party a significant advantage or places a party in a position of prejudice or allows a party to reap the benefit of his own behavior in placing his opponent at an unmerited and misleading disadvantage."

In re: Bill F., 145 N.H. at 274.

For the reasons set forth above it is clear that by funding lawyers for the State, and by revoking the indigent parent's right to counsel, the General Court has created a fundamentally unfair judicial procedure that is at odds with any reasonable concept of due process of law. Mr. and Mrs. M., the natural parents of Christian M. and Alexander M., urge this Court to follow its well reasoned and consistent precedents and answer the question transferred by the Sullivan County Superior Court by reaffirming that the due process provisions of Part 1, Articles 2 and 15 of the New Hampshire Constitution guarantee them, and all other indigent parents, the right to counsel at all phases of proceedings initiated by the State under the provisions of RSA 169-C.

RESPECTFULLY SUBMITTED,

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DATED: November 18, 2011

CERTIFICATE OF SERVICE

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