THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2011-0647

In re C.M.; In re A.M.

BRIEF FOR THE STATE OF NEW HAMPSHIRE, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION FOR CHILDREN, YOUTH AND FAMILIES

Interlocutory Transfer from Sullivan County Superior Court

THE STATE OF NEW HAMPSHIRE,
DEPARTMENT OF HEALTH & HUMAN SERVICES, DIVISION FOR CHILDREN, YOUTH AND FAMILIES

Michael A. Delaney
Attorney General

Jeanne P. Herrick, Bar No. 13817
Attorney
Civil Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3650

January 27, 2012

(Oral Argument Requested)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Constitutional Provisions

ISSUES PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment requires the appointment of counsel for an indigent parent from whom the State seeks to take custody of a minor child based upon allegations of neglect or abuse?
2. Whether the Due Process Clause of the New Hampshire Constitution (Part I, Articles 2 and 15) requires the appointment of counsel for an indigent parent from whom the State seeks to take custody of a minor child based upon allegations of neglect or abuse?

STATEMENT OF THE CASE

This is an interlocutory transfer from the superior court without ruling filed pursuant to Supreme Court Rule 9. By order dated September 29, 2011, the case was accepted by this Court.

STATEMENT OF FACTS

L.M., father, and S.M., mother, are the parents of C.M. and A.M., minor children. *See* Statement of Facts Necessary to Understanding of Controlling Question of Law (Statement of Facts) ¶ 1. On April 14, 2011, 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 their two minor children. *See id.* ¶ 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; Statement of Facts ¶ 3. The order was issued based upon allegations that the parents were neglecting their children by failing to provide adequate care for them. *See* Statement of Facts ¶ 3. 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 and intimidating behaviors by the father. *See id.*

The parents appeared at a preliminary hearing, which was held on April 15, 2011. *See* RSA 169-C:15; Statement of Facts ¶ 4. 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. *See id.* The court determined that the *ex parte* order granting custody of the children to DCYF should continue. *See id.* An adjudicatory hearing was held on May 12, 2011. *See* RSA 169-C:18; Statement of Facts ¶ 5. At the hearing, the parents were represented by appointed counsel. *See* RSA 169-C:10, II(a) (2002); Statement of Facts ¶ 5. After the hearing, the court found that both parents had neglected the children and the order granting legal custody to DCYF was continued. *See* Statement of Facts ¶ 5. A dispositional hearing was held on June 13,

2011. *See* RSA 169-C:19; Statement of Facts ¶ 6. At the dispositional hearing, the parents were represented by appointed counsel. *See* Statement of Facts ¶ 6. 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. *See id.*

Following issuance of the dispositional order, counsel for each parent filed a timely appeal to the superior court pursuant to RSA 169-C:28, where a *de novo* hearing was originally scheduled for August 4, 2011. *See* Statement of Facts ¶ 7. Pursuant to Laws 2011, 244:77, the legislature amended RSA 169-C:10, II. The amendment eliminated the provision requiring the court to appoint counsel for an indigent parent alleged to have abused or neglected his or her child. *See id.* The amendment became effective July 1, 2011. *See id.*

The parents in this case each filed a motion in superior court seeking to continue representation by the counsel appointed by the circuit court. *See* Statement of Facts ¶ 9. In their motions, the parents assert that the Due Process Clauses of the State and Federal Constitutions require appointment of counsel. *See id.* As factual support for her motion, the mother asserts that she suffers from severe depression and received special education services in school. *See id.* ¶ 10. She has a high school diploma and has completed to coursework necessary to obtain a Licensed Practical Nurse certificate. *See id.* The father asserts that he is partially disabled and receives Social Security Disability benefits. *See id.* ¶ 11. He is blind in one eye and also received special education services prior to leaving high school after tenth grade. *See id.*

Until recently, the parents shared the same household. *See id.* ¶ 12. Their total household income is limited to the father's disability benefits. *See id.* The mother currently has no income at all. *See id.* They have less than $25.00 in the bank and own no assets that they can liquidate to pay for counsel. *See id.* Consequently, they contend that they do not have sufficient resources to pay for counsel.

The parents assert that they do not have prior experience representing themselves in court proceedings. *See id.* 14. They also claim that they are not familiar with the governing law. *See id.* They assert that they have never prepared a case for trial and do not have any experience eliciting testimony from witnesses directly or on cross-examination. *See id.* Further, they claim that they do not have the financial resources or any prior experience determining whether to retain an expert witness. *See id.* In the proceedings, DCYF will be represented by counsel. *See id.* ¶ 15. The court will likely hear testimony by social workers, licensed counselors and other professionals. *See id.*

In Fiscal Years 2010 and 2011, when courts were statutorily required to appoint counsel to indigent parents alleged to have abused or neglected their children, the State expended $1,286,857.17 and $1,051,416.27 respectively, in payments to appointed counsel in abuse and neglect cases. *See id.* ¶ 16.

SUMMARY OF THE ARGUMENT

In *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the United States Supreme Court held that the Due Process Clause of the United States Constitution does not require appointment of counsel for indigent parents in every termination of parental rights case. Rather, even where the State seeks to permanently sever the parent/child relationship, due process is satisfied where the court makes a determination of whether fundamental fairness requires appointment of counsel on a case-by-case basis. Because the parental interest at stake in an abuse or neglect proceeding is lower than in a termination of parental rights proceeding, the Fourteenth Amendment does not require appointment of counsel in every abuse or neglect proceeding.

This Court has adopted the same standard for due process under Part I, Article 15 that has been adopted by the United States Supreme Court for the Fourteenth Amendment. While the Court has recognized that the right to raise and care for one's children is a fundamental liberty interest protect by the State Constitution, it has also recognized that those rights are subordinate to the State's *parens patriae* power, and must yield to the welfare of a child. Moreover, the fundamental nature of a parent's liberty interest in an abuse or neglect proceeding, where the State's purpose is to protect the safety and welfare of children while preserving the family unit, is less substantial than it is in a parental termination proceeding, where the State's purpose is to sever the parent-child relationship.

Except for *In re Shelby R.*, 148 N.H. 237 (2002), the pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist *only where* the litigant may lose his physical

liberty if he loses the litigation. The plurality's ruling in *In re Shelby R.* should not be adopted for the proposition that an indigent litigant has a *per se* right to appointed counsel where the State seeks to remove custody of his or her child because it is inconsistent with this Court's precedent and it would have a far reaching affect requiring appointment of counsel in many other cases including proceedings under RSA chapters 169-B, 169-D, 173-B, and 461-A.

In applying the due process factors adopted under both the state and federal constitutions, given the procedural protections and the State's interest in the informality, flexibility and economy of a process that best serves the purposes of RSA chapter 169-C, the parents in this case have not made a sufficient showing that the particular facts and circumstances of their cases require appointment of counsel.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION DOES NOT REQUIRE APPOINTMENT OF COUNSEL FOR PARENTS CHARGED WITH ABUSE OR NEGLECT UNDER RSA CHAPTER 169-C.

"In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution." *Lassiter v. Department of Social Services*, 452 U.S. 18, 33 (1981). Whether it is wise public policy to provide appointed counsel to indigent parents in abuse or neglect proceedings is not an issue before this court. Rather, the questions in this case are limited to determining what is fundamentally fair and therefore constitutionally required.

A. Under The Fourteenth Amendment, Parents Do Not Have A *Per Se* Right To Appointed Counsel In An Abuse Or Neglect Proceeding.

In *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the United States Supreme Court considered whether a parent in a termination of parental rights proceeding has a right to appointed counsel under the Fourteenth Amendment of the United States Constitution. The *Lassiter* Court held that parents do not, *per se*, have a right to appointed counsel in termination proceedings. *See id.* at 24-27.

The court arrived at its conclusion by reviewing precedent and the nature of the interests at stake. *See id.* In doing so, it observed that "[t]he pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist *only where* the litigant may lose his physical liberty if he loses the litigation." *Id.* at 25 (emphasis added). Hence, whether criminal proceedings, *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407

U.S. 25 (2006), or juvenile delinquency proceedings, *In re Gault*, 387 U.S. 1 (1967) or involuntary commitment proceedings, *Vitek v. Jones*, 445 U.S. 480 (1980), "it is the defendant's interest in personal freedom, which triggers the right to appointed counsel . . . ." *Lassiter*, 452 U.S. at 25. "In sum, the Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and [the *Lassiter* Court] thus [drew] from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Id.* at 26-27. Because parents in abuse or neglect proceedings, if they lose, may not be deprived of their physical liberty, it is presumed that they are not entitled to appointed counsel under the Fourteenth Amendment.

After recognizing the presumption that appointed counsel is not required, the *Lassiter* Court evaluated the three elements set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) – the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. *See Lassiter*, 452 U.S. at 27. To make its determination, the court balanced the *Mathews'* factors "and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." *Id.*

With respect to the private interests at stake, the court observed that "a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Id.* (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). Where, as in *Lassiter*, the state sought to terminate the parent's relationship with her child, the court concluded that "[a] parent's interest in the accuracy

and justice of the decision . . . is a commanding one." *Lassiter*, 452 U.S. at 27. The court also noted that where the allegations in a petition are based upon alleged criminal activity, "[p]arents so accused may need legal counsel to guide them in understanding the problems such petitions may create." *Id.*

With respect to the government's interest, the court observed that because the State has an "urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision." *Id.*

> For this reason, the State may share the indigent parent's interest in the availability of appointed counsel. If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal.

Id. at 27-28. The State's and the parent's interest, however, clearly diverge where it comes to the point of paying for the cost of providing appointed counsel and the State's pecuniary interest is legitimate. *Id.* at 28. In providing appointed counsel to indigent parents accused in abuse or neglect proceedings in the past two fiscal years, the State incurred expenses exceeding one million dollars annually.

The *Lassiter* Court then considered the risk that a parent will be erroneously deprived of his or her child if not represented by counsel. In considering the risk, the court reviewed the procedural protections such as the standard required for filing a petition, the availability of guardian *ad litem* appointment to represent the interest of the child, the scope and nature of the hearing, the burden of proof and the opportunity for appellate review. *See id.* at 29. Though the proceedings are likely to be factually driven without the burden of difficult questions of substantive or evidentiary law, the court

recognized that "the ultimate issues with which a termination hearing deals are not always simple . . . ." *Id.* at 30. Rather, "[e]xpert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, is sometimes presented." *Id.* Further, "[t]he parents are likely to be people with little education, who have had uncommon difficulty dealing with life, and who are, at the hearing thrust into a distressing and disorienting situation." *Id.* Nonetheless, upon weighing the respective interests and the risk of error, the court concluded that due process does not require appointment of counsel in every parental termination case. *Id.* at 31.

In arriving at its conclusion, the court reasoned that there may be cases where "the parental interests were at their strongest and the State's interests were at their weakest, and the risks of error were at their peak," such that due process required the appointment of counsel but that it would not be the same for every case. *Id.* And, "since 'due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed,'" the Federal Constitution does not require the appointment of counsel in every termination proceeding. *Id.* (citation omitted); *In re "A" Children*, 193 P.3d 1228, 1256-57 (Haw. App. Ct. 2008) (applying *Lassiter* to termination proceeding).

Because the parental interests at stake in abuse or neglect proceedings is even lower than in a parental termination proceeding, the Federal Constitution does not require appointment of counsel in every abuse or neglect proceeding. *See Department of Soc. Servs. v. Perry*, 385 N.W. 2d 287, 292-93 (Mich. App. Ct. 1986).

B. Under The Fourteenth Amendment, The Parents In This Case Do Not Have A Right To Appointed Counsel In Their Abuse Or Neglect Proceeding.

In determining on a case-by-case basis whether fundamental fairness required appointment of counsel, the *Lassiter* Court adopted "the standard found appropriate in *Gagnon v. Scarpelli*, and [left] the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instances by the trial court, subject, of course, to appellate review." *Lassiter*, 452 U.S. at 31-32. In the context of the probation revocation, the court held that "[i]t is neither possible nor prudent to attempt to formulate a precise detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements." *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). The facts and circumstances are susceptible to almost infinite variation and a considerable discretion must be allowed the trial court. *Id.*

In determining whether due process required appointment of counsel under the specific facts and circumstances at issue in *Lassiter*, the court considered whether there was a genuine dispute as to the factual allegations and, even if there was not, whether there were other issues such as allegations of criminal conduct, expert witness testimony, or troublesome points of law, procedural or substantive, that would make her case complex or difficult to present. Though Ms. Lassiter disputed some of the factual allegations and counsel could have assisted her in presenting her case better, the court concluded that the absence of counsel did not make the proceeding fundamentally unfair. While hearsay testimony was no doubt admitted, that circumstance did not leave the parent incapable of presenting her defense. Further, the case did not involve allegations of criminal conduct, no expert witnesses testified, and the case presented no specially

troublesome points of law. This case similarly presents no unusual circumstances that would make the proceeding in the absence of counsel fundamentally unfair.

In this case, though it is not clear on the record presented, it can be assumed that the parents contested at least some of the factual allegations in the adjudicatory hearing. Nonetheless, they do not assert that the petition alleged criminal conduct, or that the proceedings through the dispositional hearing required expert testimony or that any specially troublesome points of procedural or substantive law were present. In sum, they do not present any facts or circumstances that would make their cases complex or difficult to present. As noted in *Lassiter*, neither the admission of hearsay evidence nor the parents' inability to present a complete defense is sufficient to make the proceeding fundamentally unfair in the absence of counsel. Thus, the parents' assertions that they are generally not familiar with presenting a case for trial and eliciting testimony alone are not sufficient to require appointed counsel. Moreover, the court has in place procedural protections that reduce the risk that the parent will suffer an erroneous deprivation.

The procedural protections in place include informal proceedings where parents are made aware of the process and potential consequences. *See generally* Protocols Relative to Abuse and Neglect Cases and Permanency Planning. RSA 169-C:2, I provides that its purpose is to "provide protection to children whose life, health or welfare is endangered and to establish a judicial framework to protect the rights of all parties involved in the adjudication of child abuse or neglect cases." To further this purpose, the court system has established and published comprehensive protocols for use in child abuse or neglect proceedings. *See* Protocols Relative to Abuse and Neglect Cases and Permanency Planning. In conjunction with the protocols, the court utilizes

acknowledgement forms and notices to accused parents. *See, e.g.*, Forms NHJB-2192-DF; NHJB-2209-DF; NHJB-2258-DF; NHJB-2270-DF. Together, the forms and the procedures set forth in the protocols create a process from which the court may determine that a parent has sufficient understanding to assure a fundamentally fair process.

Moreover, there is an adequate opportunity for the court to determine whether counsel is constitutionally required in those cases where the facts or circumstances are particularly complex or difficult to present. Prior to the adjudicatory hearing, the court holds a preliminary hearing during which it may also determine whether there are special circumstances that require appointment of counsel. *See* RSA 169-C:15. At the preliminary hearing, DCYF must present the court with sufficient evidence for the court to find that "reasonable cause exists to believe that the child is abused or neglected." RSA 169-C:15, I. If there is sufficient evidence, the court appoints a guardian *ad litem* to represent the interest of the child. *See* RSA 169-C:15, III(a). The statute also requires that "[t]he court . . . determine whether each parent summoned, having custody or control of the child, understands the possible consequences to parental rights should the court find that the child is abused or neglected." RSA 169-C:15, IV. The parents in this case have not alleged that they are incapable of understanding the nature of the proceedings or its potential consequences.

The statute provides further procedural protections to ensure that the process is fundamentally fair for an unrepresented person. The court may issue subpoenas on behalf of the parents for the production of papers or the attendance of any person whose presence is required by the parents. *See* RSA 169-C:11. The hearings are conducted in an informal manner. The rules of evidence do not apply, *see* RSA 169-C:12, and the

hearings are not open to the public, *see* RSA 169-C:14. Additionally, to the extent the conduct alleged in the petition may constitute criminal conduct, parents are free to testify without fear that such testimony may be used in a criminal proceeding. *See* RSA 169-C:12-a. Given these procedural protections and the state's interest in the informality, flexibility and economy of a process that best serves the purposes of RSA chapter 169-C, the parents in this case have not made a sufficient showing that the particular facts and circumstances of their cases require appointment of counsel.

II. THE DUE PROCESS CLAUSE OF THE STATE CONSTITUTION DOES NOT REQUIRE APPOINTMENT OF COUNSEL FOR PARENTS CHARGED WITH ABUSE OF NEGLECT UNDER RSA CHAPTER 169-C.

Part I Article 15 of the State Constitution provides, in relevant part: "No subject shall be . . . deprived of his property, immunities, or privileges, put out of protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land . . . ." "Law of the land in this article means due process of law." *State v. Veale*, 158 N.H. 632, 636 *cert. denied* 130 S.Ct. 748 (2009). "As the phrase 'law of the land' indicates, procedural due process is a traditional, though flexible, concept." *Riblet Tramway Co., Inc. v. Stickney*, 129 N.H. 140, 149 (1987).

This Court has adopted the same standard for due process under Part I Article 15 that has been adopted by the United States Supreme Court for the Fourteenth Amendment, *i.e.*, "[t]he ultimate standard for judging a due process claim is the notion of fundamental fairness." *State v. Mwangi*, 161 N.H. 699, 703 (2011); *cf.*, *Lassiter*, 452 U.S. at 24 (due process "expresses the requirement of 'fundamental fairness'"). "Procedural due process requires 'an opportunity . . . granted at a meaningful time and in a meaningful manner' . . . for [a] hearing appropriate to the nature of the case.'" *Riblet*

Tramway, 129 N.H. at 148 (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982)). "[T]he requirements of due process are flexible and call for such procedural protections as the particular situation demands." *Mwangi*, 161 N.H. at 70 (quoting *Veale*, 158 N.H. at 642). Analysis of the due process claim requires the Court to first determine whether the parents have a legally protected interest and, if so, whether a meaningful opportunity to be heard in the context of an abuse or neglect proceeding requires the appointment of counsel for indigent parents. *See In re Tracy M.*, 137 N.H. 119, 122 (1993).

This Court has recognized that "[t]he right to raise and care for one's children is a fundamental liberty interest protected by Part I, Article 2 of the New Hampshire Constitution." *In re Guardianship of Brittany S.*, 147 N.H. 489, 491 (2002). Undoubtedly, the provisions of RSA chapter 169-C have an affect on a parent's right to raise and care for his or her child. For example, where the court has made a finding of abuse or neglect, the court may issue orders that permit the child to remain with the parents subject to conditions including supervision of parents by DCYF, participation of parents in therapy or medial treatment, and assistance of homemakers or parent aides. *See* RSA 169-C:19, I. The court may also order that legal custody of the child to be temporarily transferred to DCYF or a relative. *See* RSA 169-C:19, III.

A. Under Part I, Article 15, Parents Do Not Have A *Per Se* Right To Appointed Counsel In An Abuse Or Neglect Proceeding.

To determine whether the Due Process Clause of the State Constitution requires appointment of counsel, the Court employs the same three-prong balancing test that is employed by the United States Supreme Court. *See Brittany S.*, 147 N.H. at 491. It considers:

> (1) the private interest affected by the official actions; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of any additional or substitute procedural safeguards; and (3) the government's interest, considering the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

Id. (citing *In re Baby K.*, 143 N.H. 201, 204 (1998) and *Eldridge*, 424 U.S. at 335).

The primary private interest of a parent alleged to have abused or neglected his or her child is the parent-child relationship. As noted above, where the court finds a parent has abused or neglected his or her child, it may intervene in the parent-child relationship by ordering the parents to comply with conditions including supervision by DCYF, participation in therapy or medical treatment, and assistance of homemakers or parent aides or by ordering legal custody of the child to be temporarily transferred to DCYF or a relative. The court may not terminate parental rights in an abuse or neglect proceeding. Rather, "the dispositional order is not permanent and subject to review." *In re Father 2006-360*, 155 N.H. 93, 97 (2007); RSA 169-C:22 and :24. Moreover, the provisions of RSA chapter 169-C must be construed by the court to achieve the purposes of

> keeping a child in contact with his home community and in a family environment by *preserving the unity of the family and separating a child from his parents only when the safety of the child is in danger* or when it is clearly necessary for his welfare or the interests of public safety and when it can be clearly shown that the change in custody and control will plainly better the child.

RSA 169-C:2, II(b) (emphasis added). Thus, the fundamental nature of a parent's liberty interest in an abuse or neglect proceeding is less substantial than it is in a parental termination proceeding where the State's purpose is to sever the parent-child relationship. *Cf. Brittany S.*, 147 N.H. 489, 492 (2002) (holding parent has a lesser interest in proceedings to terminate guardianship because "guardianship may be terminated or

modified and the parental rights are not permanently severed"); *In re M.G., D.H. and R.H.*, 128 P.3d 332, 334 (Colo. Ct. App. 2006) ("parent has no due process right to counsel when the state seeks, not to terminate parental rights, but merely to award custody of the children to other individuals"); *Department of Children's Servs. v. Mims*, 285 S.W.3d 435, 450 (Tenn. App. Ct. 2009).

The parents argue that their interest in the parent-child relationship in an abuse or neglect proceeding is on par with a termination proceeding because a finding of abuse or neglect may later form the basis for a petition for termination. Their reasoning is inconsistent with this Court's precedent. The notion that due process requires appointed counsel in an earlier proceeding if the result may be used in a later proceeding where due process would require appointed counsel was rejected by this Court in *State v. Cook*, 125 N.H. 452, 455 (1984). *See State v. Weeks*, 141 N.H. 248, 250 (1996). In *Cook*, the Court considered whether due process required appointment counsel for violation level traffic offenses where conviction of those offenses later were used a prerequisites to prove a habitual offender felony charge. *See Cook*, 125 N.H. at 454-56. Applying the due process analysis applicable here, the court concluded that appointed counsel was not constitutionally required. Thus, even assuming that the State Constitution would require appointment of counsel in a termination proceeding, the fact that an abuse or neglect finding may be later used as a prerequisite for a termination proceeding does not mean appointment of counsel for an abuse or neglect proceeding is constitutionally mandated. *See In the Interest of S.J.T. and T.N.T.*, 475 So.2d 951, 954 (App. Ct. Fla. 1985); *C.V. v. T.V. and S.V.*, 499 So.2d 159, 162-63 (La. App. Ct. 1986).

A petition for termination of parental rights is not part and parcel of an abuse or neglect proceeding. *See Smith v. Marion County Dep't of Public Welfare*, 635 N.E.2d 1144, 1148-49 (Ind. Ct. App. 1994) (noting abuse or neglect proceeding does not necessarily pave path to termination). Rather, a separate proceeding must be initiated under RSA chapter 170-C. *See* RSA 169-C:24-a; RSA 170-C:4. The timeframe set forth under RSA 169-C:24-a for filing a petition for termination does not create a direct linkage between abuse or neglect proceedings and termination proceedings; rather, it creates a timeframe for rehabilitative efforts. As Justice Dalianis aptly observed *In re Juvenile 2006-674*, 156 N.H. 1, 9 (2007), the time limitations required by federal law were imposed because children deserve permanent living arrangements *if reunification cannot be achieved* in a timely manner.

Once a petition for termination is filed, the State must prove the specific statutory grounds beyond a reasonable doubt. *See* RSA 170-C:5; *In re Robert H.*, 118 N.H. 713 (1978). In addition, the State must demonstrate that termination is in the child's best interest. *In re Juvenile 2003-195*, 150 N.H. 644, 648 (2004). Though a prior finding of abuse or neglect under RSA 169-C may be a prerequisite to bringing a petition for termination of parental rights, the court considering the termination petition may not rely upon the findings made during the course of the abuse or neglect proceedings regarding the parents' failure to correct the conditions or the reasonableness of DCYF's efforts. Instead, the State must prove each statutory element beyond a reasonable doubt. *See, e.g., In re Michael E.*, 162 N.H. __, __ (2011) (decided September 22, 2011) (specifically reviewing *termination proceeding record* to determine whether sufficient evidence to support findings of failure to correct and reasonableness of DCYF efforts beyond a

reasonable doubt); *In re Zachary G.*, 159 N.H. 146, 153 (2009); *In re Craig T.*, 147 N.H. 739, 744-45 (2002).

The Court next examines the risk of an erroneous deprivation of the parents' interests in the parent-child relationship through the procedures used, and the probable value, if any, of appointed counsel as an additional procedural safeguard. The most significant deprivation that a parent may suffer in an abuse or neglect proceeding is temporary loss of custody of his or her child. The issues raised in the petition in this case are not complex – they are basic issues involving the parents' failure to provide a safe and sanitary home, failure to provide adequate supervision, and exposure of the children to non-physical domestic violence. The parents do not allege that there was any expert testimony involved in resolving any factual disputes in the adjudicatory or dispositional hearing. They do not assert that State's petition alleges criminal conduct. Even if they did, testimony regarding such conduct would be inadmissible in criminal proceedings. *See* RSA 169-C:12-a. Nor do they claim that their case presents any specially troublesome points of law. Rather, their case appears to be a run of the mill neglect case, one where the focus of the proceedings in the appeal *de novo* will be on determining the truth of factual allegations, and whether those allegations, if true, should result in a finding that the child was abused or neglected.

In resolving this fact-intensive inquiry, the court does not apply the rules of evidence, but may admit any evidence that it considers relevant and material. *See* RSA 169-C:12. Because the rules of evidence do not apply, the parents may present their cases and challenge the State's case unburdened by difficult questions of evidentiary law. *See id.* Further, the proceedings are held in a closed court before a judge without a jury.

See RSA 169-C:14, :18. This allows the parents to present their cases free from the distraction created by members of the public and the complications of a jury trial. These procedural protections reduce the risk of erroneous deprivation. *See Brittany S.*, 147 N.H. at 493. Further, the courts' orders are subject to regular review (usually once every three months) and may be reviewed additionally upon motion at hearings where prior erroneous deprivations may be corrected. RSA 169-C:22, :24. Moreover, under procedures adopted by the court system, the parents are provided at the outset with a notice explaining the nature of the hearings, the manner in which they will be conducted and the potential consequences, s*ee* NHJB-2192-DF, and at the preliminary hearing, the court must make a determination that each parent "understands the possible consequences to parental rights should the court find that the child is abused or neglected," RSA 169-C:15, IV.

Though the hearings are generally not complex proceedings involving technical rules and complicated legal issues, there may be cases that are, such as those alleging mental incapacity where expert testimony is required. Parents involved in such cases are likely people who are not equipped to understand or challenge such testimony. In such cases, the presence of counsel could make a determinative difference in the outcome. Given the detailed allegations of fact that must support a petition and the required colloquy, in most cases it will be readily apparent to the judge upon making the initial inquiry of the parent at the preliminary hearing whether counsel is required.

Finally, the Court examines the government's interest, including the function involved and the fiscal and administrative burdens that the provision of court-appointed counsel would entail. "The State, in its role as *parens patriae*, has a significant interest in

the protecting the best interests of [children]." *Brittany S.*, 147 N.H. at 493. The purpose of the Child Protection Act is "to provide protection to children whose life, health or welfare is endangered and 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. This Court has held consistently held that "parental rights are not absolute, but are subordinate to the State's *parens patriae* power, and must yield to the welfare of the child." *Preston v. Mercieri*, 133 N.H. 36, 40 (1990); *In re Tracy M.*, 137 N.H. 119, 124 (1993). Because the purpose under RSA chapter 169-C is to "[p]rotect the safety of the child," RSA 169-C:2(a), "[p]reserve the unity of the family whenever possible," RSA 169-C:2(b), [p]rovide assistance to parents to deal with and correct problems in order to avoid removal of children from the family," RSA 169-C:2(c), and "take such action as may be necessary to prevent abuse or neglect of children," RSA 169-C:2(d), the State shares the parents' interest in maintaining the parent-child relationship. As noted above, the State's interest diverges from the parents' interest when it comes to the fiscal burden associated with appointed counsel.

The cost of appointed counsel for parents charged with abuse or neglect is not insignificant – in each State Fiscal Year 2010 and 2011, the State expended more than $1,000,000 on appointed counsel. This expense must be viewed in light of the other expenses the State incurs in protecting the interest of children subjected to abuse or neglect proceedings including the costs related to foster parents, social workers, parent aides, and treatment providers made available to parents and children. These expenses provide the State with an added reason for seeking an accurate result – it would be a

waste of the State's resources to place children out of the home or provide services that are unnecessary.

The parents' liberty interest in the parent-child relationship is an important one, the State has a strong interest in protecting children and preserving the unity of the family and a lesser interest in reducing its fiscal burden, and risk of erroneous deprivation is minimal where the proceeding generally focuses on a resolving factual not legal disputes though it may be significantly increased where expert testimony or complex legal issues are involved. In weighing the factors, due process does not require appointment of counsel in every case. Indeed, appointment of counsel is not constitutionally mandated in most cases. Rather, because "the requirements of due process are flexible and call for such procedural protections as the particular situation demands," *Mwangi*, 161 N.H. at 703, it does not require rigid rules that would sacrifice the State's interest in informality and economy in cases where the absence of appointed counsel does not significantly increase the risk of erroneous deprivation. *See Lassiter*, 452 U.S. at 31-32. Nevertheless, in order to identify those cases where extraordinary circumstances may warrant appointment of counsel, the court should maintain the authority and flexibility to determine whether appointed counsel is necessary to ensure fundamental fairness on a case-by-case basis.

B. In Re Shelby R. Should Not Be Viewed As Controlling Precedent In This Case.

The parents rely upon *In re Shelby R.*, 148 N.H. 237 (2002) to support their claim that they have a *per se* right to counsel. *Shelby R.*, however, should not be afforded such precedential value because the broad rule the parents seek to apply was not decided by a majority of the Court. At the session convened for the case, four justices sat. *See id.* at

243; RSA 490:7. Only two justices concurred in the plurality opinion. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [three] Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell and Stevens, JJ.)). The judgment on the narrowest grounds in *Shelby R.* is that the statute violated due process because it prohibited appointed counsel for an indigent stepparent accused of abusing or neglecting his or her stepchild. *See Shelby R.*, 148 N.H. at 243. Thus, the decisions of this Court have not established a broadly applicable rule requiring appointed counsel for indigent parents accused in abuse or neglect proceedings.

Except for *In re Shelby R.*, 148 N.H. 237 (2002), the pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist *only where* the litigant may lose his physical liberty if he loses the litigation. *Compare In re Father 2006-360*, 155 N.H. at 97-98 (due process does not require appointment of counsel for unaccused non-custodial parent); *In re Brittany S.*, 147 N.H. at 493-94 (due process does not require appointment of counsel for mother seeking to terminate guardianship); *Weeks*, 141 N.H. at 250 (due process does not require appointment of counsel when no term of incarceration is imposed) *with Stapleford v. Perrin*, 122 N.H. 1083, 1088 (1982) (due process requires appointment of counsel in probation revocation proceedings because defendant may be deprived of physical liberty). Thus, to the extent that *Shelby R.* can be read to stand for the proposition that an indigent litigant has a *per se* right to appointed counsel in proceedings

that can affect his interest in the care custody and control of his child, *see Shelby R.*, 148 N.H. at 245, it stands alone and should be reconsidered.[1] *Cf. In re Miller*, 465 N.E. 397, 399 (Ohio 1984) (no constitutional requirement to counsel other than termination proceedings); *In the Matter of A.B.*, 780 P.2d 622, 625 (Mont. 1989) (no constitutional right to counsel in proceedings prior to petition to terminate); *Department of Soc. Servs. v. Nash*, 419 N.W. 2d 1, 5 (Mich. App. Ct. 1987) (no constitutional right to assistance of appointed counsel in child protection proceedings).

"The doctrine of stare decisis demands respect in a society governed by the rules 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." *Jacobs v. Director, N.H. Motor Vehicles*, 149 N.H. 502, 504 (2003) (quotations omitted). Among the factors that should be considered in determining whether precedent should be overruled are:

> (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance

---

[1] A review of the cases cited in the other briefs submitted in this case reveals that only one state under its state constitution has found a due process right to court appointed counsel in a child custody proceeding not involving termination of parental rights. *Flores v. Flores*, 598 P.2d 893 (Alaska 1979). The rule set forth in *Flores* would require appointed counsel for parents in all proceedings under RSA chapters 169-B, 169-C, 169-D and in all divorces where one party is represented by New Hampshire Legal Services or any other agency that receives public funding. Moreover, the Alaska Supreme Court has interpreted its state constitution as requiring appointed counsel in all civil contempt proceedings and paternity suits where the state supplies counsel to the mother. *See id.* at 895.

In *Juvenile Action No. J-64016*, 619 P.2d 1073, 1074-75 (Ariz. App. Ct. 1980), the court did not find that the parent had a constitutional right to counsel. Rather, the court held that the parent's due process rights were violated where she had a statutory right to counsel and the court violated her statutory right by holding a hearing in the absence of counsel.

> that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Jacobs, 149 N.H. at 505 (quotations omitted). "Although these factors guide [the Court's] judgment . . . no single factor is wholly determinative because the doctrine of stare decisis is not one to be either rigidly applied or blindly followed." *State v. Quintero*, __ N.H. __, __ (decided October 12, 2011) (quotations and citations omitted).

First, the rule has proven to be intolerable simply by defying practical workability. In an abuse or neglect proceeding, the extent of interference with the parent-child relationship ranges from providing assistance in parenting skills to the parents to removal of the child from the family home. A parent may suffer the same type of interference with parent-child relationship in other proceedings governed by other statutes. *See* RSA 169-B:19; RSA 169-D:17; RSA 173-B:5; RSA 461-A:6. For example, when a court finds that a person has abused the parent of his or her minor children under RSA chapter 173-B, it may award temporary custody of the children to the other parent or to the department of health and human services. *See* RSA 173-B:5, I(b)(5), (6); *In re Morrill*, 147 N.H. 116, 118-19 (2001). RSA chapter 461-A grants similar powers to the court including broad discretion in determining parental rights and responsibilities, RSA 461-A:6, and the power to enjoin a parent from having any contact with their children, RSA 461-A:9, :10. In proceedings under both RSA chapter 173-B and 461-A, the conduct alleged may involve the commission or attempted commission of a criminal acts or abuse or neglect. *See* RSA 173-B:1, I; RSA 461-A:6, I(j), IV. The orders issued may be enforceable in a criminal proceeding. *See* RSA 173-B:9; RSA 461-A:10, II. Thus, in

some circumstances the parents may have a more substantial liberty interest at stake. Given the similar interest and proceedings involved, it is difficult to see why, under the plurality's reasoning in *Shelby R.*, due process would not require court-appointed counsel whenever an indigent parent's relationship with his or her child may be affected when a petition is brought under RSA chapter 173-B or when a determination of parental rights and responsibilities is made under RSA chapter 461-A.[2] The administrative and fiscal burden to the State of providing appointed counsel in all such cases would be intolerable. Moreover, such a consequence is at odds with established precedent and therefore the rule is unworkable.

The rule is not subject to a kind of reliance that would lend a special hardship to the consequence of overruling. Because a statutory right to counsel for indigent parents in abuse or neglect proceedings previously existed, this Court has not relied upon the rule in *Shelby R.* Rather, it has sought only to distinguish other cases from *Shelby R.* *See In re Father 2006-360*, 155 N.H. at 96. The next factor, which analyzes whether principles of law have so far developed as to leave the old rule no more than a remnant of abandoned doctrine, is not directly relevant here because the principles of due process are well established. As stated above, the problem with *Shelby R.* is that the plurality opinion is at odds with precedent.

Finally, because *Shelby R.* was decided at a time when indigent parents had a statutory right to counsel in abuse or neglect proceedings, the facts have so changed as to have robbed the old rule of significant application or justification. The plurality opinion

---

[2] That a ruling in favor of a *per se* right to appointed counsel in every abuse or neglect proceeding may result in such a consequence is underscored by the argument presented by the ABA in its amicus brief.

justified the rule based upon the familial relationships at stake for both a stepparent and a parent in an abuse or neglect proceeding. In concluding that a stepparent has a right to appointed counsel, the plurality sought to even the playing field – asserting that "[t]he State's interest in providing all parties a fair hearing . . . favors appointing counsel for stepparents." *Id.* at 241. In essence, the plurality's ruling is grounded in equal protection, which is most evident in its statement that "stepparents who demonstrate a full commitment to raising and caring for their stepchildren are generally charged with the rights and duties attributed to natural parents." *Id.* at 242. It is likely that if *Shelby R.* were decided at a time when natural parents were not afforded a statutory right to counsel that the plurality would not have reached the same result. *Cf. In re Kotey M.*, 158 N.H. 358, 361 (2009). Thus, the doctrine of stare decisis does not demand that the plurality rule in *Shelby R.* be carried forward.

Finally, even if this court should conclude that appointed counsel is required as a matter of right to every parent charged in proceedings under RSA 169-C, the appointment should be required only through the dispositional hearing. *In re Brittany S.*, 147 N.H. at 493-94. *See also* RSA 169-C:24 (court shall conduct review hearing to review status of dispositional order and determine whether DCYF has made reasonable efforts including services that are accessible, available and appropriate where reunification is permanency plan).

C. The Parents In This Proceeding Have Not Demonstrated That Their Cases Are Sufficiently Complex To Require Appointed Counsel Under Part I, Article 15.

At best in its application to this case, *Shelby R.* can be read to stand for the proposition that due process requires that the court make a case-by-case determination whether appointed counsel is necessary. In determining whether due process requires

appointment of counsel under the specific facts and circumstances at issue in this case, the court should consider the complexity of the proceeding and the parents' ability to present their cases. As noted above, the record presented does not clearly show that the parents contested the factual allegations in the adjudicatory hearing. Even if they did, they do not assert that the petition alleges criminal conduct, or that the proceedings through the dispositional hearing required expert testimony or that any specially troublesome points of procedural or substantive law were present. In sum, they do not present any facts or circumstances that would make their cases complex or difficult to present.

Neither of the parents alleges that they have any significant physical or mental disability that would prevent them from presenting their case. As for the mother, it is clear that whatever the nature of her learning disability, she was able to obtain a high school education and successfully complete and LPN certification. The father has not disclosed the nature of his disability with sufficient specificity for the Court to assess his ability to understand the proceedings. The parents' assertions that they are generally not familiar with presenting a case for trial and eliciting testimony alone are not sufficient to require appointed counsel, especially in view of the procedural protections that reduce the risk that the parent will suffer an erroneous deprivation.

If this Court should decide that the record is not adequate to determine whether counsel is constitutionally required for these parents given the facts and circumstances of their cases, it may instruct the superior court to make such a determination prior to proceeding with the *de novo* appeal.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court conclude that due process does not require appointment of counsel in abuse or neglect proceedings for indigent parents from whom the State seeks to take custody.

The State desires to be heard orally for no less than 15 minutes.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE,
DEPARTMENT OF HEALTH AND
HUMAN SERVICES, DIVISION FOR
CHILDREN, YOUTH AND FAMILIES

By its attorneys,

Michael A. Delaney
Attorney General

Dated: January 27, 2012

Jeanne P. Herrick, Bar No. 13817
Attorney
Civil Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3650

Certification

January 27, 2012

I hereby certify that two copies of the foregoing brief were mailed this day, postage prepaid, to Michael C. Shklar, Esquire, Elliott N. Berry, Esquire, Ann F. Larney, Esquire and Barbara L. Parker, Esquire, counsel of record and amici Tracy A. Bernson, Esquire, Vivek S. Sankaran, Esquire, Laura J. Brevitz, Esquire, Kysa M. Crusco, Esquire, John Pollock, Esquire, Doreen F. Connor, Esquire, Heather B. Repicky, Esquire and William T. Robinson, III, Esquire.

Jeanne P. Herrick, No. 13817

#699450