THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2012 TERM

FEBRUARY SESSION

Docket No. 2011-0647

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

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

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I. RECENT DECISIONS REINFORCE THE RIGHT TO COUNSEL FOR INDIGENT PARENTS FACING THE LOSS OF THEIR RIGHT TO CARE AND CUSTODY OF THEIR CHILDREN.

In the short time since the filing of the parents' brief, this Court has yet again underscored the rigorous protection of parental rights contained in Part 1, Article 2 of the New Hampshire Constitution. Vacating a probate court ruling on a motion by a natural father to terminate guardianship over his daughter, this Court ruled that when a parent seeks to terminate a consensual guardianship the guardian opposing the termination bears the burden of proving that substitution or supplementation of parental care and supervision is essential for the physical and safety needs of the minor. In Re Guardianship of Reena D., No. 2010-187 (N.H. December 28, 2011). In placing the burden of proof on the guardian and elevating the level of that burden the Court explained "…Part I, Article 2 of the State Constitution protects a parent's fundamental liberty interest in raising or caring for her children." Id. Thus, the Court has shown no indication to overrule its long standing reliance upon the protection furnished parents by the New Hampshire Constitution nor should it now do so simply on the basis of fiscal expediency as urged by the State.

Recent legal developments in Massachusetts further reinforce the parents' position. On January 30, 2012, the Massachusetts Supreme Judicial Court issued a decision in Adoption of Meaghan, 2012 WL 247851 (Mass., January 30, 2012). That court held that in a private adoption proceeding which involved the termination of a parent's rights, "[a]n indigent parent facing the possible loss of a child cannot be said to have a meaningful right to be heard in a contested proceeding without the assistance of counsel," quoting Dep't of Public Welfare v. J.K.B., 393 N.E. 2d 406, 408 (Mass. 1979).

While the Massachusetts Constitution is not identical to ours, it is noteworthy that this Court has been guided by the Supreme Judicial Court's interpretations of it in the recent past. See Claremont School District vs. Governor, 138 N.H. 183, 186 (1993). ("Given that New Hampshire shares its early history with Massachusetts, that we modeled much of our constitution on one adopted by Massachusetts four years earlier, and that the Massachusetts Constitution contains a nearly identical provision… we give weight to the interpretation given that provision by the Supreme Judicial Court…" Id.) The Massachusetts Supreme Judicial Court's expansive view of the due process rights of parents in a "private" adoption scenario is therefore of value to this Court.

Adoption of Meaghan implicitly addresses, and rejects, the argument advanced by the State that a right to counsel in all cases involving parental rights such as divorces, or other custodial actions would create a huge and unknown financial burden on the State. (State's Brief at 27). The State's argument fails to recognize two salient factors: First, this Court has shown itself to be quite adept at distinguishing between cases in which appointed counsel for indigent parents is fundamental to the exercise of a right to a fair and meaningful hearing, and those in which the lack of counsel for the parent does not rise to constitutional dimensions. Compare In re Shelby R.,148 N.H. 237 (2002) to In re Father, 155 N.H. 93 (2007) and In re Guardianship of Brittany S., 147 N.H. 489 (2002). Second, parenting disputes in the context of divorce and post-divorce proceedings do not implicate the loss of parental rights, but merely the apportionment thereof, and do not set a foundation for a total loss of those rights. Indeed, the entire notion of "custody" has been stricken from divorce jurisprudence in this state. In contrast, abuse and neglect proceedings are inextricably and foundationally linked to total termination of parental rights. (See Argument II, B., infra).

Such a profound loss cannot be rendered without affording a parent the full measure of due process of law, including the right to counsel.

II. THE LOSS OF CUSTODY OF A CHILD TO THE STATE IN ABUSE AND NEGLECT PROCEEDINGS IS A PROFOUND INTERFERENCE WITH PARENTS' CONSTITUTIONALLY PROTECTED LIBERTY INTERESTS.

A. The Loss Of Temporary Custody.

The State argues that counsel is not required in abuse and neglect proceedings because the interference with parental rights may be only *temporary* (State's Brief at 16-19). While parents' lack of counsel in abuse and neglect proceedings can bring them perilously close to permanent loss of their parental rights (see below), the State chooses to ignore the profound loss of constitutionally fundamental liberty interests involved in the removal of the child from the home for up to a year pursuant to RSA 169-C. Over such a time period the bonds between parent and child can become severely and permanently weakened. Children removed from their home can feel abandoned by their parents. They can develop new bonds with foster parents, guardians, and the other children who reside with them. Temporary custodians who seek long term custody and social workers who are frustrated with the natural parents can contribute to alienation of the child from the parent.

The involuntary removal of the child from the home – even if the child is returned after the initial three month review – can lead a child to believe that her parents are bad, or even that she herself has done something terribly wrong. Such feelings can have serious adverse effects on the child and on the parent-child relationship. Regardless of whether the deprivation of custody is temporary or permanent, none of these consequences should be inflicted on parents or children in the absence of procedures that guarantee a meaningful

right to be heard. As noted by the Supreme Judicial Court of Massachusetts, an indigent parent lacking the assistance of counsel who must face the State, which "is not only represented by counsel but also has vastly superior resources for investigation and presentation of its case," cannot be said to have a meaningful right to be heard. Dep't of Public Welfare v. J.K.B., 393 N.E. 2d at 408.

B. A Giant Step Along The Road To Permanent Loss Of Parental Rights.

In addition to ignoring the profound loss visited upon parents by the temporary removal of their children, the State cites In re Michael E., 162 N.H. 520 (2011) in an attempt to diminish the profoundly detrimental effect of prior uncounseled findings of neglect or abuse on parents' ability to contest the permanent loss of their children in a Termination of Parental Rights ("TPR") proceeding. (State's Brief at 19). This Court's decision in Michael E., however, emphatically demonstrates the opposite. As the Court explicitly notes, the State must prove only three elements to permanently terminate the parent's rights based on "failure to correct" under RSA 170-C:5: 1) a finding of neglect and abuse; 2) a failure to correct same within twelve months of the findings; and 3) reasonable efforts under the direction of the court to rectify the conditions. Id. This Court's express holding that collateral estoppel bars a parent from challenging findings of neglect under RSA 169-C means that in every TPR case based on "failure to correct" the parents come to the proceedings with one strike against them. Moreover, every TPR proceeding brought by the State will have been preceded by a permanency hearing at which a judge has found that DCYF has made "reasonable efforts to finalize the permanency plan" (RSA 169-C:24-b, III). Such a finding comes dangerously close to a second strike being called on the parents

(on the issue of "reasonable efforts under the direction of the court to rectify the conditions" – see RSA 170-C:5, III) before the TPR hearing even begins. By the time the TPR petition is filed, the parent's chances of recovering the child are hugely diminished.[1]

Due to both the substantial interference with constitutionally protected parental rights involved in the temporary loss of custody of a child, and the profoundly negative effect that neglect and abuse proceedings can have on a parent's efforts to avoid permanent termination of his or her parental rights, due process under the State Constitution requires the appointment of counsel for all indigent parents in proceedings under RSA 169-C.

III. SHELBY R. IS CONTROLLING PRECEDENT.

In its brief, the State relies largely on an analysis of the Federal Constitution (State's Brief at 8-15). However this Court has long held that the State Constitution provides greater protection to parents than does the Federal Constitution. See In the Matter of R.A. and J.M. 153 N.H. 82, 92 (2005). At least as far back as State v Robert H., 118 N.H. 713 (1978) this Court has ruled, "[t]he family and the rights of parents over it are held to be natural, essential, and inherent rights" within the meaning of Part I, Article 2 of the New Hampshire Constitution." Id. at 716. Shelby R. is simply another in a consistent and long line of cases in which this Court has accorded special protections to such rights. See Ross v. Gadwah, 131 N.H. 391 (1988); In re Baby K., 143 N.H. 201 (1998); In re Kerry D., 144 N.H. 146 (1999); In re Bill F., 145 N.H. 267 (2000); In the Matter of Nelson and Horsley, 149 N.H.

[1] Even in cases where termination is denied based on "the best interests of the child" the child is often not returned to the parents, but rather is placed in guardianship with a relative, DHHS, or other party, or another planned permanent living arrangement is ordered. RSA 169-C:24-b, II; RSA 170-C:11, IV.

545 (2003); In the Matter of Jamie M. Huff and Lawrence R. Huff, 158 N.H. 414 (2009); In re Guardianship of Reena D., No. 2010-187 (N.H. December 28, 2011).

In arguing that Shelby R. should not be viewed as controlling precedent, the State argues that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (State's Brief at 24, citations omitted). A close reading of Justice Duggan's opinion concurring in part and dissenting in part, shows that **all** of the participating members of the Court, including Justice Duggan, agreed that due process requires the appointment of counsel for indigent parents (as opposed to stepparents) in abuse and neglect proceedings. In the dissenting aspect of his opinion in which he rejects an indigent stepparent's right to counsel in every case, Justice Duggan explicitly notes that: 1) the stepparent's interest here "is not entitled to the same weight as the relationship with his or her natural children" and 2) "[t]he stepparent's relationship with the stepchild… has not been recognized as a constitutional interest on par with a natural parent-child relationship." Shelby R., 148 N.H. at 245. Justice Duggan observes that "[e]quating the interests of natural parents and stepparents raises serious constitutional concerns." Id. Finally he concluded that "to the extent that the plurality's due process analysis elevates a stepparent's interest in his or her relationship with a stepchild to mirror the interest that the constitution recognizes a natural parent has in the care, custody and control of his or her natural child, the analysis is inconsistent with *Troxel*." Id.[2]

A careful reading of the dissenting opinion shows that Justice Duggan would have agreed with the plurality opinion that counsel be afforded to all indigent parents in abuse and

[2] Justice Duggan refers to Troxel v. Granville, 530 U.S. 57 (2000) "protecting natural parent's fundamental constitutional right to make decisions concerning rearing of children…." Shelby R., 148 N.H. at 245 (emphasis added).

neglect proceedings if the Court had been examining the right to counsel for natural parents.[3]

For these reasons, even under the State's questionable limitation on the precedential value of Shelby R., **all** of the participating justices in Shelby R. were in agreement that under the State Constitution due process requires that an indigent natural parent be afforded appointed counsel when faced with the loss of custody in a proceeding under RSA 169-C.

IV. CONCLUSION

The State dismissively refers to this matter as a "run of the mill abuse and neglect case." (State's Brief at 20.) However, as noted in the stipulated facts clearly set forth in the Interlocutory Transfer Statement, the parents cannot defend themselves or fully understand the nature of the proceedings. Statement of Interlocutory Transfer Without Ruling, paragraph 14. This case may, in fact, be a "run of the mill" neglect case, in the sense that parents with limited education and other significant deficits make up the bulk of parents involved in such matters. Fundamental fairness lies at the heart of due process. Given all that is at stake in the proceedings, and the State's huge advantage in expertise, experience and resources, fundamental fairness requires that counsel be appointed to **all** indigent parents who face the loss of care and custody of their children based on the State's allegations of neglect or abuse.

For the reasons set forth above, in the parents' initial brief, and the briefs of the Amici Curiae, this Court should answer the question transferred by the Sullivan County Superior Court in the affirmative and rule that Part 1, Articles 2 and 15 of the New

[3] See also Justice Duggan's strong affirmation of the rights of natural parents, writing for a unanimous court in In the Matter of Jamie M. Huff and Lawrence R. Huff, 158 N.H. 414 (2009).

Hampshire Constitution require that all indigent parents whom the State accuses of child neglect or abuse pursuant to RSA Chapter 169-C be afforded the right to appointed counsel.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

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