State of New Hampshire
Supreme Court

NO. 2013-0490

2014 TERM

APRIL SESSION

In the Matter of Delmy Rickert (Barrera) and Howard Rickert

RULE 7 APPEAL OF FINAL DECISION OF THE
HILLSBOROUGH FAMILY DIVISION

BRIEF OF DELMY KARINA RICKERT (BARRERA)

By: Joshua L. Gordon, Esq.
NH Bar ID No. 9046
Law Office of Joshua L. Gordon
75 South Main Street #7
Concord, NH 03301
(603) 226-4225 www.AppealsLawyer.net

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QUESTIONS PRESENTED

I. Did the court err in excluding the testimony of Mr. Fennewald-Velez, who was the children's treating therapist, was not a retained expert, and who complied applicable disclosure rules, when he was the only available independent source of information about the best interest of the children?

Preserved: See citations noted in the Statement of the Case, *infra*.

STATEMENT OF FACTS

This case involves the disclosure of records and the extent to which non-disclosure prevents testimony of a therapist who was treating the parties children.

I. Separation and Divorce

Howard Rickert is 52 years old, and has been a commercial airline pilot for 30 years. FINAL HRG. (Nov. 27, 2012) at 32. Delmy Karina Barrera[1] is 36 years old with some college education who had been employed as a Spanish medical interpreter at Dartmouth-Hitchcock. FINAL HRG. at 168. They were married in 1998. FINAL HRG. at 32-34. They have four children – a 13-year-old, a 9-year old, a 7-year old, and a 5-year old, FINAL HRG. at 35 – for whom Ms. Barrera is their full-time mother. FINAL HRG. at 144-45. They had a house in North Sutton, New Hampshire.

Mr. Rickert and Ms. Barrera appear to have a stormy relationship, punctuated by domestic violence perpetrated by Mr. Rickert which at least once involved the police, FINAL HRG.at 179-81, 206-07, but also by post-separation romantic encounters. FINAL HRG. at 208.

In June 2010 the parties filed a joint petition for divorce on grounds of irreconcilable differences. JOINT PETITION FOR DIVORCE (June 8, 2010), *Appx*. at 1; FINAL HRG. at 109.

In late 2010 Ms. Barrera moved out of the Sutton home with the children, first to Wilmot, New Hampshire, and then to Orlando, Florida, where she now lives with Ken Koval, a doctor she met at work, FINAL HEARING. at 114, 167-69, 172, and to whom she is now married. Mr. Rickert did not want to live in the marital home, FINAL HRG. at 73, and when he stopped paying the mortgage, the house and some furnishings were lost to foreclosure. FINAL HRG. at

[1]The court allowed Ms. Barerra to resume use of her maiden name, and to eliminate confusion, it is used herein. DECREE OF DIVORCE ¶ 19 (June 27, 2013), *Addn*. at 40.

65-68, 112-15. The court found "[t]he parties' home was abandoned by both … parties." DECREE OF DIVORCE (June 27, 2013) at 4 & ¶ 14, *Addn*. at 40.

Ms. Barrera introduced the children to Mr. Koval in the summer 2010 after the divorce was filed and she was no longer living with Mr. Rickert. FINAL HRG. at 169; DECREE OF DIVORCE at 2, *Addn*. at 40. She introduced him as a "friend," was discreet about showing him affection when the children were present, and did not discuss with them a potential marriage. FINAL HRG. at 169-71. Although Ms. Barrera "figured they knew what was going on between [Mr. Rickert] and I, … I tried to make sure that they knew that no matter whatever happened, [Mr. Rickert] was always going to be – he was going to be their father no matter what." FINAL HRG. at 170-71. Ms. Barrera believes the children get along with Mr. Koval, and the children's therapist indicated they have not reported any problems with him. FINAL HRG. at 199. In any event, the court found no problems between the children and Mr. Koval, "they have been living with him [] for two years," and have a rapport. DECREE OF DIVORCE (June 27, 2013), *Addn*. at 40; FINAL HRG. at 123.

Ms. Barrera expects to move within the Orlando area because her house is leased. FINAL HRG. at 172-73. The parties believe a local move does not matter much because Mr. Rickert mostly lives at "crash pads" kept by his employer for pilots, can easily fly to Orlando as an employee benefit, and keeps a car at the Orlando airport to facilitate visitation; and it may not impact the children's school district. FINAL HRG. at 36, 78.[2]

Although Mr. Rickert's flying schedule varies month to month, FINAL HRG. at 37-38, 83-84, Ms. Barrera claims Mr. Rickert waits until the last minute to arrange parenting time, and

[2]Even though neither party any longer lives in New Hampshire, they agree New Hampshire has current jurisdiction but that the case will ultimately move to Florida. MOTION HRG. (Apr. 30, 2012) at 21-22; FINAL HRG. at 23.

that despite her efforts at flexibility, his sudden visits create chaos in the children's schedules. FINAL HRG. at 127-28, 182-83. Mr. Rickert acknowledged that he "usually know[s] about the 23rd of the month" what his work schedule will be for the following month, FINAL HRG. at 38-39, and the court established a parenting schedule with that in mind. DECREE OF DIVORCE, *Addn*. at 40.

Despite scheduling difficulties, Mr. Rickert has been seeing the children about once a month. FINAL HRG. at 36, 40, 44, 46, 49, 124, 126, 128. Some months go by when he does not request visitation. FINAL HRG. at 199. Because he either sleeps in his car or lives in a hotel, he acknowledges that his routine parenting activities take place in somewhat artificial surroundings. FINAL HRG. at 23, 45, 49, 51, 53-54, 88, 90.

II. Oldest Child is Hospitalized and Referred to Outpatient Therapist

The couple's oldest son suffered mental health difficulties, which need not be detailed here, MOTION HRG. (Apr. 30, 2012) at 20; PRETRIAL STATEMENT (Apr. 30, 2012), *Appx*. at 43; FINAL HRG. at 110, but which landed him for a while at the Brattleboro Retreat when the family lived in New Hampshire, FINAL HEARING. at 137-41; DECREE OF DIVORCE (June 27, 2013), *Addn*. at 40, and later at the South Seminole Hospital when they moved to Florida. FINAL HEARING. at 141.

Toward the end of the boy's stay, South Seminole suggested continued outpatient treatment with a psychiatrist because they thought he needed medication. FINAL HEARING. at 142-43; VIDEO DEPOSITION at 5. South Seminole nonetheless referred him to Robert Fennewald-Velez, a psychotherapist who for 28 years has practiced mental health therapy in Orlando, Florida.[3] VIDEO DEPOSITION at 5-6.

Mr. Fennewald-Velez began his involvement with the Rickert family in February 2011, VIDEO DEPOSITION at 5-6; LETTER FROM FENNEWALD-VELEZ TO CLAUSON (July 31, 2012), *Appx*. at 63, treated the oldest boy on dozens of occasions during 2011 and 2012, VIDEO DEPOSITION at 6-7, 37-47, and was providing continuing therapy at the time of trial. FINAL HRG. at 144. The child was placed on medication, which has since been discontinued, he is generally doing better, and Mr. Fennewald-Velez believes therapy is helping. FINAL HRG. at 143-44; VIDEO DEPOSITION at 6, 10, 74-75; MOTION HRG. at 21.

[3]Mr. Fennewald-Velez's *curriculum vitae* shows a long list of impressive qualifications – he is a psychologist and a Florida "Licensed Mental Health Counselor" – but none of them apparently earn him the title "doctor." LETTER FROM FENNEWALD-VELEZ TO CLAUSON (July 31, 2012), *Appx.* at 63. Despite use of title throughout the record, the parties stipulated and the court found he is not a "doctor." VIDEO DEPOSITION at 27; ORDER ON MOTION IN LIMINE (May 17, 2013), *Addn.* At 36, *Appx.* at 155.

III. Mr. Fennewald-Velez's Basis for Assessment

Although only the oldest child was established as an individual patient, VIDEO DEPOSITION at 13-14, 38-39, 62-63; ORDER ON MOTION IN LIMINE (May 17, 2013), *Addn.* at 36, *Appx*. at 155, Mr. Fennewald-Velez had sporadic sessions with the other three, VIDEO DEPOSITION at 5-6, 13, 38, 53, 55, 58, 60-61; FINAL HEARING. at 143, helping them with sibling interrelationships, VIDEO DEPOSITION at 57-58, counseling them to cope with the breakup of their family, VIDEO DEPOSITION at 13, and noticing they did not have the same difficulties as the oldest boy. VIDEO DEPOSITION at 6, 14, 16, 18-19; LETTER FROM FENNEWALD-VELEZ TO CLAUSON (July 31, 2012), *Appx*. at 63; FINAL HRG. at 41, 152-53.

Mr. Fennewald-Velez observed all the children interact with Mr. Rickert at least twice, VIDEO DEPOSITION at 59-60, and with Mr. Koval on ten or twelve occasions. VIDEO DEPOSITION at 52-54. Mr. Fennewald-Velez said that his knowledge of the parents' behaviors came from the children only. VIDEO DEPOSITION at 85.

It appears that Mr. Fennewald-Velez had in his file some records from South Seminole but not Brattleboro. He said that he did not disclose that fact to either party because he believed Florida law forbade disclosure, and that he based his opinion on his own observations. VIDEO DEPOSITION at 48-50.

In addition, although Mr. Fennewald-Velez disclosed therapy records from sessions through January 4, 2013, he did not disclose records of three additional sessions between January 4 and the time of his March 29, 2013 deposition. VIDEO DEPOSITION at 47; ORDER ON MOTION FOR RECONSIDERATION OF MAY 17, 2013 ORDER ON MOTION IN LIMINE (June 20, 2013), *Appx*. at 179. Consequently, cross examination of Mr. Fennewald-Velez by Mr. Rickert's attorney confined Mr. Fennewald-Velez's assessment to only those therapy sessions through January 4, 2013 for which records were disclosed. VIDEO DEPOSITION at 13-16, 40-41, 68.

The opinions contained in Mr. Fennewald-Velez's letter of July 31, 2012, which the court characterized as an expert opinion, ORDER ON ISSUES CONCERNING DEPOSITION OF DR. FENNEWALD-VELEZ (Dec. 5, 2012), *Appx*. at 135, necessarily reflects his assessment up to that date only. VIDEO DEPOSITION at 62.

IV. The Parties Blame Each Other For Their Oldest Child's Troubles

The parties blame each other for their oldest child's troubles. FINAL HRG. at 178; *see also* DAILY PROGRESS NOTE, *Resp Exh. E* (Oct. 2, 2010), *Appx*. at 199; FINAL HRG. at 146, 176, 178; VIDEO DEPOSITION at 24.

Mr. Rickert alleges it is not coincidence that the child was admitted to the Brattleboro Retreat at about the same time that Ms. Barrera moved in with Mr. Koval, FINAL HRG. at 172; DISCHARGE SUMMARY, *Pet. Exh. 2* (Oct. 12, 2010), *Appx*. at 191; PROVISIONAL DIAGNOSES, *Resp. Exh. C* (Sept. 30, 2010), *Appx*. at 197, that the child has expressed negative thoughts about Mr. Koval, PROGRESS NOTE, *Resp. Exh. G*, (Oct. 7, 2010), *Appx*. at 201; DISCHARGE SUMMARY, *Pet. Exh. 2*, *Appx*. at 191, and that the child had difficulty dealing with Ms. Barrera's new relationship. DECREE OF DIVORCE, *Addn*. at 40; *see also*, FINAL HRG. at 157-159, 173, 177-78. Mr. Rickert also blames Ms. Barrera for their communication difficulties, and alleges that overly-stringent visitation-notice requirements impedes his parental relationships. He nonetheless concedes that he does not know very well how to discuss important matters with the children over the phone. FINAL HRG. at 41, 52, 54.

Ms. Barrera, on the other hand, alleges that during the marriage the children witnessed domestic violence, verbal abuse, and Mr. Rickert's bad temper, repeatedly perpetrated on both them and her. FINAL HRG. at 142, 178-79. These allegations are corroborated by the mental health institutions. DISCHARGE SUMMARY, *Pet. Exh. 2*, *Appx*. at 191 (child reported having attempted intervention when he "saw his father push his mother against a wall and hit her").

Ms. Barrera also alleges that after separation the children – especially the oldest – have been repeatedly apprised by Mr. Rickert of the issues dividing the parties, exposed to adult topics, and asked to chose loyalties. She understands from the oldest child that Mr. Rickert blames her for the loss of their New Hampshire home and for their money problems. FINAL HRG. at 129-30, 139, 160-61. She notices that following phone conversations with Mr. Rickert, the child is sad, scared, and confused, FINAL HRG. at 129-30, 160-61, and that afterward he has left her notes and drawings expressing his negative emotions. FINAL HRG. at 130, 147-51.

Ms. Barrera believes Mr. Rickert exacerbates problems by not being involved with the adults and institutions in the children's lives, such as schools and teachers, FINAL HRG. at 54 (Mr. Rickert did not discuss with teacher disturbing picture drawn at school); FINAL HRG. at 57 (Mr. Rickert did not discuss with school that child repeating a grade); FINAL HRG. at 57 (Mr. Rickert does not review report cards), and health-care professionals, FINAL HRG. at 198 (Mr. Rickert did not visit child at Brattleboro Retreat); FINAL HRG. at 60 (Mr. Rickert had no conversation with mental health doctors during 2012), and by not creating a reliable visitation schedule because the child reacts negatively to surprise stopovers. MOTION HRG. (Apr. 30, 2012) at 20, 24.

Although Ms. Barrera acknowledges that the children's problems are not all Mr. Rickert's fault, FINAL HRG. at 179, she testified that when the oldest child was released from South Seminole, she called Mr. Rickert to discuss it, "and the only thing I heard was yelling, accusing me that I was the cause of it. And for me, it was very hard to see my son left in the hospital." FINAL HRG. at 142.

V. Therapist Corroborates Ms. Barrera and Recommends Sole Custody

Mr. Fennewald-Velez agreed he was not a guardian *ad litem* in the case,[4] did not talk to the children' teachers, members of their extended family, or friends of the family, nor conduct a full investigation of the family situation. VIDEO DEPOSITION at 65-67. He nonetheless had substantial contact with all members of the family, heard from the children how the adults in their lives relate to them, heard from the children how the adults are or are not present for them, and also extrapolated from the oldest's child's situation. VIDEO DEPOSITION at 23-24, 25-26, 27-29, 62, 64, 68, 71.

Based on the "emotional reactivity" of the children to each parent, Mr. Fennewald-Velez felt he could form a sufficient impression of the difficulties within the family, and that he could express a professional opinion about the parents' custodial ability and what might be the best custodial situation for the children. VIDEO DEPOSITION at 29, 80, 81-82, 83.

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[4]Despite four children, and parents that do not communicate well, no Guardian *ad Litem* was appointed. The pretrial conference report notes only "n/a" regarding a GAL. PRETRIAL CONFERENCE REPORT (Apr. 30, 2012), *Appx*. at 41. 44At the trial management conference, "[b]oth attorneys told the Court that although parenting issues are in dispute, neither one is requesting that the Court appoint a Guardian *ad litem*. ORDER ON TRIAL MANAGEMENT CONFERENCE (Aug. 20, 2012), *Appx*. at 67. Mr. Rickert's lawyer reported that everybody had rejected a GAL. FINAL HRG. at 15.

During trial, the court repeatedly lamented the absence of a GAL. Upon learning that there had been domestic violence in the family, the court commented:

> I'm a little upset that this has come up in the middle of trial, because … it would have been checked off as an issue to investigate; we would have had it investigated, and it wouldn't be coming up in the middle of a case.

FINAL HRG. at 154. After a interchange regarding admissibility of notes written by the child and slid under Ms. Barrera bedroom door, the court commented: "[T]his is another reason why … this case should have had a guardian ad litem." FINAL HRG. at 134. After an interchange regarding the confidentiality of Mr. Fennewald-Velez's records, the court commented:

> [I]f I had realized all of this back in August, I probably would have appointed a guardian ad litem, even if neither side said they needed one, because that's what we need right now. We need a guardian ad litem.

FINAL HRG. at 19. The court nonetheless determined that trial would not be postponed. FINAL HRG. at 24.

In its final orders, that court reviewed the history of the case and its lack of a GAL, but noted "it is too late to appoint a Guardian *ad Litem* in this case at this time." ORDER ON ISSUES CONCERNING DEPOSITION OF DR. FENNEWALD-VELEZ (Dec. 5, 2012), *Appx*. at 135. *See also* DECREE OF DIVORCE (June 27, 2013), *Addn*. at 40.

Overall, Mr. Fennewald-Velez found caring and understanding coming from the mother, but emotional distress coming from the father. VIDEO DEPOSITION at 29-30.

He reported that Ms. Barrera is a good mother – she is supportive, keeps the children away from adult discord, gives them private time, does not interfere with their father's communications, is available to them, gets involved in their school and extracurricular activities, and has established positive psychological bonds. VIDEO DEPOSITION at 34-35.

The oldest child told Mr. Fennewald-Velez that Mr. Rickert, however, expects the child to report on what Ms. Barrera is doing and scolds him for not informing. LETTER FROM FENNEWALD-VELEZ TO CLAUSON (July 31, 2012), *Appx*. at 63; VIDEO DEPOSITION at 7-8. Mr. Fennewald-Velez learned from the child that Mr. Rickert is openly critical of Ms. Barrera. LETTER FROM FENNEWALD-VELEZ TO CLAUSON (July 31, 2012), *Appx*. at 63. Mr. Fennewald-Velez said the child reported to him that Mr. Rickert discusses with the child matters such as the cause of the family breakup, VIDEO DEPOSITION at 7-9, 12, 33, family finances including blaming Ms. Barrera for the family being homeless, VIDEO DEPOSITION at 11-12, 19, 33-44, disciplining philosophy which undermines Ms. Barrera's authority, LETTER FROM FENNEWALD-VELEZ TO CLAUSON (July 31, 2012), *Appx*. at 63; VIDEO DEPOSITION at 19, visitation difficulties including blaming Ms. Barrera for them, VIDEO DEPOSITION at 17-18, 23-24, and adult topics generally. VIDEO DEPOSITION at 7, 12, 19, 35.

The child corroborated to Mr. Fennewald-Velez Ms. Barrera's allegations of domestic violence. VIDEO DEPOSITION at 9-10. He told Mr. Fennewald-Velez, for instance, that his father threw a brick at him, VIDEO DEPOSITION at 17, which Mr. Fennewald-Velez regarded as "creditable." VIDEO DEPOSITION at 11. The child also told Mr. Fennewald-Velez that Mr. Rickert denied any domestic violence, which put the child in the position of an arbiter not knowing whether to believe what he saw or his father's words, thus causing distrust. VIDEO

DEPOSITION at 9.

The child told Mr. Fennewald-Velez that Mr. Rickert told the child that he was not his son, which made him emotionally devastated. VIDEO DEPOSITION at 19-20.

Mr. Fennewald-Velez further believes Mr. Rickert ignores the other children, LETTER FROM FENNEWALD-VELEZ TO CLAUSON (July 31, 2012), *Appx*. at 63, and that Mr. Rickert calls and expects to be called at "very awkward times, 3:00 a.m. in the morning." VIDEO DEPOSITION at 8.

Although the children miss activities with their father, DAILY PROGRESS NOTE (*Resp. Exh*. E) (Oct. 2, 2010), *Appx*. at 199; DAILY PROGRESS NOTE (*Resp. Exh*. H) (Oct. 7, 2010), *Appx*. at 200, Mr. Fennewald-Velez understands from them that Mr. Rickert is "emotionally … aggressive," and acts in a way that is "very discounting and humiliating for the child." VIDEO DEPOSITION at 85. Mr. Fennewald-Velez reports that this causes the oldest child a range of negative emotions, including "frustration," "fear," "somberness," "anxiety," "the point of no return," "anger," "stress," "sadness," and "distrust." VIDEO DEPOSITION at 30-31.

Mr. Fennewald-Velez said that Mr. Rickert's behaviors cause the oldest child to be placed between the parents, and to choose loyalties. VIDEO DEPOSITION at 8, 12-13, 17-18; LETTER FROM FENNEWALD-VELEZ TO CLAUSON (July 31, 2012), *Appx*. at 63.

Much of Mr. Fennewald-Velez's work with the oldest child has been to undo the mental anguish caused by Mr. Rickert's behaviors. VIDEO DEPOSITION at 7-8, 33-44. Mr. Fennewald-Velez testified he believes Mr. Rickert is not fully aware of the effect his behaviors, and that his failure to curtail them borders on abuse. VIDEO DEPOSITION at 22, 84.

Thus, the deposition of Mr. Fennewald-Velez largely corroborates Ms. Barrera's version – that the children's (or at least the oldest son's) problems are caused by Mr. Rickert's history and current behaviors, and not by Ms. Barrera's relationship with Mr. Koval – and tends

to undermine Mr. Rickert's version.

Mr. Fennewald-Velez provided his opinion regarding the custody of the children. In a July 2012 letter to Ms. Barrera's attorney, he wrote:

> [S]plitting of the custody of the children would not be in their best interest.... Based on the family and children's history, I believe the children will be best served in the custody of their mother and in their current home.

LETTER FROM FENNEWALD-VELEZ TO CLAUSON (July 31, 2012), *Appx*. at 63. In his deposition testimony Mr. Fennewald-Velez reiterated that Ms. Barrera should have both residential and decision-making responsibility. VIDEO DEPOSITION at 35-36.

STATEMENT OF THE CASE

I. Parties' Positions on Parenting

When they first filed in 2010 their joint petition for divorce, JOINT PETITION FOR DIVORCE (June 8, 2010), *Appx*. at 1, it appears the parties initially agreed on joint decision-making and residential responsibility, with a plan for parenting time. PROPOSED PARENTING PLAN ¶¶ A & B (June 8, 2010), *Appx*. at 9. The court implemented that in its temporary order. TEMPORARY PARENTING PLAN (Nov. 8, 2010).

The case languished for nearly two years however, due to Mr. Rickert's inattention, for which he later apologized. RESPONDENT'S MOTION TO CONTINUE APRIL 30TH FINAL HEARING ¶2 (Apr. 13, 2012) (filing for divorce "has been devastating to Mr. Rickert. As a result, Mr. Rickert probably hasn't acted as diligently as he should have in managing this matter."). In the meantime, the parties had moved to Florida, communication had broken down, scheduling parenting time had been troublesome, and Mr. Rickert had largely ignored the children's scholastic, extracurricular, medical, and other needs. Ms. Barrera's observation of how Mr. Rickert handled long-distance parenting convinced her that shared decision-making would be perpetually problematic, and the children's counseling with Mr. Fennewald-Velez had informed her of the harm caused by Mr. Rickert.

Consequently, in her April 2012 pre-trial documents, Ms. Barrera's position had changed: She requested sole decision-making with regularized parenting time. PRETRIAL STATEMENT ¶3 (Apr. 30, 2012), *Appx*. at 43; PROPOSED FINAL ORDER ¶6 (Apr. 30, 2012), *Appx*. at 51. Also in her pre-trial documents, Ms. Barrera filed her witness list, which included "Dr. Robert Fennewale [sic] … ([the oldest child's] psychologist and familiar with the other children - by video deposition.)" WITNESS LIST ¶1 (Apr. 30, 2012), *Appx*. at 62.

On April 30, 2012 the court (*Lawrence A. MacLeod, Jr.*, J.) issued a pretrial conference

report in which it checked "no" indicating neither party planned expert witnesses, or indeed any witnesses, PRETRIAL CONFERENCE REPORT ¶¶ 10 & 11 (April 30, 2012), *Appx*. at 41, and scheduled a trial management conference 70-90 days hence. *Id.* ¶ 18.

II. Mr. Fennewald-Velez's Opinion

In July 2012 Mr. Fennewald-Velez wrote a letter at the request of Ms. Barrera's lawyer, which Ms. Barrera's lawyer forwarded to the court and to Mr. Rickert's lawyer. In the letter Mr. Fennewald-Velez set forth his contact history with the family, and described the harm Mr. Rickert caused the children.

> [The child] has had to endure his father's emotional distress, which frequently he has been placed in situations of having to choose loyalties between his father['s] needs/wants and that of his o[w]n needs, his current life events and family. The patient has reported several incidents in which his father has scolded him for not keeping him informed of the family activities, undermining choices being made by the mother, being critical of her and discussing issues that should be addressed with the children's mother.
>
> …
>
> Through out the course of treatment [the child] has had difficulty trusting his father due to his past experiences. The other children have not verbalized much opinion and seem guarded with their feelings. The clinical progress that has been made may be attributed to the stable, predictable, and safe environment the[] children currently share. They have adapted to their school, developed friendships, become involved in sports and leisure activities.

LETTER FROM FENNEWALD-VELEZ TO CLAUSON (July 31, 2012), *Appx*. at 63. Mr. Fennewald-Velez wrote that "the splitting of the custody of the children would not be in their best interest," and concluded that "[b]ased on the family and children's history, I believe the children will be best served in the custody of their mother and in their current home." *Id.;* VIDEO DEPOSITION at 71.

In August 2012 the court held its trial management conference and issued a trial management report. It reiterated "there are no expert witnesses," and noted Ms. Barrera wished

to take a video deposition of "the psychiatrist [sic] who is working with the children in Florida." ORDER ON TRIAL MANAGEMENT CONFERENCE (Aug. 20, 2012), *Appx*. at 67. Mr. Rickert filed a pre-trial statement in which he noted no expert witnesses, but expressed his interest in "[a]ny witness identified by Mrs. Rickert." PRETRIAL STATEMENT ¶5L (Aug. 23, 2012), *Appx*. at 68.

Mr. Rickert propounded expert interrogatories. Ms. Barrera asked to strike them because Mr. Fennewald-Velez was the children's treating therapist, because Mr. Fennewald-Velez had not been retained as an expert witness for the litigation, and because any information Ms. Barrera had with Mr. Fennewald-Velez was already available to Mr. Rickert. Ms. Barrera again provided the court and Mr. Rickert with a copy of Mr. Fennewald-Velez's then-recent July 31 letter to demonstrate the non-retained nature of her contact with Mr. Fennewald-Velez. MOTION TO STRIKE EXPERT INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS (Aug. 27, 2012), *Appx*. at 71. Mr. Rickert conceded that Mr. Fennewald-Velez "is familiar with and knows the Rickert children as a result of his role as their psychotherapist" and that the content of his July 31 letter "is derived from his work with the children as their psychotherapist," but argued that being "hired as an expert" for the purposes of litigation "is irrelevant" because he intends to "express a professional opinion." Mr. Rickert also alleged that because the basis of Mr. Fennewald-Velez's July 31 letter "was obtained from the children in the course of treatment," he "has already violated their therapist/patient privilege," and asserted that Mr. Rickert is entitled to Mr. Fennewald-Velez's file. OBJECTION TO MOTION TO STRIKE EXPERT INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS (Sept. 12, 2012), *Appx*. at 74.

Ms. Barrera then requested leave to take a video deposition of Mr. Fennewald-Velez. She noted that because "[n]either parent nor counsel has had access to his files," other than the July 31 letter which everybody already had, there was nothing further to disclose. MOTION FOR

FLORIDA DEPOSITION OF DR. FENNEWALD- VELEZ (Sept. 24, 2012), *Appx*. at 80; MEMORANDUM IN SUPPORT OF MOTION FOR TAKING DR. FENNEWALD'S DEPOSITION IN FLORIDA (Oct. 2, 2012), *Appx*. at 90; RESPONSE TO OBJECTION (Oct. 10, 2012), *Appx*. at 95. Mr. Rickert objected, and suggested Mr. Fennewald-Velez be barred from testifying. OBJECTION TO MOTION FOR FLORIDA DEPOSITION OF DR. FENNEWALD-VELEZ AND CROSS-MOTION TO STRIKE AND FOR THE IMPOSITION OF SANCTIONS ¶5 (Oct. 2, 2012), *Appx*. at 90. The deposition was granted (*Paul S. Moore*, J.) to "provide current important psychiatric [sic] evidence at trial." MOTION FOR FLORIDA DEPOSITION OF DR. FENNEWALD-VELEZ (Sept. 24, 2012), *Appx*. at 81 (handwritten order) (Nov. 7, 2012).

As the deposition had been allowed but Mr. Rickert's interrogatories were still outstanding, Mr. Rickert requested a ruling that he be provided with expert disclosures. EXPEDITED MOTION FOR ORDERS (Nov. 13, 2012), *Appx*. at 106. Ms. Barrera again replied that "Fennewald-Velez is the children's treating psychologist, not [Ms. Barrera's] hired expert," OBJECTION TO EXPEDITED MOTION FOR ORDERS (Nov. 14, 2012), *Appx*. at 116, that all information regarding the children was equally available to both parents, that in the circumstances no rule required disclosure by Ms. Barrera to Mr. Rickert, and that Ms. Barrera had nonetheless long ago already disclosed everything she had pertaining to Mr. Fennewald-Velez. HEARING MEMORANDUM (Nov. 14, 2012), *Appx*. at 110.

III. Trial Ends With Record Open Awaiting Deposition

Trial was on November 27, 2012, the first segment of which was addressed to this matter. FINAL HRG. at 5-31. Mr. Rickert argued that because Mr. Fennewald-Velez would be profferring an opinion on parental rights and responsibilities, he should be treated as an expert; and that expert or not, Mr. Rickert is entitled to disclosure. FINAL HRG. at 7-8, 12-14. Ms. Barrera argued that because Mr. Fennewald-Velez was the children's treating physician and not hired for the purpose of litigation, he is not her expert, and indeed Ms. Barrera had no knowledge of what he would say; and because both parties are parents, they have equal access to Mr. Fennewald-Velez and all his records. FINAL HRG. at 8-11.

The court announced it "will take this issue under advisement," promised to issue an order after the trial, and moved on to the final divorce hearing. FINAL HRG. at 29.

Trial proceeded with testimony by the parties only.

At the end of the day, the court held open the record, awaiting its ruling and potentially the transcript of Mr. Fennewald-Velez's deposition.[5] FINAL HRG. at 219-20.

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[5]Disclosure of Mr. Fennewald-Velez's records raised the issue of their confidentiality, and the possibility of differing confidentiality rules between New Hampshire and Florida. FINAL HRG. at 14.

In re Berg, 152 N.H. 658, 666 (2005), held that children have a patient-therapist privilege, and that "[t]he trial court has the authority and discretion to determine whether assertion or waiver of the privilege is in the child's best interests." The court here waived the privilege:

> In light of the Court's need to decide what is in the best interests of the parties' four children, the Court finds that the testimony from Dr. [sic] Fennewald-Velez to be relevant, and therefore the waiver of the children's right to privacy is in their best interests. *See Berg*. The Court considers both parties to have waived their rights to assert the confidentiality of their children's records.

ORDER ON ISSUES CONCERNING DEPOSITION OF DR. FENNEWALD-VELEZ (Dec. 5, 2012), *Appx*. at 135. The court also declined the suggestion that it appoint a GAL to aid determination of waiver of the privilege. The privilege issue was thus disposed.

IV. Deposition Taken, But Ruled Inadmissible

The following week the court issued its order concerning a deposition of Mr. Fennewald-Velez. It first held it would not revisit another marital master's earlier order allowing the deposition.

The court then deemed Mr. Fennewald-Velez's July 31 letter an expert report, recognizing it "goes through the treatment history of the parties older child," "addresses his diagnosis and issues of loyalty … relative to [the boy's] father," "states his opinion as to custody of the children," and gives "his opinion and recommendation as to the ultimate issue as to parenting in this case, the residential parenting arrangement." ORDER ON ISSUES CONCERNING DEPOSITION OF DR. FENNEWALD-VELEZ (Dec. 5, 2012), *Appx*. at 135.

The court ruled the deposition "should be done with both attorneys having full access to all of his records." The court required Mr. Fennewald-Velez be provided with information regarding the fact and timing of the oldest son's hospitalization, the existence and timing of Ms. Barrera's relationship with Mr. Koval, and the circumstances and timing of her move to Florida. The court inferred Mr. Fennewald-Velez may be ignorant of New Hampshire's law regarding the presumption of shared parenting, and thus ordered he be apprised. Finally, the court noted the record would remain open pending submission of the deposition. *Id.*

On March 28, 2013, the video deposition was conducted with Mr. Fennewald-Velez in Florida, and the parties' lawyers via telephone. Mr. Fennewald-Velez's comments are summarized *supra*, including his corroboration of Ms. Barrera's suggestion that Mr. Rickert was largely the cause of the children's difficulties, and his recommendation that she get "custody."

During the deposition two issues became apparent. First, Mr. Fennewald-Velez had not disclosed records concerning treatment of the children occurring during the several months after trial but before the deposition. Mr. Rickert's lawyer successfully restricted Mr. Fennewald-

Velez's opinion testimony, however, to only those dates for which records were disclosed. VIDEO DEPOSITION at 13-19; 37-47, 60. Second, the parties learned Mr. Fennewald-Velez had in his files records developed by South Seminole which he had acquired from Ms. Barrera. VIDEO DEPOSITION at 48-49. Mr. Fennewald-Velez did not tell either lawyer he had them, however, because he understood Florida law forbade redisclosure to the parents or their attorneys. VIDEO DEPOSITION at 48. It also came to light that Mr. Fennewald-Velez was under the mis-impression that Attorney Clauson represented the children as well as Ms. Barrera. VIDEO DEPOSITION at 70-71.

As soon as the transcript of the deposition became available, Mr. Rickert filed a motion in *limine* seeking to exclude Mr. Fennewald-Velez's testimony on an allegation of him squirreling the South Seminole records, on an implication of him misunderstanding Attorney Clauson's role, and on a suggestion of Ms. Barrera acting in bad faith by giving the records to Mr. Fennewald-Velez and no one else. MOTION IN LIMINE (Apr. 19, 2013), *Appx*. at 138; REPLY TO OBJECTION TO MOTION IN LIMINE (May 1, 2013), *Appx*. at 146. Ms. Barrera objected on the grounds that both parents knew the child had been in South Seminole and were equally free to request records, and that if Florida law bars redisclosure that is not a basis for excluding the testimony. OBJECTION TO MOTION IN LIMINE (Apr. 23, 2013), *Appx*. at 143; RESPONSE TO REPLY TO OBJECTION TO MOTION IN LIMINE (May 6, 2013), *Appx*. at 150.

On May 17, 2013, the Hillsborough Family Division (*Nancy J. Geiger*, MM; *Edward M Gordon*, J.) issued its decision. In the order the court cited several misunderstandings – that Mr. Fennewald-Velez had been treating all four children though the oldest son was his primary patient, Mr. Fennewald-Velez's belief that Attorney Clauson was the children's attorney in addition to representing Ms. Barrera, and the mutual apparent inaccuracy of referring to him as "doctor." The court noted that even though Mr. Rickert could have gotten records directly

from Brattleboro and South Seminole, because Ms. Barrera sought Mr. Fennewald-Velez's testimony, she was responsible for the fact that he withheld some based on his understanding of Florida law. The court also noted that even though he confined his testimony to dates for which the parties had his progress reports, Mr. Fennewald-Velez conducted additional treatment sessions. Because of non-compliance with the order allowing the deposition, the court excluded his entire testimony, ORDER ON MOTION IN LIMINE (May 17, 2013), *Addn.* at 36, *Appx*. at 155, including Mr. Fennewald-Velez's direct factual observations based on dates for which all records were not disclosed, his direct factual observations based on dates for which all records were disclosed, and his opinion on a parenting plan.

Reconsideration was filed, objected to, and denied. MOTION FOR RECONSIDERATION OF ORDER ON MOTION IN LIMINE (May 23, 2013), *Appx*. at 160; OBJECTION TO MOTION FOR RECONSIDERATION OF ORDER ON MOTION IN LIMINE (June 4, 2013), *Appx*. at 173; RESPONSE TO OBJECTION TO MOTION TO RECONSIDER (June 12, 2013), *Appx*. at 177; ORDER ON MOTION FOR RECONSIDERATION OF MAY 17, 2013 ORDER ON MOTION IN LIMINE (June 20, 2013), *Appx*. at 179; NOTICE OF DECISION (July 17, 2013), *Appx*. at 186.

The court issued a decree of divorce and a parenting plan. It recited the statutory factors for determining parental responsibility, without the benefit of any of Mr. Fennewald-Velez's observations about the family or the children's reports of their treatment by Mr. Rickert including exposure to domestic violence. DECREE OF DIVORCE (June 27, 2013), *Addn*. at 40. The court gave the parties joint decision-making responsibility and Ms. Barrera residential responsibility, and established a plan for the allocation of parenting time. PARENTING PLAN (June 27, 2013), *Addn*. at 50; NOTICE OF DECISION (June 28, 2013), *Appx*. at 181.

SUMMARY OF ARGUMENT

Ms. Barrera first notes the relevance of Mr. Fennewald-Velez's testimony to this case, and that he was the only independent available source of information about the children's best interest. She then lists possible sources of law governing the matter, and notes that the rules of evidence may inform or control the decision here.

Ms. Barrera argues that whether or not Mr. Fennewald-Velez was an expert, the court erred by not allowing his testimony about his direct observations and his opinions regarding the children's living situation. She points out that despite some potential technical errors in disclosure, and despite the fact that Mr. Fennewald-Velez was a treating therapist and the disclosure thus rules do not apply, the rules were nonetheless complied with. She also argues that even if there were non-compliance, exclusion of Mr. Fennewald-Velez's testimony was not a proper remedy, and that therefore this Court should remand for consideration of it.

ARGUMENT

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.H. R.EVID. 401.

That Mr. Fennewald-Velez's testimony is relevant and helpful is apparent from its context, and not disputed. The court wrote: "In light of the court's need to decide what is in the best interests of the parties' four children, the court finds that the testimony from Dr. Fennewald-Velez to be relevant." ORDER ON ISSUES CONCERNING DEPOSITION OF DR. FENNEWALD-VELEZ (Dec. 5, 2012), *Appx*. at 135.

Because there was no GAL, Mr. Fennewald-Velez's testimony was the only independent available source of information regarding the children having witnessed domestic violence, their hostile treatment by Mr. Rickert, their exposure to Mr. Rickert's comments about the family's financial and relationship troubles, their anxiety and distrust engendered by Mr. Rickert, and their best interest generally. And there is no allegation that Mr. Fennewald-Velez was not a reliable source. By setting aside his testimony, the court ignored important facts that could have affected the parenting arrangement.

This case raises several issues:

- Whether Mr. Fennewald-Velez is an "expert";
- Whether or not he is an expert, what disclosures or other actions were required of him or the parties; and
- Whether or not he is an expert, if actions were required that were not taken, what is the remedy.

I. Five Potential Sources of Law Regarding Expert Testimony

There are five potential sources of law in New Hampshire regarding expert testimony.

A. RSA 516:29-b

The statute specifies that a party must disclose the identity of any experts who may be used at trial. RSA 516:29-b, I. Because Ms. Barrera's attorney noted Mr. Fennewald-Velez in her witness list in April 2012, WITNESS LIST ¶1 (Apr. 30, 2012), *Appx*. at 62, and then apprised the court and Mr. Rickert of Mr. Fennewald-Velez's July 2012 letter at the time it was written, Ms. Barrera complied.

The statute further requires that the expert file a report, but the statute pertains only to "a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." RSA 516:29-b, II. Because Mr. Fennewald-Velez was not specially retained as an expert, but was merely the child's or the children's treating therapist, that portion of the statute does not apply.

The statute further defines expert and expert testimony by reference to "Rules 702, 703, [and] 705 of the New Hampshire rules of evidence."

B. Family Division Rule 1.25

The rules of the Family Division of the Circuit Court require that upon request of the opponent, a party must "identify each person … whom the party expects to call as an expert witness at trial," "provide a brief summary" of the expert's qualifications, "state the subject matter on which the expert is expected to testify," summarize "the facts and opinions to which the expert is expected to testify" and "the grounds for each opinion," and provide an "expert report." N.H. FAM.CT. R. 1.25 D.(1) (a)-(d). Ms. Barrera's April witness list and Mr. Fennewald-Velez's July letter along with his *curriculum vitae,* constitutes complete compliance with each element of the rule.

The rule allows further discovery in "exceptional circumstances" by an opponent, but only as to an expert "who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial." Because Mr. Fennewald-Velez was not retained for the litigation and was expected to testify, that provision does not apply.

The rule further specifies that expert disclosure is "defined under Rule 702 of the Rules of Evidence." N.H. FAM.CT. R. 1.25 D.(1).

C. Rules of Evidence

Because all the potentially relevant sources of law all point toward the rules of evidence, it is apparent that the rules of evidence either control here or provide guidance regarding both whether Mr. Fennewald-Velez is an expert, and what disclosures were required. *See* N.H. R.EVID. 702-705.[6]

D. Other Analogous Rules

The analogous superior court expert discovery rule is very brief and merely references RSA 516:29-b and Evidence Rule 702. SUPER.CT. R. 27. The analogous federal rule, although not brief, in its expert disclosure portion merely references Evidence Rules 702, 703, and 705. FED. R. CIV. P. 26(a)(2)(A) & 26(a)(2)(C)(I).

[6]Although the issue was not raised below, the rules of evidence do not apply in "divorce cases." N.H. R. EVID. 1101(d)(3). It appears the court nonetheless applied the rules of evidence, which was error. *In re Gina D.*, 138 N.H. 697, 700 (1994)(where rule of evidence do not apply, court "look[s] to New Hampshire common law of evidence for guidance"). It was plain error, SUP.CT.R. 16-A, because it affected substantial rights, and affected the fairness and integrity of the proceedings. *See Clark & Lavey Benefits, Inc. v. Educ. Dev. Ctr., Inc.*, 157 N.H. 220, 225 (2008) (applying plain error rule to civil proceedings).

II. Whether Expert or Not, Mr. Fennewald-Velez Should Have Been Allowed to Testify

Non-expert witnesses may testify – indeed are required to testify – as to their personal observations, *State v. Tierney*, 150 N.H. 339, 348 (2003), and as to their opinion when "the witness's opinion is 'rationally based on the perception of the witness' and helpful to the trier of fact." N.H. R.EVID. 701; *State v. McDonald*, 163 N.H. 115, 121 (2011). Expert witnesses, once qualified,[7] may testify as to personal observations requiring their expertise to observe, *State v. Martin*, 142 N.H. 63, 65 (1997), or as to opinions developed as a result of their expertise when it is helpful to the factfinder. *McLaughlin v. Fisher Engineering*, 150 N.H. 195 (2003); *O'Donnell v. Moose Hill Orchards, Inc.*, 140 N.H. 601, 670 A.2d 1030 (1996).

Even a non-expert can testify as to state of mind when the matter is perceptible to a lay person. *Hardy v. Merrill*, 56 N.H. 227 (1875). The testimony of treating professionals, when they "have great familiarity" with the subject's condition, should be given substantial weight. *Appeal of Morin*, 140 N.H. 515, 519 (1995) (availability of workers' compensation claimant's doctor regarding treatment for respiratory condition). If continuing care is part of treatment, the caregiver can testify about that. *See* Christopher W. Dyer, *Treating Physicians: Fact Witnesses or Retained Expert Witnesses in Disguise? Finding A Place for Treating Physician Opinions in the Iowa Discovery Rules*, 48 DRAKE L. REV. 719 (2000).

Mr. Fennewald-Velez was the oldest child's mental-health care-giver, and stood in a similar role with the other children. He had direct evidence of what the children had seen and

[7]A witness may be qualified as an expert "by knowledge, skill, experience, training, or education." N.H. R.EVID. 702; *Dowling v. L.H. Shattuck, Inc.*, 91 N.H. 234 (1941) (manual laborer qualified as expert in ditch-digging). The court has discretion to determine whether a witness is an expert, *Laramie v. Stone*, 160 N.H. 419 (2010), whether the proffered testimony is expert in nature, *Porter v. City of Manchester*, 151 N.H. 30 (2004), and whether the proffer is within the witness's field of expertise. *Figlioli v. R.J. Moreau Companies, Inc.*, 151 N.H. 618 (2005).

heard, its effect on them, and their feelings about their family situation. He had a history providing him a competent basis to relate these facts as well as to discern the children's state of mind. Accordingly, whether considered an expert or not, he should have been allowed to testify regarding the oldest child, the other children, and the family, as to both his personal observations and opinions. *Rau v. First Nat. Stores*, 97 N.H. 490, 494-95 (1952) ("The admissibility of opinion evidence in this state has a broader scope than it does in other jurisdictions."). Further, because Mr. Fennewald-Velez's prognosis and recommended treatment are affected by the children's living situation, his observations and opinions regarding parenting arrangements were also within his purview.

Whether expert or not, the court erred by excluding Mr. Fennewald-Velez's testimony, and this Court should remand for its consideration.

III. Disclosure Requirements Were Satisfied

The purpose of the expert disclosure rules is "to ensure that a fact-finder is presented with reliable and relevant evidence, not flawless evidence." *State v. Langill*, 157 N.H. 77, 87 (2008). "Thus, expert testimony must rise to a threshold level of reliability to be admissible." *Baker Valley Lumber, Inc. v. Ingersoll-Rand Co.*, 148 N.H. 609, 613 (2002) (quotation omitted). "In the evidentiary context … the term 'reliable' does not mandate correctness; it signifies a much lower standard, to wit, trustworthiness." *Langill*, 157 N.H. at 87.

To establish trustworthiness of one who testifies as an expert, "[a] party is entitled to disclosure of an opposing party's experts, the substance of the facts and opinions about which they are expected to testify, and the basis of those opinions." *Laramie v. Stone*, 160 N.H. 419, 425 (2010), quoting *Figlioli v. R.J. Moreau Cos.*, 151 N.H. 618, 626 (2005).

Ms. Barrera complied with these three requirements.

- By listing Mr. Fennewald-Velez in her April 2012 witness list, Ms. Barrera disclosed the existence and identity of Mr. Fennewald-Velez, even though Mr. Rickert would have already known about him because it was his children who were being treated.

- By sending the court and Mr. Rickert Mr. Fennewald-Velez's July 2012 letter, Ms. Barrera disclosed the substance of the facts and opinions about which Mr. Fennewald-Velez might testify, even though Mr. Rickert would have already known because it was his children who were being treated and Mr. Rickert had met with him.

- By listing Mr. Fennewald-Velez as a possible witness and sending the July 2012 letter reflecting his thoughts, Ms. Barrera disclosed Mr. Fennewald-Velez's treatment of the children and thus the basis on which he formed his opinions, even though Mr. Rickert would have already known because it was his children who were being treated and Mr. Rickert had met with him.

To the extent Mr. Rickert might have wanted more information, he could have followed up with Mr. Fennewald-Velez, Brattleboro, or South Seminole, because as a parent he had equal

access to his children's records. If Mr. Rickert felt additional information or more formal procedures were necessary, he had plenty of time, and could have, for instance, sought a discovery deposition of Mr. Fennewald-Velez, or queried those institutions.

What Mr. Rickert did however – stand on his rights and send Ms. Barrera interrogatories – could not possibly be fruitful because Ms. Barrera had no greater access to information than Mr. Rickert. To the extent Ms. Barrera neglected to give Mr. Rickert any materials, the error was harmless because the materials were not necessary to Mr. Fennewald-Velez's assessment and because any reliance on them was excluded in cross-examination.

Accordingly, the court had no lawful basis on which to exclude Mr. Fennewald-Velez's video deposition, and erred by not admitting it into evidence. This Court should thus reverse and remand for its consideration.

IV. Treating Physicians Are Exempt From Disclosure Requirements

When a party hires an expert for the purpose of litigation, the party provides information to the expert and receives reports from the expert. When the expert is a treating physician, however, the party does not possess "the substance of the facts and opinions about which they are expected to testify, and the basis of those opinions." All the party has is a record of treatment. And any proof of the record of treatment is generally possessed by the physician.

> [W]e conclude that as long as an expert was not retained or specially employed in connection with the litigation, and his opinion about causation is premised on personal knowledge and observations made in the course of treatment, no report is required under the terms of Rule 26(a)(2)(B). This sensible interpretation is also consistent with the unique role that an expert who is actually involved in the events giving rise to the litigation plays in the development of the factual underpinnings of a case. Finally, this interpretation recognizes that the source, purpose, and timing of such an opinion differs materially from the architecture of an opinion given by an expert who is "retained or specially employed" for litigation purposes.

Downey v. Bob's Disc. Furniture Holdings, Inc., 633 F.3d 1, 7 (1st Cir. 2011).

Consequently, treating physicians are generally exempt from expert disclosure requirements. *Sprague v. Liberty Mut. Ins. Co.*, 177 F.R.D. 78, 81 (D.N.H.1998) ("[t]he majority of … courts in the country have concluded that [expert] reports are not required as a prerequisite to a treating physician expressing opinions as to causation, diagnosis, prognosis and extent of disability where they are based on treatment."); *see also* Christopher W. Dyer, *Treating Physicians: Fact Witnesses or Retained Expert Witnesses in Disguise? Finding A Place for Treating Physician Opinions in the Iowa Discovery Rules*, 48 DRAKE L. REV. 719 (2000).

Mr. Fennewald-Velez was a psychologist and a Florida "Licensed Mental Health Counselor," was treating the oldest boy and assessing the other children, and was thus acting as a treating physician. *Thynne v. City of Omaha*, 351 N.W.2d 54, 58 (Neb. 1984) ("[C]linical psychologists are physicians within … the Nebraska Discovery Rules.").

Accordingly, the expert disclosure rules do not apply here, and any failure to comply with them is not a lawful basis to exclude Mr. Fennewald-Velezs' testimony. Moreover, the disclosure rules were complied with, obviating any claim of prejudice or harm. This Court should thus remand for consideration of Mr. Fennewald-Velez's testimony.

V. Exclusion of Expert is Improper Remedy for Technical Nonprejudicial Nondisclosure

Expert testimony may be entirely excluded when complete failure to comply with disclosure requirements prevents the opposing party from examining the expert, such that the reliability of the expert's testimony is undermined. *Laramie v. Stone*, 160 N.H. 419 , 425 (2010) ("A party's failure to supply this information should result in the exclusion of expert opinion testimony unless good cause is shown to excuse the failure to disclose."); *J & M Lumber and Const. Co., Inc. v. Smyjunas*, 161 N.H. 714 (2011); *State v. Langill*, 157 N.H. 77, 83 (2008).

When there is partial failure to disclose, the remedy is only to the extent of the prejudice.

> To show that the trial court's decision is not sustainable, the defendant must demonstrate that the ruling was clearly untenable or unreasonable to the prejudice of his case. In the context of a discovery violation, actual prejudice exists if the [opponent] has been impeded to a significant degree by the nondisclosure.

Barking Dog, Ltd. v. Citizens Ins. Co. of America, 164 N.H. 80, 86 (2012). In *Barking Dog*, "[a]lthough the plaintiff did not provide its expert report by the disclosure deadline …, it did provide the three-page report approximately three months prior to trial. Thus, the defendant had ample time to examine the report and prepare to contest it at trial." *Id.* This court held that because the defendant "still had ample tools at its disposal" to challenge the plaintiff's expert, there was no prejudice. Similarly, this court held in *J & M Lumber & Const. Co., Inc. v. Smyjunas,* 161 N.H. 714, 723 (2011), that because the allegedly prejudiced party "conducted no expert witness discovery, even though [the opponent] first disclosed its expert and the subjects about which he was expected to testify more than a year before trial," there was no prejudice. *See also*, *Gulf Insurance Co. v. AMSCO, Inc.*, 153 N.H. 28 (2005) (allowing late-disclosed expert to testify where opposing party not surprised); *Wheeler v. Sch. Admin. Unit 21*, 130 N.H. 666, 670 (1988) (expert testimony admissible even though opponent had received only one of two expert

reports).

Here, Ms. Barrera disclosed Mr. Fennewald-Velez's identity, what he was likely to testify about, and the basis for his opinion, long before trial, giving Mr. Rickert ample opportunity to do whatever follow-up he wished. There is no more prejudice here than in *Barking Dog, J & M Lumber*, *Gulf Insurance*, or *Wheeler*, and thus the court was in error by entirely excluding Mr. Fennewald-Velez's trial deposition.

As noted, there were two things that were undisclosed. The first was treatment records for treatment during the several months after trial but before the deposition. Because Mr. Rickert's lawyer successfully restricted Mr. Fennewald-Velez's opinion to only those dates for which records were disclosed, however, this caused no prejudice. The second was treatment records developed by South Seminole which Mr. Fennewald-Velez acquired from Ms. Barrera but did not mention because he understood Florida law forbade redisclosure. Because they were equally available to Mr. Rickert had he asked South Seminole for them, however, likewise there was no prejudice.

Moreover, the disclosure rules are construed to avoid exclusion for technical violations. *Bronson v. Hitchcock Clinic*, 140 N.H. 798, 808 (1996) (exclusion improper remedy for expert expressing opinion on differing issue in discovery and trial). Here, the post-trial pre-deposition treatment records were not disclosed because of the continuing nature of the therapy in the gap, and the South Seminole records were not disclosed because Mr. Fennewald-Velez thought he was not allowed. To the extent there were errors, they were merely technical and caused no prejudice. Thus no sanction should be based on them.

The most prejudice Mr. Rickert can allege is that Mr. Fennewald-Velez based his opinion to some degree on the South Seminole records. That is unlikely, however. After the oldest child was discharged from South Seminole, Mr. Fennewald-Velez started his treatment

in February 2011. Mr. Fennewald-Velez conducted dozens of therapy sessions with him and his siblings. The last treatment on which Mr. Fennewald-Velez's based his opinion was in January 2013. Thus Mr. Fennewald-Velez had two full years of frequent on-going therapy on which to form his views. The South Seminole records were a remnant. Although there is no evidence of it in his deposition, if the presence of the undisclosed South Seminole records somehow tainted Mr. Fennewald-Velez's opinion, the remedy is to either excise the tainted portion, or if that is impossible, to give less weight to the deposition generally. *Brewster v. State*, 107 N.H. 226, 227 (1966) (once a witness is qualified as an expert, "any deficiencies in his testimony exposed by cross-examination [go] to the weight of the testimony rather than its admissibility.").

Here, however, any prejudice is not against Mr. Rickert. Mr. Fennewald-Velez's testimony was the only independent source of information regarding crucial facts about the children: the extent to which they witnessed domestic violence, were exposed to inappropriate topics, felt their loyalty tugged between two disputing parents, were affected by the appearance of Mr. Koval in their lives, or encountered difficulties in the parenting schedule. By excluding Mr. Fennewald-Velez's testimony, the court deprived itself of the only child-centered information available, and thereby compounded the error of not having appointed a GAL.

Thus it was error to exclude in its entirety Mr. Fennewald-Velez's testimony, and this court should remand for consideration of it.

CONCLUSION

This court "generally review[s] a trial court's determination of expert reliability under Rule 702 for an unsustainable exercise of discretion." *State v. Langill*, 157 N.H. 77, 83 (2008). In expert disclosure cases, "[t]o show that the trial court's decision was not sustainable, the appealing party must show that the ruling was clearly untenable or unreasonable to the prejudice of his case." *J & M Lumber & Const. Co., Inc. v. Smyjunas*, 161 N.H. 714, 723 (2011).

The exclusion of Mr. Fennewald-Velez's trial deposition was an unsustainable exercise of discretion because Mr. Rickert was not prejudiced by the alleged non-disclosure, and because the expert disclosure rules are intended to aid the trier of fact rather than to create litigation traps.

More important, the court unsustainably exercised its discretion and prejudiced the children by eliminating the only independent source of information regarding them. It also prejudiced Ms. Barrera because had the court considered Mr. Fennewald-Velez's testimony, it would have heard how Mr. Rickert treated the children, and might have allocated parental rights and responsibilities in accord with his lack of parenting skills.

Accordingly, this Court should find that the trial court unsustainably exercised its discretion by excluding Mr. Fennewald-Velez's testimony, and remand for a rehearing to take his testimony into account and to adjust the parenting plan accordingly.

Respectfully submitted,

Delmy Karina Barrera
By her Attorney,

Law Office of Joshua L. Gordon

Dated: April 23, 2014

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
75 South Main Street #7
Concord, NH 03301
(603) 226-4225
www.AppealsLawyer.net

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Delmy Karina Barrera requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issue presented here is novel in the family law context where the rules of evidence normally do not apply, because expert witnesses with many types of expertise frequently appear in family court and therefore the outcome here may affect many cases, and because the court unsustainably exercised its discretion and that wrong should be righted.

I hereby certify that the decision being appealed is addended to this brief. I further certify that on April 23, 2014, copies of the foregoing will be forwarded to Carolyn Garvey, Esq.

Dated: April 23, 2014

Joshua L. Gordon, Esq.

ADDENDUM