State of New Hampshire
Supreme Court

NO. 2007-0774

2008 TERM

APRIL SESSION

In the Matter of

Yelena Katalichenko

and

John Hoffmeier

RULE 7 APPEAL OF FINAL DECISION OF
PORTSMOUTH FAMILY DIVISION

OPENING BRIEF OF RESPONDENT JOHN HOFFMEIER

By: Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Hampshire Cases

New Hampshire Statutes

Secondary Sources

QUESTIONS PRESENTED

I. Did the court err in err in basing parenting rights, responsibilities, and schedules on factors other than the best interest of the child?

Preserved: Motion for Reconsideration (Sept. 10, 2007)

II. Did the court improperly label Mr. Hoffmeier a "batterer" when he has never been subject to the legally-specified procedure by which one acquires such a label, and the label is likely to have long-lasting prejudicial effects?

Preserved: Motion for Reconsideration (Sept. 10, 2007)

III. Did the court err in establishing a disproportionate parenting schedule where the schedules bears no relation to the ostensible basis for it, and it is not in the best interest of the child?

Preserved: Motion for Reconsideration (Sept. 10, 2007)

STATEMENT OF FACTS AND STATEMENT OF THE CASE

John ("Andy") Hoffmeier and Yelena Katalichenko were never married. They resided together in Hampton, New Hampshire until separating in December 2006. Ms. Katalichenko has two sons from a prior marriage, who lived with her and Mr. Hoffmeier. Ms. Katalichenko and Mr. Hoffmeier have one child together, Allison, who was 2½ years old at the time of the parenting hearing.

Although the Portsmouth Family Division court (*Fishman*, M., *DeVries*, J.) found that Ms. Katalichenko was the primary care-giver, Mr. Hoffmeier is an involved father. All agree that Allison has a good relationship with Mr. Hoffmeier, and that he is a good father for her. 1 *Trn.* 70-71 (testimony of GAL).

On the other hand, the relationship between Mr. Hoffmeier and Ms. Katalichenko is not peaceful. It appears that they argued frequently, and that the arguments were loud, angry, and mutually abusive. The court found that "frequent connection between these parties is toxic." DECREE, *Appx.* at 13, 15.

The police were called to the parties' residence twice. They concluded the incidents were "mutual combat," 2 *Trn.* at 14 (testimony of GAL, quoting police report), and gave both parties information for filing a domestic violence petition. *Id.* Ms. Katalichenko, however, never sought a domestic violence order. Moreover, although she alleges that intimidation pervaded the relationship, in her testimony Ms. Katalichenko was able to point to only a handful – maybe 3 or 4 – instances during the more than five years she lived with Mr. Hoffmeier, where any actual angry physical contact took place. 2 *Trn.* at 40-45, 52. The GAL reported that although "any level of domestic violence … is not good," the incidents "were isolated." 1 *Trn.* at 77. The court found

that "[o]n more than one occasion, [Mr. Hoffmeier] was physically abusive towards" Ms. Katalichenko. DECREE, *Appx.* at 14.

Although all the children may have witnessed some of the parties' altercations, there has never been any allegation that Mr. Hoffmeier was in any way violent toward Allison. The GAL reported that violence was "never directed at Allison." 1 *Trn.* at 77

Both parents have the means to provide sufficiently for their child, and both sought primary residential responsibility. Mr. Hoffmeier requested that Allison have equal time with both parents. Ms. Katalichenko sought a much less balanced arrangement whereby Allison would live with Mr. Hoffmeier just every other weekend and every Wednesday night.

In granting Ms. Katalichenko's request, the court wrote that Ms. Katalichenko's "Findings and Rulings paragraphs, numbers 8 and 9, form the basis of this Order." DECREE, *Appx.* at 13. The findings the court referred to recite:

> "8. John was the aggressor during the incidents of domestic violence."
>
> "9. At least two of the incidents of domestic violence occurred in the presence of Allison and while Yelena was actively trying to care for Allison."

PETITIONER'S REQUEST FOR FINDINGS AND RULINGS (Aug. 13, 2007) ¶¶ 8 & 9, *Appx.* at 18.

The court also granted Ms. Katalichenko's request that "[b]ased on the testimony and evidence presented, John, can be labeled a batterer." *Id.* ¶ 20, *Appx.* at 19. The court provided no other basis for its decision. DECREE, *Appx.* at 13, 14; PETITIONER'S REQUEST FOR FINDINGS AND RULINGS, *Appx.* at 18; RESPONDENT'S PROPOSED FINDINGS OF FACT AND RULINGS OF LAW (Aug. 15, 2007), *Appx.* at 22.

This appeal followed.

SUMMARY OF ARGUMENT

Mr. Hoffmeier first points out that the overriding concern of the court in parenting schedule cases is the best interest of the child, and notes that "battering" that does not effect the child is not among the statutory factors. He then argues that because there was no proof that problems between the parties effected the child, the court was in error in basing its decision on the non-statutory factor.

He then lists some of the prejudices that follow the label of "batterer," explains that he has never been subject to the procedure specified to acquire such a label, and argues that the label unconstitutionally effects his rights.

Finally, Mr. Hoffmeier sets forth the disproportionate parenting schedule the court ordered, notes that it bears no relation to the basis of the court's order because it does not decrease the amount of contact between the parties or the number of exchanges of the child, and argues that it is not in the child's best interest.

ARGUMENT

I. Focus Exclusively on the Best Interest of the Child

In making decisions regarding parenting responsibilities and parenting schedules, courts are required to focus exclusively on the best interest of the child. "In matters of visitation, the court's overriding concern is the best interests of the child." *In re Peirano*, 155 N.H. 738, 748 (2007) (emphasis added); RSA 461-A:6 ("In determining parental rights and responsibilities, the court shall be guided by the best interests of the child.").

New Hampshire's parenting rights and responsibilities statute provides a list of factors that go into determining the child's best interest. Among them is "abuse" which "impact[s] … the relationship between the child and the abusing parent." RSA 461-A:6, I(j). "Abuse" is defined with reference to the technical definitions of particular conduct contained in a variety of criminal and child protection statutes.

Not among the factors is generalized "battering" that has no impact on the relationship between child and parent. Also not among them is anger between the parents. This is in contrast to the statutes of other jurisdictions which allow consideration of domestic violence more generally and regardless of its impact on the child. *See* Annotation, *Construction and Effect of Statutes Mandating Consideration Of, or Creating Presumptions Regarding, Domestic Violence in Awarding Custody of Children*, 51 A.L.R.5th 241 (cases collected); Amy B. Levin, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 UCLA L. REV. 813 (2000) (policy considerations).

In Mr. Hoffmeier's case, the court said next to nothing about the best interest of Allison.

Rather it plainly stated that the "basis" of its order was the "incidents of domestic violence." Although it is possible to imagine that a child's emotional well-being can be impacted by witnessing domestic violence, here there were only a few incidents, and the parties separated when the child was just two years old. There was no finding – and no evidence in the record that could support such a finding – that the incidents impacted Allison in any way. This is in contrast to *In re Peirano*, 155 N.H. at 747-748, where the teenage child had clear memory and knowledge of the violence, and was plainly effected by it.

The family division here determined the parenting rights of the parties with respect to criterion which has no basis in law. Its decree has short-term effects, such as where the child lives now; and also long-term effects, such as Allison's school district, and her ability to continue developing a close relationship with Mr. Hoffmeier. As the family division made no other findings upon which this Court can sustain the lower court's ruling, *see e.g., In re Mannion*, 155 N.H. 52 (2007), this Court cannot decide based on the current record, and thus the case must be remanded for further fact-finding.

II. Label of "Batterer" is Prejudicial

Ms. Katalichenko urged the court to take into evidence a particular book which contains a definition of "battering." The court wisely declined to allow the book into evidence, but made clear that through judicial education there was familiarity with it. 2 *Trn.* 56-59. While this leaves unclear what the court meant by its holding that Mr. Hoffmeier "can be labeled a batterer," the label is highly prejudicial.

It can be expected that the finding will likely prevent Mr. Hoffmeier from being a teacher, volunteering in a day-care or school, coaching a youth sports team, or undertaking any profession or situation that involves children, including his own daughter. Officials governing such activities cannot be expected to understand that the label was applied in a parenting proceeding and not a criminal case, and will likely assume the worst. As such it impacts Mr. Hoffmeier's livelihood, his liberty, and his constitutional rights. Moreover, it will no doubt surface in, and probably influence, any future parenting modification proceeding. *See In re Morrill*, 147 N.H. 116, 121 (2001) ("domestic violence charge … would carry significant adverse consequences … relating to custody, visitation and other individual rights").

No domestic violence petition was ever filed against Mr. Hoffmeier. He has never been subject to the legally-specified procedure by which one acquires such a label. *See* RSA 169-C; RSA 173-B. And he has never been accorded the due process that comes with such a proceeding. U.S. CONST. amd. 14; N.H. CONST., pt. I, art. 15. Moreover, the court lacked jurisdiction to impart the label. Nothing in the parenting statute pursuant to which the proceeding here was conducted, RSA 461-A, gives the court authority to label Mr. Hoffmeier a "batterer." *See Fichtner v. Pittsley*, 146 N.H. 512 (2001) (district court not have authority to make child custody determinations).

Accordingly the finding, though superfluous, is prejudicial and should be struck.

III. Disproportionate Parenting Schedule

Apparently based on the domestic violence, the family division determined the parenting schedule for the parties.

Ms. Katalichenko's proposed schedule was that Allison would reside with Ms. Katalichenko at all times except each Wednesday night and every-other weekend, when the child would reside with Mr. Hoffmeier. PETITIONER'S PROPOSED FINAL PARENTING PLAN (adopted by court), *Appx.* at 24. This gives Ms. Katalichenko the great bulk of parenting time.

Mr. Hoffmeier's proposed schedule created an alternating weeks plan. During "Week One," Allison would reside with Mr. Hoffmeier Monday through Wednesday morning, with Ms. Katalichenko Wednesday afternoon through Friday, and with Mr. Hoffmeier for the weekend. During "Week Two," the schedule would be precisely the reverse. FINAL PA0RENTING PLAN, *Appx.* at 28. This sort of alternating week plan is designed to give the child equal time with each parent. *See e.g., Wheaton-Dunberger v. Dunberger*, 137 N.H. 504 (1993); *Russman v. Russman*, 124 N.H. 593 (1984).

Mr. Hoffmeier's proposal was based on the recommendations of the Guardian ad Litem, whose report said:

> I have no other reason to recommend anything but an equal or shared parenting schedule. My review of Allison's child care and pediatric records show that both parties have been and continue to be active participants in her care. … Allison clearly has a close bond with both of her parents, as well as with her two half brothers, and it is in her best interest to have as equal parenting time with both her parents as possible. This may become more complicated as Allison grows older, but the parties will have to address those issues when they arise.

GUARDIAN AD LITEM REPORT (Aug. 7, 2007) at 6-7, *Appx.* at 30, 35-36.

It is significant that in both proposed plans, Ms. Katalichenko and Mr. Hoffmeier have no

face-to-face contact, because all exchanges would take place at the day-care facility. 2 *Trn*. at 9 (testimony of GAL). It is also significant that both proposed plans contain the exact same number of exchanges – three per week.

The total amount of time Allison spends with each parent under the two plans is radically different, however. Under Mr. Hoffmeier's plan, the time spent is exactly equal. Ms. Katalichenko's proposed plan, which was adopted by the court, is lopsided. Mr. Hoffmeier has parenting time only on alternating weekends and on Wednesday evening to Thursday morning; whereas Ms. Katalichenko has parenting time not only on alternating weekends, but all week every week except on Wednesday evening to Thursday morning.

Thus Mr. Hoffmeier's plan, which the court rejected, shares parenting time equally but creates no extra exchanges.

If "battering" is the basis of the court's decree, there is no rational relation between the "battering" and the disproportionate parenting time. Because the basis of the decree cannot explain its timetable, the family division unreasonably exercised its discretion.

If minimizing contact between the parties is the basis of the court's decree – because "frequent connection between these parties is toxic" – there still is no rational relation between the court's basis and the lopsided parenting time. This is because the equal parenting plan Mr. Hoffmeier proposed does not increase contact. Thus this basis for the decree cannot explain its timetable, and the family division unreasonably exercised its discretion.

New Hampshire's recently-enacted parenting plan statute sets forth the State's policy in these situations:

> Because children do best when both parents have a stable and meaningful involvement in their lives, it is the policy of this state, unless it is clearly shown that in a particular case it is detrimental to a child, to … [s]upport frequent and continuing contact between each child and both parents, [and] [e]ncourage parents to share in the rights and responsibilities of raising their children after the parents have separated or divorced.

RSA 461-A:2, I (a) & (b).

Here, it was not "clearly shown" that equal parenting "is detrimental to a child."

Accordingly, this Court should remand to develop a more balanced parenting plan.

CONCLUSION

Based on the foregoing, this court should remand, instructing the family division to delete the characterization of Mr. Hoffmeier as a "batterer" from its order, and to develop a more balanced parenting schedule.

Respectfully submitted,

John (Andy) Hoffmeier
By his Attorney,

Law Office of Joshua L. Gordon

Dated: April 4, 2008

Joshua L. Gordon, Esq.
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Client John (Andy) Hoffmeier requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because this court has never reached the issue of whether a label such as "batterer" is a valid consideration in parenting schedule cases, and because of the significant prejudice attached to the label.

I hereby certify that on April 4, 2008, copies of the foregoing will be forwarded to Kimberly Shoen, Esq., and Patrick F. Harrigan, Esq., GAL.

Dated: April 4, 2008

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

APPENDIX