State of New Hampshire
Supreme Court

NO. 2009-0806

2010 TERM

JULY SESSION

In the Matter of

JAMES J. MILLER

and

JANET S. TODD

Rule 7 Appeal of Final Decision of Portsmouth Family Division

Brief of Petitioner/Appellant James Miller

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QUESTIONS PRESENTED

1. Did the court err in awarding Ms. Todd parenting responsibility when she has engaged in a sustained campaign to alienate the children from Mr. Miller, and to interfere with his parenting rights, by making multiple accusations of sexual abuse which have all been unfounded?

   Preserved: MOTION TO RECONSIDER THE FINAL ORDER (Sept. 19, 2009), *Appx.I-e* at 1193.

2. Did the court err in not providing Mr. Miller a timely opportunity to view video tapes of interviews with the children which contain statements by them that tend to exonerate Ms. Todd's allegations of sexual abuse?

   Preserved: MOTION FOR ORDER DIRECTING HILLSBOROUGH COUNTY ATTORNEY'S OFFICE TO RELEASE COPIES OF TAPED INTERVIEWS WITH CHILDREN TO DR. PEGGIE WARD AND TO COUNSEL FOR THE PARTIES (Jun. 12, 2007), *Appx.I-b* at 463; PETITIONER'S REPLICATION TO THE STATE'S OBJECTION TO MOTION FOR ORDER DIRECTING HILLSBOROUGH COUNTY ATTORNEY'S OFFICE TO RELEASE COPIES OF TAPED INTERVIEWS WITH CHILDREN TO DR. PEGGIE WARD AND TO COUNSEL FOR THE PARTIES (Jul. 11, 2007), *Appx.I-b* at 481.

3. Is this Court's rule providing for mandatory review of appeals involving married parents, but providing for certiorari review of appeals involving non-married parents, unlawful and unconstitutional?

   Preserved: MOTION TO RECONSIDER DECLINATION OF DISCRETIONARY APPEAL (filed in New Hampshire Supreme Court, Jan. 4, 2010).

STATEMENT OF FACTS

I. Parties' Positions

This child custody case concerns two little girls, Laurel (8) and Lindsay (7). They have been the subject of litigation since shortly after birth, comprising over 400 pleadings, 20 review hearings, and a three-day trial. *See* TEMPORARY DECREE (Nov. 9, 2004), *Appx.I-a* at 110[1]; REPORT OF DR. PEGGY WARD (Dec. 18, 2007) [hereinafter WARDRPT.) (Chronology of Events), *Appx.II-a* at 1279; ORDER (Sept. 8, 2009), *Appx.I-e* at 1186. "To characterize the litigation as extraordinarily

[1]There are nine volumes of appendices to this brief. They are referred to herein by volume number. The first volume, comprising five books, contains pleadings and orders: *Appx.I-a*, *Appx.I-b*, *Appx.I-c*, *Appx.I-d*, and *Appx.I-e*. The second volume, comprising two books, contains GAL Reports, Expert Reports, and Exhibits: *Appx.II-a*, and *Appx.II-b*. The third volume, comprising two books, contains transcripts of review hearings, and relevant statutes: *Appx.III-a*, and *Appx.III-b.* The pages of the appendices are consecutively numbered.

acrimonious is an understatement." ORDER (May 15, 2008), *Appx.I-c* at 789.

The gist of each party's position is easily summarized. Despite a dearth of evidence, Ms. Todd keeps accusing Mr. Miller of sexually molesting both children. But all her numerous allegations have been unanimously determined unfounded, and her own statements show she may not even believe them herself. ORDER (Mar. 7, 2008), *Appx.I-c* at 744 ("The court is growing increasingly convinced that [Ms. Todd's] insistence that [Mr. Miller] sexually abused the children is the single biggest obstacle to restoring [Mr. Miller's] relationship with them."). Mr. Miller vociferously denies the allegations, believes Ms. Todd is either malicious or mentally unstable,[2] and accuses her of a sustained and unjustified effort to alienate their daughters fron him. ORDER (Sept. 8, 2009), *Appx.I-e* at 1186. Both seek primary residential responsibility.

II. Ms. Todd's Numerous Unfounded Allegations of Sexual Abuse

A. Documented Allegations, all Unfounded

There have been at least seven separate and well-documented unfounded allegations made that Mr. Miller has sexually abused his daughters, and many other allegations that are suggested by the record but without sufficient detail for specification here.

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[2]Mr. Miller has some basis for his understanding of Ms. Todd's mental state. Dr. David Medoff did psychological testing of both Mr. Miller, REPORT OF PSYCHOLOGICAL TESTING OF JAMES MILLER BY DAVID MEDOFF, PH.D. (July 31, 2007), *Appx.II-a* at 1266, and Ms. Todd. REPORT OF PSYCHOLOGICAL TESTING OF JANET TODD BY DAVID MEDOFF, PH.D. (Aug. 2, 2007), *Appx.II-a* at 1271. Among his findings regarding Ms. Todd:

> "[I]mpairment in Ms. Todd's ability to accurately process the information she takes in from her surroundings and the degree of the misperception she demonstrates has major negative implications for her adaptive functioning. That is, Ms. Todd's level of distortion is substantial and predisposes her to misunderstanding and misconstruing the intentions, motivations and actions of other people. This places her at great risk for faulty judgment, for errors in decison making and for behaving in ways that are based on inaccurate information. These data indicate that Ms. Todd will not only fail to recognize or foresee the consequences of her actions at times, but that she will also become confused at times in separating fantasy from reality."

1. February 2004

Alleged Event. After a court order directing the children be surrendered to the father and returned to their "home state" of Michigan, ORDER ON ENFORCEMENT OF MICHIGAN ORDER (Jan. 26, 2004), *Appx.I-a* at 16, the maternal grandmother made a claim that, four months earlier, she saw Mr. Miller molest the eldest daughter. Specifically: "Maternal grandmother stated father inserted his fore-finger inside of Laurel. This was never reported to anyone." FAMILY INDEPENDENCE AGENCY OF MICHIGAN, PROTECTIVE SERVICES INVESTIGATION SUMMARY (March 2, 2004), *Appx.II-a* at 1400.

Unfounded. In a 2004 hearing, Ms. Todd's mother testified the incident was reported to the Portsmouth Police, but the police have no such record. *9/15/04 Trn*.at 113-114.[3] In February 2004, Ms. Todd and the maternal grandmother made a report of the alleged incident to the Michigan child protective agency. EXPEDITED MOTION TO MODIFY PARENTING RESPONSIBILITY AND PARENTING TIME at 3 (Apr. 21, 2006), *Appx.I-a* at 245. Its investigation included, among other things, pelvic examinations of both children. No indications of sexual abuse of either child were found, and the investigation was closed for lack of evidence. FAMILY INDEPENDENCE AGENCY OF MICHIGAN, PROTECTIVE SERVICES INVESTIGATION SUMMARY (March 2, 2004), *Appx.II-a* at 1400.

2. June 2005

Alleged Event. The maternal grandfather reported that while he was watching a movie on his bed with the children, Laurel, then age 3, tried to straddle him and stated, "I'm fucking you." He

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[3]There are seven transcripts in the record before this Court. Three of them are of the recent trial below – held on July 20, 21, and 22, 2009. They are referred to herein as: *1 TrialTrn.*, *2 TrialTrn.* and *3 TrialTrn.* The pages of the trial transcript are consecutively numbered, and are already a part of this Court's record as they were ordered for the purposes of this appeal.

The other four transcripts are from review hearings held in the years preceding trial. They are referred to herein by their dates: *9/15/04Trn.*, *10/6/05Trn.*, *7/12/06Trn*., and *3/20/09Trn*. These review hearing transcripts are contained in volumes *III-a*, and *III-b* of the appendix to this brief.

asked whether she heard this from her father, and she said yes. Reportedly Lindsay, then age 2, also used the word "fuck." *1 TrialTrn.* at 181; *3 Trial Trn*. at 543-544.

Unfounded. The maternal grandfather reported the alleged event to the Hampton, New Hampshire, police, EXPEDITED MOTION TO MODIFY PARENTING RESPONSIBILITY AND PARENTING TIME at 7 (Apr. 21, 2006), *Appx.I-a* at 245, who acknowledged its receipt, noted it as a "possible disclosure" of sexual abuse, but took no action. WARDRPT., *Appx.II-a* at 1284.

3. September 2005

Alleged Event. Ms. Todd, her parents, and a friend made allegations that the children had been sexually abused by Mr. Miller. Ms. Todd and her friend alleged the children had reported they had been spanked in their genital area. The maternal grandparents reasserted the unfounded allegations of February 2004 and June 2005. Ms. Todd made a variety of allegations, including parental kidnapping. TEMPORARY DECREE (Nov. 9, 2004), *Appx.I-a* at 110.

Unfounded. The allegations were made to the DCYF. As a result, the court issued an order prohibiting the father from having any contact with the children pending the DCYF investigation. TEMPORARY ORDER (Sept. 6, 2005), *Appx.I-a* at 171; TEMPORARY ORDER (Oct. 7, 2005), *Appx.I-a* at 228; EXPEDITED MOTION TO MODIFY PARENTING RESPONSIBILITY AND PARENTING TIME at 10 (Apr. 21, 2006), *Appx*. at 245. The investigation included, among other things, a second pelvic examination and videotaped interviews of Laurel. DCYF closed the matter as unfounded. DCYF ASSESSMENT OF FAMILY SAFETY REPORT (Oct. 21, 2005), *Appx.II-b* at 1494; LETTER FROM DCYF TO JIM MILLER (Oct. 21, 2005), *Appx.II-b* at 1492; *10/6/05Trn*. at 33. Referrals were made to the Manchester Police and Hillsborough County Attorney, LETTER FROM DCYF TO CHIEF JOHN JASKOLKA (Sept. 29, 2005), *Appx.II-b* at 1474. who both declined to take action.

Despite the "unfounded" determination, the children remained prohibited from contact with

their father for 2½ years.

4. November 2005

Alleged Event. Both Ms. Todd and the children's therapist alleged that the children had reported Mr. Miller took nude photographs of them, and forced Laurel to fondle him and perform unspecified acts of fellatio. DCYF ASSESSMENT OF FAMILY SAFETY REPORT, Report No. 273744 (Jan. 30, 2006), *Appx.II-b* at 1511; CAC VIDEOTAPES (Sept. 22, 2005, Nov. 30, 2005, Jan. 20, 2006).

Unfounded. The matter was reported to DCYF, whose investigation included videotaped interviews of Laurel, then age 3. During the interviews, the child stated that both Ms. Todd and the maternal grandmother had instructed her on what to say. CAC VIDEOTAPES (Jan. 20, 2006). At the time of the interviews, Mr. Miller had been prohibited from contact with the children for over two months.

An initial finding was made against Mr. Miller. ALLEGED PERPETRATOR NOTICE (Jan. 30, 2006), *Appx.II-b* at 1512. Upon further investigation by the Manchester Police, including the review of a polygraph examination of Mr. Miller and the CAC videotapes, the initial determination was rescinded. LETTER FROM DCYF TO JIM MILLER (Feb. 24, 2006), *Appx.II-b* at 1517; LETTER FROM DCYF TO JANET TODD (Feb. 24, 2006), *Appx.II-b* at 1516.

At the conclusion of its investigation the Manchester Police were concerned that the children may have been coached to make the disclosures. *7/12/06Trn*. at 42. Similarly, in its letter closing the matter, DCYF stated: "There has been a concern that Laurel has been coached with the information that she has been disclosing. Please understand that this … type of coaching, if proven, is equally as abusive to a child as if the abuse had actually occurred." LETTER FROM DCYF TO JIM MILLER (Feb. 24, 2006), *Appx.II-b* at 1518.

Despite this finding, the children were still denied contact with their father.

5. April 2006

Alleged Event. The specifics of this event are unknown. There is mention in the DCYF case file that the same accusations that were made in the past were being re-alleged. DCYF ASSESSMENT OF FAMILY SAFETY REPORT (Aug. 28, 2006), *Appx.II-b* at 1527.

Unfounded. DCYF, the Manchester Police, and the Hillsborough County Attorney's Office reviewed the complaint, and the matter was closed as "unfounded." Once again in its closing letter DCYF wrote regarding its "concern for your children's emotional well being. Coaching or engaging a child to make a sexual abuse disclosure is emotionally abusive and harmful to the child." LETTER FROM DCYF TO MILLER (June 16, 2006), *Appx.II-b* at 1528. The State also indicated it would not prosecute. LETTER FROM MARGUERITE WAGELING, COUNTY ATTORNEY TO HON. HARRIET FISHMAN, MASTER (Sept. 26, 2006), *Appx.I-b* at 408.

Despite these findings, the children were still prevented from contact with Mr. Miller.

6. March 2009

Alleged Event. Ms. Todd claimed Lindsay reported that "daddy touched her pee-pee. She told him not to and he did it anyway, and that there was also a threat in there that if they told anyone, he would kill their mother." *3/20/09Trn*. at 3-4.

Unfounded. The GAL testified that she spoke the next day with the children and that "[t]he girls did not say anything like that had happened." *3/20/09Trn*. at 4. Despite the lack of supporting evidence, statements by the children denying Ms. Todd's allegations, and the history of unfounded accusations, the court ordered the matter reported to DCYF. ORDER (Mar. 20, 2009), *Appx.I-d* at 974. DCYF investigated and closed the matter as unfounded. DCYF ASSESSMENT OF FAMILY SAFETY REPORT (June 11, 2009), *Appx.II-b* at 1598.

In its closing letter DCYF wrote: "If we shall get another report in with further concerns for

Lindsay and Laurel and they have not started therapy, the Division for Children, Youth and Families may be forced to take a different course of action." LETTER FROM DCYF TO JIM MILLER (June 16, 2009), *Appx.II-b* at 1603; LETTER FROM DCYF TO JANET TODD (June 16, 2009), *Appx.II-b* at 1614.

7. April 2009

Alleged Event. While sitting in her first grade class, Laurel experienced an emotional breakdown, reportedly telling her teacher she was fearful her father was going to kill her mother.

Unfounded. The school reported the incident to the GAL. Based on conversations with the school and others, Mr. Miller requested the court give him custody. EX PARTE MOTION TO MODIFY CUSTODY OF THE MINOR CHILDREN DUE TO NEW ACTS OF CHILD ABUSE (Apr. 28, 2009), *Appx.I-d* at 997. Because the final hearing was just two months away, the court took no action.

B. Numerous Other Allegations and Unfoundeds

There have been numerous other reports, but documentation is sketchy. For instance, in February 2004, for reasons that are unclear, Ms. Todd contacted the police in Hamburg, New York. This resulted in the police appearing in the night for a welfare check on the children who were at Mr. Miller's mother's home. Nothing was amiss. EXPEDITED MOTION TO MODIFY PARENTING RESPONSIBILITY AND PARENTING TIME at 3 (Apr. 21, 2006), *Appx.I-a* at 245. In another incident, Ms. Todd called a guidance counselor at the East Lansing High School in Michigan alleging Mr. Miller had molested his children and also taken their babysitter, a student at the school who was in Michigan at the time, to New Hampshire. WARDRPT., *Appx.II-a* at 1284. In addition, the trial transcript contains talk of a number of other unfounded allegations, denials, involvements of the GALs, the parties, the court, and outside officials. But the transcript and the documentary record are ambiguous enough so that the nature of each allegation, the particulars of its report to authorities, and the ultimate finding regarding it cannot be correlated.

It is nonetheless clear that the allegations were frequent and repetitive. *1 TrialTrn.* at 183. Mr. Miller testified that "[a]s soon as one was unfounded, there was another one right there." *1 TrialTrn.* at 185. Mr. Miller had repeated contacts with DCYF, and interactions with the police "[t]oo many times to count." *1 TrialTrn.* at 179.

Despite the myriad allegations, there has never been a single finding that Mr. Miller ever sexually abused anybody. He has been investigated by child protection services in two states, and has been contacted by five police departments in three states, two of which explicitly refused to bring charges. He has passed a polygraph. No state agency – administrative or criminal – has ever brought an enforcement action against him. Mr. Miller has been exonerated every time. He is not a child molester. Rather, he and the children are victims of Ms. Todd's imagination.

C. Not Even Ms. Todd Herself Believes the Allegations

Ms. Todd has never conceded the sex abuse allegations she has made against Mr. Miller are merely a child custody tactic, but she readily admits she does not know whether they have actually occurred, *3 TrialTrn.* at 634, 748, and that she has no evidence Mr. Miller has done anything wrong. *3 TrialTrn.* at 708-09. In fact she may not really believe the allegations herself. *3 TrialTrn.* at 708-10, 734-37. Her doubt of her own allegations is echoed by others – experts who have conducted numerous interviews with the children or worked with the parties do not believe them. Accordingly, the court wrote it is "growing increasingly convinced that [Ms. Todd's] insistence that [Mr. Miller] sexually abused the children is the single biggest obstacle to restoring [Mr. Miller's] relationship with them." ORDER (Mar. 6, 2008), *Appx.I-c* at 744.

D. Children Do Not Confirm Allegations

This court is urged to view the three videos of Laurel, in which she does not confirm the allegations, but suggests Ms. Todd coached her to some extent. CAC VIDEOTAPES (Sept. 22, 2005,

Nov. 30, 2005, Jan. 20, 2006). In her interview with Dr. Ward, Laurel also denied the allegations, and again suggested her mother had coached her to make a report. WARDRPT., *Appx.II-a* at 1311.

III. Effects of the Allegations

A. Acrimony

Ms. Todd's allegations against Mr. Miller have had debilitating effects. First is the acrimony of the litigation, to which the children have had "a front row seat," *2 TrialTrn.* at 292, and about which they cannot help but know. *3 TrialTrn.* at 589-90. Moreover, because Ms. Todd's family, with whom the girls live, has repeatedly involved them in the many unfounded allegations, their New Hampshire home does not provide respite from the acrimony.

B. Forensic and Therapeutic Physical and Psychological Examinations

The children have been subjected to numerous forensic physical and psychological evaluations. The court noted the children "have been interviewed by DCYF and law enforcement, have been evaluated by Dr. Ward, have had 2 GALs, and have participated at least twice in reunification therapy." ORDER (July 15, 2009), *Appx.II-d* at 1067. Three of the interviews have been taped, as noted *infra*. The girls had at least two physical exams, necessarily focused on private areas of their bodies. The GAL characterized these as "intrusive examinations." *2 TrialTrn.* at 293.

The evaluations have given the children adult sexual knowledge at inappropriately young ages. In March 2009 the GAL went to the children's school to follow up another allegation of sexual abuse. When asked whether the child knew why she was there, the GAL testified:

> I think these kids have been seen so many times by professionals and the topic of sexual abuse, I think, has been present in these meetings with professional[s]. It wouldn't be farfetched for me to think something like that might have been in their mind.

3/20/09Trn. at 6-7.

DCYF was also concerned the children had been coached. LETTER FROM DCYF TO JIM MILLER (Feb. 24, 2006), *Appx.II-b* at 1518; LETTER FROM DCYF TO JAMES MILLER (June 16, 2006), *Appx.II-b* at 1528. The Manchester police officer tasked with the case testified he "had issues whether or not these disclosures were accurate or whether or not the child had been provided some of this information." *7/12/06Trn*. at 42. When asked about coaching, Mr. Miller was charitable:

> I don't think there's active coaching the kids to – I don't think she's saying go in there, honey, and tell people that your daddy molested you. … But maybe … she believes it so much, and I know the Todds aren't careful about talking things like this, that maybe the kids are sitting there and they've got a front row seat in the stadium, and they're listening and seeing what happens, and they're sponges. They pick up on everything they hear, everything they see. It all just comes rushing into them.

1 TrialTrn. at 210-11.

C. Prolonged Interruption of Father's Parenting

The unfounded allegations caused a prolonged interruption of the children's relationship with their father. From September 2005 until January 2008 – nearly 2½ years – the children were denied their father's affection and guidance. TEMPORARY ORDER (Sept. 6, 2005), *Appx.I-a* at 171; TEMPORARY ORDER (Oct. 7, 2005), *Appx.I-a* at 228. Except for a single contact in October 2007 in Dr. Ward's office for the purpose of evaluation, during which Mr. Miller was allowed only to "sit silently while his daughters played in the room," WARDRPT., *Appx.II-a* at 1356; *1 TrialTrn.* at 185-86, he was not permitted *any* interactions with his children, including cards, gifts, letters, or phone calls. *1 TrialTrn.* at 229-230. In 2006, just half-way through the suspension period, the GAL reflected on the "tragedy" that the girls had changed so much since Mr. Miller had last seen them – "And Lindsay was a baby the last time he saw her, now she's a little girl. [A]nd he hasn't seen her in all that time." *7/12/06Trn*. at 50-51.

In reinstating visitation, the court noted the harm:

> The result is that the children continue to be denied any meaningful relationship with their father. Were it up to [Ms. Todd], this sad state of affairs would continue indefinitely, or at least until the children were significantly older – she continues to be convinced that [Mr. Miller sexually abused the children despite substantial evidence to the contrary.

ORDER (Mar. 6, 2008), *Appx.I-c* at 744**.**

D. Ostracism

Another effect of Ms. Todd's unfounded accusations is that word of them leaked out, effectively making Mr. Miller a pariah in the girls' community.

According to Ms. Todd's reverend, members of their church are aware of the allegations. *3 TrialTrn.* at 515, 517-18. The allegations appear in medical records, *1 TrialTrn.* at 169, and school records. *1 TrialTrn.* at 170. Ms. Todd is a sometimes substitute teacher in the Hampton schools, and testified she told people there. *3 TrialTrn.* at 714. When Mr. Miller met with teachers for a routine progress report, he was aware from body language that his character was being questioned. *1 TrialTrn.* at 170, 172. Ms. Todd admits that whether or not she has told them, people in the wider community know of the allegations. *3 TrialTrn.* at 742. Mr. Miller testified that when he attends the children's sporting and social events there is "whispering" and "finger pointing." He feels "Like a pariah. Like maybe I should have a big red A or something on my chest." Mr. Miller does not think he is merely being paranoid. *1 TrialTrn.* at 166-67, 255-56, 258-59, 290-91.

E. Other Harm

Defending against the allegations has been expensive. Dr. Ward's investigation, by itself, cost $20,000. *1 TrialTrn.* at 185. Mr. Miller believes the allegations have cost him three good jobs because of the time and energy he has been forced to expend contesting the allegations. PETITIONER'S MOTION FOR RECONSIDERATION, *Appx.I-c* at 749, 753.

The 2½ year suspension prevented the children from knowing Mr. Miller's father and oldest

brother because they died in the interim. *1 TrialTrn.* at 175. The allegations and resulting suspension also were an interference with Mr. Miller's constitutional rights to parenthood OBJECTION TO GUARDIAN AD LITEM'S EX PARTE MOTION (Feb 13, 2009), *Appx.I-d* at 964.

IV. Mr. Miller Wants Custody

Because of the repeated and ongoing unfounded allegations, and the harm they have caused his children, Mr. Miller believes it is in their best interest that he have joint legal and primary residential parenting. PROPOSED PARENTING PLAN (Jan. 17, 2008), *Appx.I-c* at 628; PROPOSED PARENTING PLAN (Mar. 3, 2008), *Appx.I-c* at 714. Because of the risk of coaching, in the event of further unfounded allegations, he has suggested Ms. Todd would be restricted to supervised parenting only. PROPOSED PARENTING PLAN (Aug. 4, 2009), *Appx.I-e* at 1133.

V. Report of Dr. Peggy Ward, Ph.D.

Dr. Peggy Ward, by agreement of the parties, AGREEMENT (July 12, 2006), *Appx.I-b* at 371, and by court order, DECREE (July 14, 2006), *Appx.I-b* at 373, prepared an 88-page report comprehensively analyzing the parties' situations, the allegations, the possibility of abuse, and the likelihood of coaching or scripting. WARDRPT., *Appx.II-a* at 1279. Because Dr. Ward's involvement was one of the few things the parties agreed to, because their respective experts praised both her and the report, *2 TrialTrn.* at 351, 354-56, 363, 367; *3 TrialTrn.* at 661, 672, and because the report so thoroughly explicated the issues, it carried particular weight throughout the litigation. ORDER (Sept. 8, 2009), *Appx.I-e* at 1186 ("Dr. Ward's lengthy parenting assessment is thorough and extraordinarily perceptive.").

It is not fair to summarize Dr. Ward's detailed work here, and this Court's attention is

directed to her full analysis, particularly to three sections: "Impressions," *Appx.II-a* at 1352; "Hypotheses," *Appx.II-a* at 1361; and "Recommendations," *Appx.II-a* at 1364.

A. Dr. Ward's Impressions

Dr. Ward reports that "Ms. Todd believes beyond any doubt that Mr. Miller sexually abused Laurel." WARDRPT., *Appx.II-a* at 1354. In formulating an opinion on the likelihood of a child having been sexually abused, Dr. Ward considered five factors:

1. The context in which the allegations emerged and the likelihood or the lack thereof that they may have been motivated by secondary gain.

2. The likelihood that the concerns regarding sexual abuse might be due to a misinterpretation or over interpretation of the child's statements and presentation.

3. The child's presentation and the degree to which it is consistent with or not consistent with the presentation of children with documented histories of sexual abuse.

4. The child's disclosure and the degree to which it appears to be consistent with what is known about the process of disclosure in same age children.

5. The credibility of the child's statements.

WARDRPT., *Appx.II-a* at 1357.

As to the first factor, Dr. Ward noted that the context of the allegations were the custody dispute, the timing of some of them was suspect, and that "[t]here is a secondary gain possible."

As to the second and third, Laurel "shows few presentations consistent with clinical presentations of other children with regard to child sexual abuse," and some of her sexualized behaviors were "most likely normal for age and stage." WARDRPT., *Appx.II-a* at 1358. Use of the word "fuck," Dr. Ward found, is more "consistent with witnessing adult sexuality or videos of adult sexuality," and "Laurel's focus on the genital area … is consistent with multiple physical examinations as well as the multiple interviews Laurel has experienced." WARDRPT., *Appx.II-a* at

1359. Dr. Ward found that "few of Laurel's clinical presentations are consistent with child sexual abuse." *Id.* "Her presentations may be seen more consistent with having viewed adult sexual behavior … and/or having medical focus on her genital area." *Id.*

As to the fourth factor, Dr. Ward found that Laurel's disclosures were not of the accidental nature which research shows is the tendency among children her age. WARDRPT., *Appx.II-a* at 1360.

As to the fifth, Dr. Ward found that "there were virtually no details included in Laurel's disclosure and no context provided. There was no indication of age inappropriate sexual knowledge in her description," *id.*, and the shifting nature of them do not tend to describe remembered experience. WARDRPT., *Appx.II-a* at 1361. Combined with the fact that "Mr. Miller does not present with risk factors such as history of sexual abuse or deviant arousal patterns," *id.*, Dr. Ward found that "Laurel's presentation is less consistent with sexual abuse and trauma than it is with early and continued exposure to genital contact with a heightened degree of anxiety and uncertainty." *Id.* Thus Dr. Ward wrote that the allegations of sexual abuse are not plausible. *Id.*

B. Dr. Ward's Hypotheses

Dr. Ward presented four hypotheses, which she tested against the data. The first was:

> Laurel was not sexually abused by her father or anyone else. She witnessed parental conflict as well as multiple examinations and focus on her genital area. These medical examinations took place with each parent taking Laurel for examination. The examinations were performed to suit the parent's fears of being accused or at the request of attorneys. It is the opinion of Dr. Ward that this hypothesis may be supported by the data. … [I]t is Dr. Ward's opinion that Laurel's presentation is less consistent with a child who has been repeatedly sexually abused and more consistent with other hypotheses.

WARDRPT., *Appx.II-a* at 1361-62.

The second hypothesis was that Laurel was inappropriately touched by Mr. Miller. After analysis, Dr. Ward rejected this, saying "Laurel's statements and behaviors are less consistent with

child sexual abuse than they are of premature focus on the genital area followed by a good deal of anxiety and distress about sexual abuse from both Janet Todd" and her family. Dr. Ward also rejected for a variety of reasons the third hypothesis, that Laurel's statements were scripted by Ms. Todd. WARDRPT., *Appx.II-a* at 1362-63.

The fourth hypothesis – best supported by the data according to Dr. Ward – was that the abuse is largely in Ms. Todd's head. Dr. Ward wrote:

> "Ms. Todd's level of distortion is substantial and predisposes her to misunderstanding and misconstruing intentions, motivations and actions of other people. This places her at great risk for faulty judgment, for errors in decision-making, and for behaving in ways that are based on inaccurate information. These data indicate that Ms. Todd will not only fail to recognize or foresee the consequences of her actions at times, but that she will also become confused at times in separating fantasy from reality." Additionally, the psychological testing showed that Ms. Todd "evidences substantial problems with her ability to think logically and coherently. Individuals with this of [sic] disturbed thought experience difficulty in reasoning through plausible alternatives and in making decisions that are based on a realistic foundation."
>
> It is Dr. Ward's opinion that this hypothesis is the most likely hypothesis supported by the data. That is that Ms. Todd, after experiencing her parent's concerns about Mr. Miller and afer having experienced her own negative interactions with Mr. Miller, became increasingly convinced that Mr. Miller was harming Laurel. While both parents had difficulty with Laurel, Ms. Todd has the liability of distortion of information and failure to accurately identify intentions, motivations and behavior of others. Ms. Todd's emotional state placed her at risk for misinterpreting information that she gained from her environment, adamantly believing that Laurel was sexually abused, and acting with full force on this information. This hypothesis is best supported by the data in that Laurel's presentation is not consistent in many ways with child sexual abuse.…
>
> Thus, the hypothesis that Ms. Todd unintentionally but clearly caused Laurel to come to believe that she has been sexually abused by her father is the hypothesis best supported by the data.

WARDRPT., *Appx.II-a* at 1363.

C. Dr. Ward's Recommendations

In her conclusion, Dr. Ward wrote:

> While it is unlikely that Mr. Miller has sexually abused Laurel, it is not possible to say with an absolute certainty that he did not. While it is likely that Janet Todd did influence her children with her negative beliefs about Mr. Miller, from her psychological profile, it is most likely that her feelings colored her perceptions and that she not only came to see Mr. Miller as harmful to Laurel but also did not protect the children from her feelings. Further, Ms. Todd's parents appear to have wholly and adamantly accepted that Mr. Miller is a pervasive negative influence on his children. Mrs. Todd in particular is active in helping her daughter prove that Mr. Miller sexually abused the children. Further, Laurel's therapist is convinced that Laurel has been sexually abused, and may have inadvertently reinforced the abuse by making a "book" with Laurel about her abuse. Mr. Miller has not seen his children, outside Dr. Ward's office since September 2005. Both children recognize him as "dada" but have no present relationship with him. Laurel is somewhat fearful of her father (although this feeling shifted in the course of the observation with Mr. Miller and the children). Mr. Miller and the children have lost the attachment that they once had with each other. This attachment must be slowly rebuilt.

WARDRPT., *Appx.II-a* at 1364. Based on this, Dr. Ward made a detailed series of recommendations, WARDRPT., *Appx.II-a* at 1364-65 – including that the children be reunified with Mr. Miller, and Ms. Todd continue in therapy – which the court implemented. ORDER (May 15, 2008), *Appx.I-c* at 789.

Dr. Ward's report was submitted to the court in December 2007. Since that time – and largely because of Dr. Ward's work – Mr. Miller has reunified with his children and they are no longer estranged from him. ORDER (Sept. 8, 2009), *Appx.I-e* at 1186.

STATEMENT OF THE CASE

The Portsmouth Family Court (*Philip D. Cross*, M.M., *Sharon N. Devries*, J.) issued a parenting plan providing: joint decision-making, primary residential responsibility with Ms. Todd, every-other-weekend residential responsibility with Mr. Miller, four weeks each summer with Mr. Miller, and holidays and school vacations roughly evenly split. PARENTING PLAN (Sept. 8, 2009), *Appx.I-e* at 1174; ATTACHMENT TO PARENTING PLAN (Sept. 8, 2009), *Appx.I-e* at 1182. The court specified transportation details, and ordered the children and Ms. Todd to continue counseling.

The court also ordered the parties to refrain from making baseless accusations and to keep their disputes away from the children.

In its narrative, the court reviewed the numerous events and the lengthy history of the case. It was persuaded that Mr. Miller "has been through a great deal of unwarranted scrutiny and his parenting time was unreasonably interrupted. He and the girls have suffered for it." ORDER (Sept. 8, 2009), *Appx.I-e* at 1186. The court pointed out that Mr. Miller's relationship with his daughters nonetheless appears healthy and full, but that the girls' lives are based in New Hampshire and not New York, and that their interest is to stay in their current environment. The court suggested Mr. Miller move away from his elderly mother in Buffalo and closer to his daughters in Hampton. *Id.*

This appeal followed.

SUMMARY OF ARGUMENT

James Miller first details Janet Todd's multi-year series of unfounded allegations of sexual abuse against him. He then canvasses the cases in other jurisdictions, and concludes that courts routinely remove children from the custody of the parent who makes such false accusations. He then compares the situations and homes of each parent, and argues that the court was wrong in leaving the children in the custody of Ms. Todd.

Additionally, Mr. Miller argues that his due process rights were violated when he was denied access to interview tapes of one of the children, whose exonerating statements would have prevented a 2½ period in which they lost contact with him. Finally, he argues that this Court's rule allowing automatic appeals for married couples disputing custody, but requiring a certiorari process for unwed parents, is unlawful and unconstitutional.

ARGUMENT

I. Remedy for Making Unfounded Allegations of Sexual Abuse is Modification of Custody

It is axiomatic that relationships with both parents is in the best interest of children. RSA 461-A:2 ("Because children do best when both parents have a stable and meaningful involvement in their lives, it is the policy of this state [to] [s]upport frequent and continuing contact between each child and both parents" and to "[e]ncourage parents to share in the rights and responsibilities of raising their children after the parents have separated or divorced.").

Interfering with a child's relationship with their other parent is contrary to the child's best interest. *In re Kosek*, 151 N.H. 722 (2005). "Indeed, a custodial parent's interference with the relationship between a child and a noncustodial parent has been said to be an act so inconsistent with the best interests of the child as to per se raise a strong probability that the offending party is unfit to act as a custodial parent." *Young v. Young*, 628 N.Y.S.2d 957, 958 (N.Y. App. Div. 1995) (quotation omitted). Moreover, interference is of constitutional dimension because "[t]he right of parents to raise and care for their children is a fundamental liberty interest" protected by both the New Hampshire and federal constitutions, *In re R.A.*, 153 N.H. 82, 90 (2005); *Santosky v. Kramer*, 455 U.S. 745 (1982), and because children themselves have concomitant constitutional rights. *See*, *Parham v. J. R.*, 442 U.S. 584 (1979); *Weiss v. Weiss*, 418 N.E.2d 377, 380 (N.Y. 1981); RSA 169-C:2, I (child protection statute "protect[s] the rights of all parties").

New Hampshire's parenting statute recognizes these interests, and thus contains several "anti-alienation" or "friendly parent" provisions to guide courts in determining custody. *See* Ann M. Haralambie, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 4:12, at 468-69 (3rd ed. 2009). The statute provides:

> In determining parental rights and responsibilities, the court shall be guided by the best interests of the child, and shall consider the following factors:
>
> …
>
> (e) The ability and disposition of each parent to foster a positive relationship and frequent and continuing physical, written, and telephonic contact with the other parent, except where contact will result in harm to the child or to a parent.
>
> (f) The support of each parent for the child's contact with the other parent as shown by allowing and promoting such contact.
>
> (g) The support of each parent for the child's relationship with the other parent.

461-A:6, I. Thus, of the dozen statutory factors the court must consider, a quarter of them concern parents' support for the child's connection with the other parent. Collectively the three provisions direct courts to look carefully at which parent best supports that connection, and who alienates it.

Thus in states that have "anti-alienation" or "friendly parent" statutes, when a parent makes unfounded allegations of sexual abuse, courts routinely modify custody to the other parent. In *Hartman v. Hartman*, 621 N.E.2d 917, 920 (Ill. App. Ct. 1993), aff'd 631 N.E.2d 708 (Ill. 1994), the court held that "unfounded allegations of sexual abuse made by one parent can be grounds for granting custody to the other parent," and awarded custody to father based on mother's unfounded allegations of sexual abuse against him. In *Mack-Manley v. Manley*, 138 P.3d 525 (Nev. 2006), mother repeatedly made allegations of abuse against father, which were not substantiated by the police or the child protective agency. Thus the court modified custody, and limited mother's visitation. Likewise, in *Begins v. Begins*, 721 A.2d 469 (Vt. 1998), under an anti-alienation statute like New Hampshire's, the court reversed the custody award after mother had poisoned the relationship between the children and father.

Even with less explicit statutes than New Hampshire's, courts still routinely modify custody when a parent makes unfounded allegations of sexual abuse. *C.J.L. v. M.W.B.*, 879 So.2d 1169 (Ala.Civ.App. 2003) (court modified custody, awarding sole physical custody to father after mother

made unfounded allegations that father sexually abused children); *Slovick v. Koca*, 636 N.E.2d 672 (Ill.App. 1993) (court awarded custody to father where mother made repeated unfounded allegations that father had sexually abused the child and had subject the child to repeated examinations); *Cole v. Cole*, 507 So.2d 1333 (Ala.Civ.App. 1987) (father had poisoned daughter's relationship with mother by several means, including a false allegation of sexual abuse; court upheld change of custody); *Mullins v. Mullins*, 490 N.E.2d 1375 (Ill.App. 1986) (court modified custody, awarding custody to father, where mother made unfounded allegations of sexual abuse against father); *Ellis v. Ellis*, 747 S.W.2d 711 (Mo.App. 1988) (court modified custody, awarding custody to father, where mother made unfounded allegations of sexual abuse against father). Although in some of these cases the unfounded allegations are as repeated and unrelenting as Ms. Todd's, courts have also modified custody where the unfounded allegations are not nearly so egregious as here.

In *Young v. Young*, 628 N.Y.S.2d 957 (N.Y. App. Div. 1995), the mother made seven unfounded allegations that the father had sexually abused the children, had caused intermittent periods during which the children had no contact with their father, and had subjected the children to repeated physical examinations. That court voiced the same concerns as are present here:

> [I]nterference with the relationship between a child and a noncustodial parent can take many forms, the obvious being the outright denial of visitation by making the child physically unavailable at the appointed time. However, the instant case involves a more subtle and insidious form of interference, a form of interference which, in many respects, has the potential for greater and more permanent damage to the emotional psyche of a young child than other forms of interference; namely, the psychological poisoning of a young person's mind to turn him or her away from the noncustodial parent. In this case, if left with their mother, the children would have no relationship with their father given the mother's constant and consistent single-minded teaching of the children that their father is dangerous. She has demonstrated that she is unable and unwilling to support the father's visitation; and it was, therefore, an improvident exercise of discretion to deny the father's petition for a change of custody.

Young, 628 N.Y.S.2d at 959.

Part of the harm to which an accusing parent subjects the child is repeated physical and psychological examinations. In *Watson v. Poole*, 495 S.E.2d 236 (S.C.App. 1997), the mother made ten unfounded allegations of sexual abuse against the father. The court understood that "[o]ne of the most disturbing things about this case is that practically every adult in [the child's] life is focused on sex and her genitalia," and that by "mentioning sexually provocative subjects, she gets an adult's attention." *Id.*, 495 S.E.2d at 241.

> We decline to provide Mother with any further opportunity to pursue unfounded allegations of sexual abuse, subject [the child] to repeated physical and psychological examinations, and harm her relationship with her Father. Mother has pursued her unfounded course of conduct for the last five years of this young child's life. She has continued to demonstrate her dissatisfaction with the current visitation arrangement, and we find no reason to believe that her conduct will cease. Therefore, we order a change of custody from Mother to Father.

Watson v. Poole, 495 S.E.2d at 240. Likewise, in *Haus v. Haus*, 479 N.W.2d 474 (N.D. 1992), the court upheld a change in custody to father where mother had "subjected [the girl] to multiple intrusive examinations by medical professionals, and at least one male non-professional." Ms. Todd has placed the children here in precisely the same position.

Understandably, courts are reluctant to change the child's living environment. *Perreault v. Cook*, 114 N.H. 440, 443 (1974) ("The shuffling of a child back and forth between a father and mother can destroy his sense of security, confuse his emotions, and greatly disrupt his growth as an individual."). But where a parent makes repeated unfounded allegations of sexual abuse, or causes alienation of any kind, courts have shown little reluctance. *See e.g.*, *C.J.L. v. M.W.B.*, 879 So. 2d 1169 (Ala.Civ.App. 2003); *Hartman v. Hartman*, 621 N.E.2d 917, 920 (Ill. App. Ct. 1993); *Mack-Manley v. Manley*, 138 P.3d 525 (Nev. 2006). Moreover, this case does not call for constant shuffling; the facts suggest a one-time move to Mr. Miller's home.

In *In re Choy*, 154 N.H. 707 (2007), the father alienated the child from his mother by

"talk[ing] openly in front of his son in a derogatory way about the mother, … coach[ing] his son to provide false and negative information about his mother," and encouraging him to keep secrets from his mother, which greatly distressed the child. This Court noted that the child "lives in an environment of extraordinary hostility, the majority of which is caused by his father, and is given far too much negative information about his mother." *Choy*, 154 N.H. at 709, 710 (quotation omitted). This Court thus approved a change in custody, even though it involved a geographical move. In *Begins v. Begins*, 721 A.2d 469 (Vt. 1998), where the law is similar to New Hampshire's, the trial court ordered custody with father, even though fatehr had alienated the children from mother, because by then the child's relationship with mother had so soured. The Vermont Supreme Court wrote: "We categorically reject such reasoning. A parent who willfully alienates a child from the other parent may not be awarded custody based on that alienation." *Begins*, 721 A.2d at 472 (quotation omitted). *See also*, *Theisen v. Theisen*, 405 N.W.2d 470 (Minn.App. 1987) (court upheld change in custody to father; one factor was mother's alienating behavior); *Wagner v. Wagner*, 674 A.2d 1 (Md.App. 1996) (affirming change of custody because of interference with father's relationship with children, including allegations of sexual abuse); *Hall v. Mason*, 462 A.2d 843 (Pa.Super. 1983) (upholding change in custody to father; among other things, mother repeatedly vilified father in front of the child).

Accordingly, the standard and oft-imposed remedy for making unfounded allegations of sexual abuse against a child's other parent is modification of custody, despite a geographic move.

II. Ms. Todd's On-Going Campaign Against the Best Interest of the Children Should not be Rewarded with Custody

It cannot be reasonably disputed that Mr. Miller has not sexually abused the children. All

the experts and all the law enforcement agencies agree. Perhaps not even Ms. Todd believes it.

In making custody determinations, the court is guided by the best interest of the children. Ms. Todd has not acted in their best interest. She has caused them to suffer numerous intrusive forensic physical and psychological evaluations. She caused them to be "denied any meaningful relationship with their father" and to be estranged from the benefits of their father's parenting for a period of 2½ years. ORDER (Mar. 6, 2008), *Appx.I-c* at 744. She has interfered in custody by not bringing the children to exchanges and by reneging on unification efforts. ORDER (Oct. 21, 2008), *Appx.I-c* at 889. She has caused the children's father to be ostracized from their community, so that it is difficult or impossible for him constructively to engage with their teachers, religious advisors, members of their community, and at the girls' events. *1 TrialTrn.* at 165-66. Ms. Todd's allegations have caused acrimonious litigation for the children's entire lives, continually placing them emotionally between their parents. Although she has been only partly successful, she has alienated the children from Mr. Miller. For whatever reason, and as the court noted, Ms. Todd would like Mr. Miller permanently out of the children's lives. ORDER (Mar. 6, 2008), *Appx.I-c* at 744. Even though Ms. Todd may not really believe Mr. Miller abused the children, she has continued to make on-going allegations even as this appeal proceeds, demonstrating that her campaign against the children's best interest is unlikely to cease.

Mr. Miller is committed to not allowing the discord get in the way of his children's lives and health. *1 TrialTrn.* at 207-08. Other than Ms. Todd's unfounded allegations, there has been no suggestion that he is anything but an effective and loving parent, and that he has a close connection with his daughters. ORDER (May 6, 2009), *Appx.I-d* at 1023.

The home lives of Ms. Todd and Mr. Miller are strikingly similar. Ms. Todd is single and lives with her parents near the strip in Hampton, New Hampshire. *3 TrialTrn.* at 535. She works

part-time as a substitute school teacher in the local district, *3 TrialTrn.* at 580, and also on weekends selling popcorn at her parent's small business, *3 TrialTrn.* at 583-84, and is supported at least in part by her family. There is the outstanding suggestion that Ms. Todd's parents are complicit in at least some of the unfounded allegations.

Mr. Miller is single and lives with his mother and brother in a suburban neighborhood near Buffalo, New York. *1 TrialTrn.* at 217-18. He was employed as a computer consultant to the dental industry, *3 TrialTrn.* at 576; *1 TrialTrn.* at 123, but lost his job while fighting Ms. Todd's unfounded allegations and has been unable to regain employment given his visitation schedule. *1 TrialTrn.* at 115. He is a member of the Massachusetts bar, but has never practiced law. *1 TrialTrn.* at 213-215. He is supported largely by his brother, *1 TrialTrn.* at 219, but if he did not need to make the 1000-mile biweekly drive to New Hampshire, *1 TrialTrn.* at 145, he may have an opportunity to regain his consulting contract. *1 TrialTrn.* at 223; *3/20/09Trn*. at 25-26. He has exercised multi-week custody of the girls for the summer. There has been no suggestion that is home is unworthy of his daughters. They do well there. *3/20/09Trn*. at 26; *1 TrialTrn.* at 128-29, 187; *2 TrialTrn.* at 306-07.

In its order the court suggested that Mr. Miller should move closer to New Hampshire. This is not viable, for several reasons. First, he cares for his elderly mother whom he cannot leave alone, and cannot relocate. Second, his business contacts are in upstate New York. Beyond a bar card in Massachusetts, he has no experience or knowledge of that industry, and thus no real job prospects. Relatedly, although not in the record, Mr. Miller has reason to suspect Ms. Todd of undermining what little chances of employment he might have in her area. Third, Mr. Miller is currently supported largely by his brother, who owns and maintains the house in which he lives and who has committed to continue doing so. *2 TrialTrn.* at 447. If Mr. Miller were to move closer to New Hampshire, he would lose that support and the free housing he currently enjoys. *1 TrialTrn.* at 217-

220. Fourth, the ostracism he experiences when he visits would make it exceedingly difficult to live or work in the Hampton area. *1 TrialTrn.* at 167-68, 174.

The court denied modification of custody to prevent the children having to move to New York. For several reasons, that is not enough in the context of this case. *Choy*, 154 N.H. at 711. First, courts everywhere regard the harm experienced by a child living in an environment produced by a continuing campaign of unfounded allegations of sexual abuse, and the resulting parental alienation it fosters, more compelling than avoiding a one-time move, as the plethora of cases cited, *supra*, indicate. Second, we live in a mobile society, where moves are not unusual. Third, this is a one-time move and not constant shuffling. Fourth, the children are just 7 and 8 years old, and not in their teens when geographic moves tend to disrupt children's lives. *2 TrialTrn.* at 393 (testimony of expert: "I've now referred to junior high school as a threshold a couple of times. Peer relationships become so terribly important in those preteen sixth, seventh, eighth grade years that the possibility of a major residential change when we reach that threshold and the trauma, potential trauma, associated with it becomes magnified and the change becomes that much more potentially difficult for the children.").

Accordingly, this Court should reverse the judgment of the Family Division.

III. State Should Have Released Interview Tapes Upon Request

Following the September 2005 allegations, the court suspended Mr. Miller's contact with his children "until this matter is duly investigated and any and all allegations of inappropriate conduct are deemed unfounded." TEMPORARY ORDER (Sept. 6, 2005), *Appx.I-a* at 171. A month later it issued a second order extending the suspension until Mr. Miller was cleared by both DCYF and the Manchester Police. TEMPORARY ORDER (Oct. 7, 2005), *Appx.I-a* at 228.

During the investigations three video-taped interviews of 3-year-old Laurel were conducted by the Child Advocacy Center (CAC) in Portsmouth.[4] In the first, on September 22, 2005, "Laurel states that her father 'panks her' and points to her vaginal area on the picture of a girl," but the interviewer noted that "Laurel had trouble with prepositions such as on top and over." WARDRPT., *Appx.II-a* at 1341. In the second, on November 30, 2005, she "stated that Mr. Rob is there when pictures are taken and 'panks her' on the front and on her back" and knows that "her father has hair on his bum" from "watching a movie." *Id*. In the third tape, on January 20, 2006, Laurel's statements indicate that the sexual abuse disclosures she made may have been scripted by Ms. Todd. At the time of the third interview, Mr. Miller had been barred from contact with the children for several months. Mr. Miller urges this Court to view the short videos.

Immediately after the third interview, DCYF sent a notice informing Mr. Miller he was an "alleged perpetrator." ALLEGED PERPETRATOR NOTICE (Jan. 30, 2006), *Appx.II-b* at 1512. Three weeks later, however, DYCF reversed itself, and informed Mr. Miller by letter that "the assessment regarding your children has been closed *unfounded*." LETTER FROM DCYF TO JIM MILLER (Feb. 24, 2006), *Appx.II-b* at 1518 (emphasis in original). The State also indicated it would not prosecute. LETTER FROM MARGUERITE WAGELING, COUNTY ATTORNEY TO HON. HARRIET FISHMAN, MASTER (Sept. 26, 2006), *Appx.I-b* at 408.

As they occurred during the period in which Mr. Miller had no contact, he did not learn of the tapes until long after the interviews were conducted. Upon discovering that DCYF's and the County Attorney's decisions were in part based on the tapes, he understood they probably contained exonerating information. Being still barred from contact with his daughters, Mr. Miller thus

[4]The tapes are part of the court record, and are sealed. ORDER (Oct. 23, 2007), *Appx.I-b* at 539.

requested access to them. MOTION FOR ORDER DIRECTING HILLSBOROUGH COUNTY ATTORNEY'S OFFICE TO RELEASE COPIES OF TAPED INTERVIEWS WITH CHILDREN (May 12, 2007), *Appx.I-b* at 463. The court held a hearing on the matter, and then deferred ruling on the matter until the completion of Dr. Ward's report. ORDER (Oct. 23, 2007), *Appx.I-b* at 539. It appears the tapes were made available for viewing in March 2009 as part of discovery shortly before trial, ORDER (Mar. 20, 2009), *Appx*. at 974, 1½ years after they were requested and 3½ years after Mr. Miller's contact with his children was suspended as a result of the allegations they addressed.[5]

Had the tapes been provided to Mr. Miller at the time they were made, he would have had the same information DCYF and the police had when DCYF issued its "unfounded" notice. He could have then used the information to clear his name and could have avoided the girls' 2½ year interruption of their relationship with their father.

In a criminal case, Mr. Miller would have had ready access to the tapes. But even in this non-criminal context, his due process rights were violated. U.S. CONST. amd. 14; N.H. CONST., pt. I, arts. 12 & 15.

> To determine the process due in a particular proceeding, we employ a three-prong balancing test. We consider the private interest that will be affected by the official action; … the risk of an erroneous determination of such interest through the procedures used, and the probable value, if any, of the additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute safeguards would entail.

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[5]Had Mr. Miller known of the tapes at their creation, he would have been entitled to them from DCYF pursuant to RSA 170-G:8-a, II(a)(2). By the time he learned of them, however, they had become part of a criminal investigation, *see* LETTER FROM SANDRA KUHN, ESQ. TO PORTSMOUTH FAMILY DIVISION (July 21, 2006), *Appx.I-b* at 375, prompting the County Attorney to file a pleading and appear at a hearing to argue the tapes were confidential on a variety of criminal practice grounds. STATE'S OBJECTION TO MOTION FOR ORDER DIRECTING HILLSBOROUGH COUNTY ATTORNEY'S OFFICE TO RELEASE COPIES OF TAPED INTERVIEWS WITH CHILDREN TO DR. PEGGIE WARD AND TO COUNSEL FOR THE PARTIES (June 25, 2007), *Appx.I-b* at 469. In any event, no party below raised the applicability of RSA 170-G:8-a.

In re Baby K., 143 N.H. 201, 205 (1998).

Mr. Miller's parenthood interest is of the highest constitutional order. The risk of erroneous deprivation is high because young children are almost never called as witnesses and thus the interview tapes are the only way their words and gestures can be assessed. Here they were the only way for Mr. Miller to defend himself against the allegations. The state's interest in maintaining secrecy is near zero because it has a statutory duty to insure children have the benefit of two parents. RSA 461-A:2.

Moreover, timely release is subject to the same analysis, because releasing the tapes early would have been the only way the state could have minimized the time during which the children were denied contact with their erroneously accused parent. *See*,*e.g.*, *Michael P. v. Superior Court*, 113 Cal. Rptr. 2d 11, 18 (Cal.App. 2001) (in juvenile dependency action parent sought records regarding juvenile statement involving death of infant) ("To defend against the allegations … petitioner is at the mercy of those governmental agencies holding the evidence.… Yet petitioner is precluded from reviewing the original reports or any of the actual evidence.… Petitioner is apparently expected to simply trust his accusers not only to characterize the evidence accurately, but also to decide what, if any, evidence is relevant … and subject to release. The unfairness of such a process is palpable.").

Accordingly, Mr. Miller should have been provided the tapes immediately upon request.

IV. Court Rules Discriminate Against Unmarried Persons

On November 9, 2009, James Miller filed this discretionary notice of appeal, raising several issues. It was declined by order of this Court without explanation. SUPREME COURT ORDER (Dec. 23, 2009). Upon motion for reconsideration, this Court accepted the case and ordered this matter

be briefed. SUPREME COURT ORDER (Feb. 4, 2010); SUPREME COURT ORDER (Mar. 3, 2010).

A. Rule 3 Mandatory Versus Discretionary Appeals

Under this Court's rules, Mr. Miller's notice of appeal was "discretionary" rather than "mandatory" – that is, the appeal was subject to a certiorari process rather than automatically accepted for review.

> A mandatory appeal shall be accepted by the supreme court for review on the merits.… Provided, however, that the following appeals are NOT mandatory appeals: … (9) an appeal from a final decision on the merits issued in, or arising out of, a domestic relations matter filed under RSA Title XLIII (RSA chapters 457 to 461-A); provided, however, that an appeal from a final divorce decree or decree of legal separation shall be a mandatory appeal.

Sup.Ct.R. 3(9) (emphasis in original). Mr. Miller's appeal falls into an exception to an exception. All appeals are mandatory, except some family-law appeals which are discretionary, except "an appeal from a final divorce decree" which is mandatory. Appeals from parenting plans where the parents are unmarried are thus discretionary.

Treating the relationship between children of unmarried parents differently than the relationship between children of married parents is unlawful and unconstitutional.[6] Parenting appeals filed by married parents or children of married parents are automatically heard, while parenting appeals filed by unmarried parents or children of unmarried parents are subject to a certiorari process, SUP.CT.R. 7(1)(B), and may be dismissed without appellate review. SUP.CT.R. 25; *State v. Cooper*, 127 N.H. 119 (1985).

Paragraph 9 of Rule 3 was promulgated and approved on a temporary basis on October 9, 2007 and made effective on January 1, 2008. *See* SUP.CT.R. 3, *History.* ("Amendments – 2007.

[6]Because parenting plans govern the *relationship*, there can be no claim a party lacks standing to assert rights of another.

Made minor stylistic changes …, added subdiv. (9), and added second paragraph in the Comment note in the definition of "Mandatory appeal."); *Temporary provisions*. ("Pursuant to Supreme Court Order dated October 9, 2007, the amendment to this rule by that court order was approved on a temporary basis)." *See also*, ORDER ON ADOPTION OF AMENDMENTS TO COURT RULES (Oct. 9, 2007), http://www.courts.state.nh.us/supreme/ orders/ord20071009.pdf.

Before the rule was promulgated, Senior Associate Supreme Court Justice Linda Dalianis and Supreme Court Clerk Eileen Fox met with members of the family law section of the New Hampshire Bar Association. In an article following the meeting, the concerns the rule was designed to address were discussed. Among them were unripe appeals instigated by *pro se* litigants, the large quantity of family law appeals as a percentage of the Court's total caseload, repeat players – "where a single divorce case has been the subject of more than one appeal in the same year, with issues raised regarding different post-divorce orders" – and the "inordinate amount of the courts' administrative and judicial resources" absorbed by these cases, "especially when many of the appeals deal with fact-based questions, rather than issues of law." Dan Wise, *Justice Dalianis Discusses Family Law Appellate Caseload*, BARNEWS (June 9, 2006).

The differing treatment of the relationship between children of married and unmarried parents affects many people. In 2007 over 31 percent of New Hampshire children were born to unmarried parents. *U.S. Dep't Health & Human Serv.*, NATIONAL VITAL STATISTICS REPORT, table 12, http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_12.pdf. *See also* Doreen F. Connor, *Rule Change Reduces Domestic Appeals by 25 Percent*, N.H BAR NEWS (Aug. 14, 2009).

B. Rule 3 Violates New Hampshire's Anti-Discrimination Statute

The law pertaining to all state action in New Hampshire bars discrimination based on marital

and familial status.

> The general court hereby finds and declares that practices of discrimination against any of its inhabitants because of age, sex, race, creed, color, *marital status*, *familial status*, physical or mental disability or national origin are a matter of state concern, that such discrimination not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.

RSA 354-A:1 (emphasis added). In addition, numerous New Hampshire statutes explicitly bar discrimination based on marital status in specific areas. *See e.g.*, RSA 21-I:42 (public employment); RSA 151:21 (provision of medical services); RSA 186:11 (educational programs); RSA 273-A:10 (labor unions); RSA 301-A:12 (consumer cooperative associations); RSA 354-A:6 & 7 (private employment); RSA 354-A:8 (housing); RSA 354-A:10 (renting or selling residential or commercial structures); RSA 354-A:16 & 17 (public accommodations); RSA 417:4 (insurance practices); RSA 417-A:3 (automobile insurance); RSA 417-B:2 (property and liability insurance); RSA 420-C:5 (health care insurance); RSA 460:21-a (contraceptive services). Federal law contains similar prohibitions.

C. Rule 3 Violates the Intent of New Hampshire's Parental Rights and Responsibility Act

The differing appellate treatment of the relationship between children and parents based on parents' marital status appears to be rooted in anachronistic legal constructs that are at odds with modern law and the recently-revised New Hampshire parenting statute. Such differing treatment is unjustified. *See*, *e.g.*, *Guard v. Jackson*, 940 P.2d 642, 645-46 (Wash. 1997) (*Smith*, J., concurring); *Miscovich v. Miscovich*, 688 A.2d 726, 728 n.2 (Pa.Super. 1997).

New Hampshire abandoned the distinction between legitimate and illegitimate children in 1971 when it repealed the Maintenance of Bastard Children Act, RSA 168, *see Hardy v. Betz*, 105

N.H. 169 (1963) (unwed father not liable for child support unless paternity affirmatively established), and replaced it with the Uniform Paternity Act, RSA 168-A (requiring child support regardless of whether father wed or unwed).

New Hampshire comprehensively revised its parenting law in 2005, when it enacted the current Parental Rights and Responsibility Act, RSA 461-A. The Act requires the family court to institute a "Parenting Plan," RSA 461-A:4, and in making parenting determinations, to focus its attention squarely on the welfare of the children. RSA 461-A:2.

The children are so central to the statutory focus that it is worth quoting in full the legislative "Statement of Purpose":

> I. 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:
>
> (a) Support frequent and continuing contact between each child and both parents.
>
> (b) Encourage parents to share in the rights and responsibilities of raising their children after the parents have separated or divorced.
>
> (c) Encourage parents to develop their own parenting plan with the assistance of legal and mediation professionals, unless there is evidence of domestic violence, child abuse, or neglect.
>
> (d) Grant parents and courts the widest discretion in developing a parenting plan.
>
> (e) Consider both the best interests of the child in light of the factors listed in RSA 461-A:6 and the safety of the parties in developing a parenting plan.
>
> II. This chapter shall be construed so as to promote the policy stated in this section.

RSA 461-A:2. *See also*, RSA 461-A:6 ("In determining parental rights and responsibilities, the court shall be guided by the best interests of the child."); RSA 461-A:4 ("In developing a parenting plan under this section, the court shall consider *only* the best interests of the child.") (emphasis added).

The statute contains no distinction based on – or even a mention of – the marital status of the

parents. The Parental Rights and Responsibility Act explicitly treats the parents as *parents* regardless of whether they are or were ever married. RSA 461-A:3, II ("In cases where husband and wife or unwed parents are living apart, the court, upon petition of either party, may make such order as to parental rights and responsibilities and support of the children as justice may require. All applicable provisions of this chapter and of RSA 458-A, 458-B, 458-C, and 458-D shall apply to such proceedings."). In *In re J.B.*, 157 N.H. 577 (2008), for example, a man who was neither the out-of-wedlock child's biological father nor stepfather was allowed to bring an action to establish his parental rights and responsibilities. *Compare, e.g.*, *In re Muchmore*, 159 N.H. 470 (2009) (modification of parenting plan for children of never-married couple) *with*, *In re Conner*, 156 N.H. 250 (2007) (modification of parenting plan for children of formerly-married couple). The statute also draws no distinction based on marital status in numerous other respects. *See e.g.*, RSA 461-A:3, I (same procedural requirements); RSA 461-A:4 (same mandatory development of parenting plan); RSA 458-D (same mandatory attendance at child impact seminar); RSA 461-A:7 (same mediation requirement); RSA 461-A:12 (same relocation alert); RSA 461-A:13 (same grandparent visitation).

The Parental Rights and Responsibility Act represents an evolution in focusing the court's attention on the children, especially compared with the pre-1971 law. *See*, Honey Hastings, *Dispute Resolution Options in Divorce and Custody Cases*, 46 N.H.B.J. 48 (Summer 2005). Whereas once parents and their difficulties were central in parenting litigation, the child is now paramount.

Thus the differing treatment accorded to appeals involving the relationship between children of married and unmarried parents in Rule 3 is contrary to the intent of the Parental Rights and Responsibility Act.

D. Rule 3 Violates Constitutional Due Process and Equal Protection

Mr. Miller is not suggesting this Court's discretionary acceptance process is flawed. *See State v. Cooper*, 127 N.H. 119 (1985). Rather, because New Hampshire "has created appellate courts as an integral part of the State trial system … the procedures used in deciding appeals must comport with due process and equal protection." *Id.* at 122 (quotations omitted).

Discrimination based on marital status, as a matter of federal law, gets low-level constitutional scrutiny. *Califano v. Jobst*, 434 U.S. 47 (1977). The standard in New Hampshire constitutional law has not been established, but it warrants high-level scrutiny. Discrimination based on illegitimacy merits high-level scrutiny. *Levy v. Louisiana*, 391 U.S. 68 (1968).

Rule 3 at issue here occupies both areas simultaneously. Parenting plans involve the *relationship* between parents and children, not rights or benefits enjoyed by just one of them such as dependency benefits in *Jobst*. Rule 3 does not merely discriminate against unwed parents and children of unwed parents – it curtails appellate review of that document which determines their legal relationship.

The relationship between children and their parents, where the parents are married, enjoys the comfort of automatic review. But there is no automatic appeal of the relationship between children and parents when the parents remain unwed. Rule 3 therefore violates due process, equal protection, and the constitutional rights to equal access to the courts. U.S. CONST., amds. 5 & 14; N.H. CONST., pt. I, art. 8 ("Government … should be open, accessible, accountable and responsive"); N.H. CONST., pt. I, art. 14 ("every subject … entitled to … recourse to the laws"); N.H. CONST., pt. I, arts. 12 & 15 (due process and equal protection).

Accordingly, the Rule 3 distinction should be abandoned, or must be drawn more narrowly

to accomplish the goals set forth by members and staff of this Court when the rule was being formulated.

While court rules may take precedence over statutes in matters of "practice and procedure," N.H. CONST. pt. I, art. 37 & pt. II, art. 73-a; *Opinion of the Justices (Prior Sexual Assault Evidence)*, 141 N.H. 562 (1997); *Petition of Mone*, 143 N.H. 128 (1998); *State v. LaFrance*, 124 N.H. 171, 175 (1983); Richard B. McNamara, *The Separation of Powers Principle and the Role of the Courts in New Hampshire*, 42 N.H.B.J. 66 (June 2001). *See also*, N.H. CONST., pt. I, art. 29 (court cannot suspend laws), the distinctions drawn by Rule 3 define substantive rights, and are thus unconstitutional.

CONCLUSION

For the foregoing reasons, James Miller requests this Court order that the Portsmouth Family Court erred by not awarding him at least residential responsibility of his two daughters.

Respectfully submitted,

James J. Miller
By his Attorney,

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Dated: July 28, 2010

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ORAL ARGUMENT AND CERTIFICATION

This Court has already ordered that the parties will present oral argument before the full court. SUPREME COURT ORDER (Feb. 4, 2010). Attorney Joshua L. Gordon, will appear for James Miller.

I hereby certify that on July 28, 2010, copies of the foregoing will be forwarded to Elizabeth B. Olcott, Esq.; John P. Carr, Esq., *pro hac vice*; and to Elaine Dolph, GAL. In accord with Supreme Court Rule 16(7), one copy each of the voluminous appendix has been provided to Ms. Todd's two attorneys.

Dated: July 28, 2010

Joshua L. Gordon, Esq.

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