State of New Hampshire Supreme Court

No. 2000-120

2000 TERM

OCTOBER SESSION

IN THE MATTER OF MEGAN SPENCER

and

VALERIE DONOVAN, NORMAN LARSEN,

ANNE KELLEY and THOMAS KELLEY

RULE 7 APPEAL FROM FINAL DECISION OF
HILLSBOROUGH COUNTY (SOUTH) SUPERIOR COURT

BRIEF OF RESPONDANTS/APPELLEES, VALERIE DONOVAN and NORMAN LARSEN

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1. Megan claimed to be merely enforcing a prior custody decree, but was made demands not anticipated in the original decree. Was the superior court correct in ruling that the relief she sought was a modification?

2. Claire has been living with her aunt and uncle in New Hampshire for 2½ years. Was the superior court correct in ruling that New Hampshire is Claire's home state?

3. This case concerns the custody of a child not in the context of a divorce case, and also the concerns guardianship of the child. Was the superior court correct in ruling that jurisdiction resides in the probate court?

STATEMENT OF FACTS

Megan Spencer is the youngest of four sisters, and has a history of mental instability. In June 1996, when Megan was living in Virginia with her husband, she gave birth to a daughter, Claire, who is now about 4 ½ years old. The relationship was abusive, and shortly after the birth, Megan left her marital home. AFFIDAVIT, *N.O.A.* at 70. Megan wound up in a state psychiatric facility. LETTER FROM TOM C. SMITH, ESQ. TO STEPHEN J. FRASCA, ESQ. (Dec. 10, 1999) (entered as Respondent's Exhibit 3, *Trn.* at 49), *Appx. to Resp't Br*. at 1. Claire was placed in state foster care for several days. AFFIDAVIT, *N.O.A.* at 70. Members of Megan's family traveled to Virginia and saw her through the crisis. *Trn*. at 32. Later, Megan and Claire were re-united at their home in Virginia. AFFIDAVIT, *N.O.A.* at 70.

In January 1997, Megan and Claire showed up on the doorstep of Megan's parents[1], Anne Kelley and Thomas Kelley, who were then living in Maryland. *Trn*. at 33. Megan and Claire moved in. AFFIDAVIT, *N.O.A.* at 70.

In June 1997, when Claire was a year old, a Virginia court gave custody of Claire *jointly* to Megan and Megan's parents. CUSTODY/VISITATION ORDER, *N.O.A.* at 25. The nature of the proceeding is disputed, but after ordering joint custody, the bulk of the court order deals with visitation by Megan's husband. The reason for joint custody is not stated in the order, but the Virginal GAL then working on the case wrote that it was "due to her instability and recent two week visit as a patient at the Virginia Beach Psychiatric Center." LETTER FROM TOM C. SMITH, ESQ. TO STEPHEN J. FRASCA, ESQ. (Dec. 10, 1999), (entered as Respondent's Exhibit 3, *Trn.* at 49), *Appx. to Resp't Br*. at 1.

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[1]Thomas is Megan's step-father.

Claire, her mother, and her grandparents all apparently lived happily in Maryland for about a year. AFFIDAVIT, *N.O.A.* at 70. Because the family was originally from New England, and Megan's sisters still lived there, Megan's parents sought to move back. *Trn.* at 34. Upon Thomas finding employment, Megan and her parents were in agreement that Claire should move north with her grandparents. *Trn.* at 37, 41, 53. It was understood that after her divorce was final that Megan would eventually move north also, and be re-united with Claire. *Trn.* at 34-37.

In May 1998, Claire and her grandparents left Maryland. The grandparents wanted to live in Boston, but their apartment was not yet ready. Thus, they temporarily moved to Nashua with Valerie Donovan and Norman Larsen. Valerie is Anne's daughter, Megan's sister, Claire's aunt, a party to this case. Several months later, the grandparents did move to Boston, but because Claire had established a relationship with her aunt and uncle, and because there was a lead paint problem in the Boston apartments, and because the Nashua home was more suitable for a toddler, Claire stayed in Nashua. *Trn.* at 41.

Meanwhile, a few days after Claire and her grandparents moved to New Hampshire, Megan filed for divorce in Maryland. COMPLAINT FOR ABSOLUTE DIVORCE (June 9, 1998), *N.O.A.* at 58. Simultaneously Megan petitioned the Maryland court to enroll the Virginia decree and to award her sole custody. PETITION TO ENROLL AND ENFORCE A FOREIGN JUDGMENT, CUSTODY AND VISITATION (June 9, 1998), *N.O.A.* at 38. Because it was believed that the grandparents' existing joint custody would complicate the divorce, the grandparents consented to Megan having sole custody, and informed Megan's attorney of their position. *Trn.* at 39-40; LETTERS, N.O.A. at 35-36. The matters were not timely pursued because Megan's Maryland

attorney went bankrupt, *Trn.* at 64, and was disbarred,[2] *Trn.* at 11. When Megan's husband indicated he would not contest the divorce or the custody, it became apparent that the grandparents' joint custody would have no complicating effect. The grandparents thus immediately revoked their consent to Megan having sole custody. *Trn.* at 40; LETTER, *N.O.A.* at 51, and Megan did not pursue the custody matter.

In the year-and-a-half between May 1998 when Claire moved to New Hampshire with her grandparents and the filing of this case in October 1999, Megan visited her family twice in Nashua. During these visits, Megan distributed resumes to New Hampshire-area employers, and took Claire to visit Megan's biological father in Massachusetts. *Trn.* at 36. Megan did not discuss with any member of her family that she disliked the arrangement of Claire living with her aunt and uncle, or that she intended to modify the situation. *Trn.* at 42-43.

During the time that Claire lived at her grandparents in Maryland, the grandparents were responsible for a significant amount of the care of the child. *Trn.* at 32-33. After Claire moved to Nashua, her grandparents, aunt, and uncle shared these duties. Although there is a dispute as to why, it is apparent that Claire's aunt and uncle have been handling Claire's, educational, emotional, medical, financial, and other needs, and that Megan has had little contact with Claire. *Trn.* at 22-23, 44-45.

Based on these facts, the Hillsborough County Superior Court (*Alice S. Love*, Master, *Linda S. Dalianis*, J.) found that Megan consented to Claire moving north with her grandparents, intended to join them in New Hampshire, and acquiesced in Claire's living in Nashua with her aunt and uncle after the grandparents moved to Boston. ORDER (Feb. 1, 2000), *N.O.A.* at 7-8.

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[2]The divorce was granted after this case was appealed. JUDGMENT FOR DIVORCE, *Appx. to Pet'r Br.* at 41.

STATEMENT OF THE CASE

This action is procedurally and jurisdictionally complicated. For that reason, a timeline is provided below, with citations to the record following it.

In summary, when Claire was one year old, a Virginia court ordered that Megan and her parents share joint custody of Claire. In May 1998, Claire moved to New Hampshire with her grandparents. A few weeks later Megan filed for a divorce and also filed a petition seeking sole custody, both in Maryland courts. That fall, the grandparents moved to Boston. Claire remained with her aunt and uncle in Nashua, to which Megan consented. Procedurally nothing further happened until October 1999, when Megan filed this case in the Superior Court seeking custody of Claire. After a hearing, in December 1999 the court issued the order from which this appeal was taken.

In its order, the Superior Court found that the relief sought by Megan is modification rather than enforcement as she maintains. Because the court found that New Hampshire has been the home state of the child with Megan's consent since May 1998, that New Hampshire courts have jurisdiction over the matter. The court noted that Valerie Donovan and Norman Larsen, the aunt and uncle with whom Claire resides in Nashua, filed a Petition for Guardianship in the probate court. The court dismissed Megan's Petition for Custody, and ordered that jurisdiction over the case probably lies in the probate court. ORDER (Feb. 1, 2000), *N.O.A.* at 7-8.

The aunt and uncle's Petition for Guardianship was filed in the Hillsborough County Probate Court, on the same date of the Superior Court's hearing in this case. PETITION FOR GUARDIANSHIP OF MINOR, *Appx. to Writ of Prohibition, N.H. Sup.Ct. No. 2000-511* at 31-48. It seeks guardianship over Claire by her aunt and uncle, reasonable visitation for

Megan, and psychological evaluation of Claire to ensure her capability to care for Claire during the visitation.

The current case was appealed on March 2, 2000. But on May 19, 2000, Megan returned to the Maryland courts seeking a sole custody. The request was granted, apparently in ignorance of these New Hampshire proceedings.

On May 8, 2000, the Probate Court (*Raymond A. Cloutier*, J.) issued a stay of the guardianship proceedings, pending resolution of this appeal. On June 29, 2000 Anne and Thomas Kelley, the aunt and uncle who hope to be Claire's guardians, filed an emergency motion to lift the stay and go forward with the guardianship case. It was denied by the Probate Court on July 20, 2000. On August 14, Megan filed a Writ of Prohibition, *N.H. Sup.Ct. No. 2000-511,* with this court attacking New Hampshire jurisdiction and seeking to allow the July 5, 2000 Maryland modified custody order can go into effect. That writ is not the subject of this appeal.

Timeline

June	29,	1996	Claire was born[1]
Oct.	1,	1996	Megan moves out from husband's house in Norfolk, Virginia[2]
Oct.	10,	1996	Claire in foster care by Virginia Social Services for five days[3]
Oct.	15,	1996	Claire goes home to father, James, in Norfolk[4]
Oct.	21,	1996	Megan goes home to husband, James, in Norfolk[5]
Jan.	??,	1997	Claire and Megan move in with grandparents in Maryland[6]
June	10,	1997	Virginia order giving grandparents and Megan joint custody[7]
Dec.	12,	1997	Virginia joint custody order becomes final[8]
May	27,	1998	Claire leaves Maryland with grandparents to live at Aunt's in Nashua[9]
June	9,	1998	Megan seeks sole custody by filing in Maryland[10]
June	9,	1998	Megan files divorce against James Spencer, husband[11]
June	20,	1998	Grandparents consent to Megan having sole custody over Claire[12]
Aug.	??,	1998	Megan's first visit to New Hampshire.[13]
Sep.	10,	1998	Grandparents revoke consent to Megan having sole custody[14]
Nov.	??,	1998	Claire stays with Aunt when grandparents move to Boston[15]
Dec.	12,	1998	Megan's second visit to New Hampshire[16]
Oct.	29,	1999	Megan files Petition for Custody in Hillsborough County Superior Court[17]
Dec.	16,	1999	Aunt & grandparents file motion to dismiss Megan's petition for custody[18]
Dec.	17,	1999	Aunt files Petition for Guardianship in Hillsborough Probate Court[19]
Dec.	17,	1999	Hearing in Superior Court resulting in order appealed[20]
Jan.	28,	2000	Superior Court issues order being appealed[21]
Mar.	2,	2000	Megan files Notice of Appeal, N.H. Sup. Ct. No. 2000-120 (current case)[22]
Mar.	8,	2000	New Hampshire Probate Court stays guardianship pending this appeal[23]
May	18,	2000	Maryland divorce granted[24]
May	19,	2000	Megan petitions Maryland court for sole custody of Megan[25]
June	29,	2000	Aunt files emergency motion to lift stay and proceed with guardianship[26]
July	5,	2000	Maryland court modifies Virginia order; Megan gets sole custody[27]
July	20,	2000	Probate Court denies motion to lift stay, orders Claire to remain in N.H.[28]
Aug.	14,	2000	Megan files Writ of Prohibition in New Hampshire Supreme Court[29]

Timeline Citations to Record

[1]AFFIDAVIT, *N.O.A.* at 70.

[2]AFFIDAVIT, *N.O.A.* at 70.

[3]AFFIDAVIT, *N.O.A.* at 70.

[4]AFFIDAVIT, *N.O.A.* at 70.

[5]AFFIDAVIT, *N.O.A.* at 70.

[6]AFFIDAVIT, *N.O.A.* at 70.

[7]CUSTODY/VISITATION ORDER, *N.O.A.* at 25.

[8] *Trn.* at 22.

[9]AFFIDAVIT, *N.O.A.* at 70; *Trn.* at 23, 36-37.

[10]PETITION TO ENROLL AND ENFORCE A FOREIGN JUDGMENT, CUSTODY AND VISITATION (June 9, 1998), *N.O.A.* at 38; *Trn.* at 64.

[11]COMPLAINT FOR ABSOLUTE DIVORCE (June 9, 1998), *N.O.A.* at 58.

[12] *Trn.* at 39-40; LETTERS, N.O.A. at 35-36.

[13] *Trn.* at 9, 42.

[14] *Trn.* at 40; Letter, *N.O.A.* at 51.

[15] *Trn.* at 9, 41.

[16] *Trn.* at 9, 50.

[17]PETITION FOR EMERGENCY CUSTODY ORDER UNDER NH RSA 458-A, *N.O.A.* at 14-19.

[18]*N.O.A.* 9-13.

[19]PETITION FOR GUARDIANSHIP OF MINOR, *Appx. to Writ of Prohibition, N.H. Sup.Ct. No. 2000-511* at 31-48. Was filed on same day as hearing. *Trn.* at 26.

[20] *Trn.* at cover sheet.

[21]ORDER (Feb. 1, 2000), *N.O.A.* at 7-8.

[22]Date in Supreme Court file in *In re Megan Spencer*, N.H. Sup. Ct. No. 2000-120.

[23]PETITION FOR GUARDIANSHIP OF MINOR, *Appx. to Writ of Prohibition, N.H. Sup.Ct. No. 2000-511* at 30.

[24]JUDGMENT FOR DIVORCE, *Appx. to Pet'r Br.* at 41.

[25]CERTIFIED MAIL RECEIPT, *Appx. to Pet'r Br.* at 33.

[26]ORDER, *Appx. to Writ of Prohibition, N.H. Sup.Ct. No. 2000-511.*

[27]CONSENT CUSTODY ORDER, *Appx. to Pet'r Br.* at 35-39.

[28]ORDER, *Appx. to Writ of Prohibition, N.H. Sup.Ct. No. 2000-511.*

[29]PETITION FOR WRIT OF PROHIBITION (Aug. 14, 2000), *In re Claire Spencer, N.H. Sup.Ct. No. 2000-511.*

SUMMARY OF ARGUMENT

Valerie and Norman, Claire's aunt and uncle, first argue that Megan is seeking modification, and not merely enforcement, of an out-of-state joint custody decree. They note that Megan's own arguments acknowledge this.

They then argue that they are valid parties to the custody case concerning Claire. They point out that because Claire has been living in New Hampshire since May 1998, she has significant contacts here and all the evidence concerning her care, protection, training, and relationships is in New Hampshire. Valerie and Norman then note that New Hampshire is Claire's home state. Accordingly, they argue that it is in Claire's best interest for her custody determination to be made by a New Hampshire court.

They finally note recent New Hampshire law specifying the probate court as the proper court to make Claire's custody determination.

ARGUMENT

I. Megan Seeks to Modify the Virginia Joint Custody Decree

Megan Spencer claims to be seeking to merely "enforce" a prior court order. PETITION FOR EMERGENCY CUSTODY ORDER UNDER NH RSA 458-A, *N.O.A.* at 18; *Resp't Br.* at 11. As the court below found, however, she is asking much more than that. She is trying to modify the Virginia decree which gave custody to her and her parents jointly.

A. On its Face, Megan's Plea Is for Modification

Generally joint custody arrangements which reach the point of litigation result in court orders that contain detailed visitation schedules. *See e.g., Chandler v. Bishop*, 142 N.H. 404 (1997). This is because masters correctly perceive that unstated details will give rise to further animosity and further litigation. If an order does not contain visitation details, it must be assumed that the joint custodians have some degree of trust for each other and the ability to negotiate inevitable visitation conflicts.

Here, there appeared to be little cause for conflict. When the Virginia court issued its joint custody order in 1997, Megan had been through a difficult period of mental instability, Megan and Claire were living with Megan's parents in Maryland, and the grandparents were providing substantial care to the child. The New Hampshire Superior Court found that Megan consented to Claire moving to Nashua, and later consented to Claire staying in Nashua with Claire's aunt and uncle when the grandparents moved to Boston.

At some point, however, there was conflict. Megan apparently became unhappy with Claire's living situation, and wants now to exercise more control over it. The Virginia joint custody decree simply does not address the difference in opinion among the joint custodians as to

what is best for Claire, nor does it provide any guidance for making such decisions.

Thus, when Megan claims she wants to merely "enforce" the decree, there is little to enforce. There is no specific visitation schedule, for example, that one of the joint custodians is violating. Indeed, in all the litigation, Megan has never specified what term of the joint custody order her parents are allegedly violating. Nor has she ever specified what term of the order she would like to have the court enforce. This is because they are in complete compliance, duly ensuring that their charge is being fed, housed, loved, supported, and educated.

Megan is not seeking enforcement. Instead, she wants the order amended to include the details of who gets physical custody when. On its face, her plea is for modification.

In *Nelson v. Nelson*, 910 P.2d 319 (N.M.App. 1995), for instance, an out-of-state court had ordered father's visitation on a schedule to be arranged through mother's attorney. In seeking to establish joint custody and greater visitation rights, he filed a "Petition to Establish Child Custody and Visitation." The court wrote that "[e]ven though Father did not specifically use the term 'modification,' he was requesting that the court enter a decree other than the [other state's] decree," and found that it constituted a "modification." *Nelson*, 910 P.2d 323.

B. By Arguing Abandonment, Megan Acknowledges She Is Seeking Modification and Not Merely Enforcement

Megan argues that her parents abandoned Claire when they left her in Nashua with her aunt. *Resp't Br*. at 8. New Hampshire law provides that "'[a]bandoned' means the child has been left by his parent, guardian or custodian, without provision for his care, supervision or financial support." RSA 169-C:3, I. By arranging for Claire's to live with her aunt and uncle, Claire's grandparents took great care to provide for Claire's care, supervision, and support.

Alleging that she has been abandoned is absurd.

Nonetheless, abandonment (if it were true) is an excellent reason for modification. Under long-standing New Hampshire law, for a switch in custody, the non-custodial parent must show that circumstances which affect the welfare of the child have so greatly altered that there is a strong possibility the child will be harmed if she continues to live in the present arrangement. *Perreault v. Cook*, 114 N.H. 440 (1974). Abandonment would constitute precisely the harm required under the *Perreault* custody modification standard. But by arguing abandonment, Megan walks directly into the *Perreault* elements, and thus effectively acknowledges that she is seeking a modification, and not merely enforcement.

II. New Hampshire Courts Have Jurisdiction over the Custody of Claire

A. Significant Connections

New Hampshire's Uniform Child Custody Jurisdiction Act provides several alternative grounds upon which courts of this state have jurisdiction over child custody matters. New Hampshire courts may decide custody when:

> It is in the best interest of the child that a court of this state assume jurisdiction because (1) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (2) there is within the jurisdiction of the court substantial evidence concerning the child's present or future care protection, training, and personal relationships.

RSA 458-A:3,I (b).

1. Valerie Donovan and Norman Larsen are Contestants

Claire's aunt and uncle, Valerie Donovan and Norman Larsen, are "contestants" within the meaning of the statute. "'Contestant' means a person, including a parent, who claims a right to custody or visitation rights with respect to a child." RSA 458-A:2,I. Claire's aunt and uncle have a claim of right to custody because, as Megan points out, *Trn.* at 53, Claire's care was delegated to them by the grandparents who are joint custodians by court order. *See Justis v. Justis*, 691 N.E.2d 264 (Ohio 1998) (father claimed Ohio jurisdiction over custody while mother claimed North Carolina jurisdiction; court ruled both sets of *grandparents* were contestants for purposes of Uniform Child Custody Jurisdiction Act).

2. Child and Contestants Have Significant Connections with New Hampshire and All the Relevant Evidence Is Here

Claire has been living in Nashua since May 1998. She has been cared for by her aunt and uncle. She frequently visits her grandparents, who live in Boston. Various other members of her

family live in the area. *See Murnane v. Murnane*, 552 A.2d 194 (N.J.Super.A.D. 1989) (family ties are relevant in determining jurisdiction). All the people who cared for Claire when Megan last became mentally unstable are in New Hampshire. Claire attends a part-time day care in New Hampshire, *Trn.* at 24, and presumably has friends there. She has been getting all her medical attention for the last two-and-a-half years in Nashua, and goes to church here. *Trn.* at 24. Because she left before her second birthday, Claire probably has no memory of Maryland or her mother's home there.

In this case, both the child and the contestants have significant connections with New Hampshire. All of the evidence concerning Claire's present or future care, protection, training, and personal relationships is in New Hampshire. It is reasonable to suppose that little or no evidence of these things remains in Maryland. It is thus in Claire's best interest to have New Hampshire courts determine her custody. *Brauch v. Shaw*, 121 N.H. 562, 574 (1981) (where child had not lived in other jurisdiction for 16 months, "greatest amount of information concerning the child's present and future welfare is most readily available in this State").

The children in *Mattleman v. Bandler*, 123 N.H. 368 (1983), lived with their mother in Florida and were merely visiting their father in New Hampshire during their summer vacation. As this court pointed out, it is likely that all the evidence of the children's care, protection, training, and relationships existed in Florida and not New Hampshire. This court thus ruled that New Hampshire lacked jurisdiction to determine custody. Claire's Spencer's case is the opposite of *Mattleman*, and deserves the opposite result. *See In Interest of A.E.H.*, 468 N.W.2d 504 (1991), *cert. denied*, 112 S.Ct. 338 (upon aunt seeking guardianship, Wisconsin court found significant contacts there because child had visited state for substantial periods, and had relatives in state).

B. Home State

New Hampshire's Uniform Child Custody Jurisdiction Act also provides that courts of this state may decide child custody matters when:

> This state (1) is the home state of the child at the time of commencement of the custody proceeding; or (1) has been the child's home state within 6 months before commencement of such proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state.

RSA 458-A:3,I (a).

> "Home state" means the state in which the child at the time of the commencement of the custody proceeding has resided with his parents, a parent, or a person acting as parent, for at least 6 consecutive months.

RSA 458-A:2,V; *Brauch v. Shaw*, 121 N.H. 562, 571 (1981) ("the Act sets forth a definite and certain test based on the reasonable assumption that a child is integrated into an American community after living there for six months").

1. Valerie Donovan and Norman Larsen are Persons Acting as Parents

Claire's aunt and uncle, Valerie Donovan and Norman Larsen, are persons acting as parents within the meaning of the statute.

> "Person acting as parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody.

RSA 458-A:2,IX.

Claire's aunt and uncle have physical custody of Claire. Although they have not been awarded custody by a court, they claim a right to custody because Claire's care was delegated to them by the grandparents who are joint custodians by court order. In *Hangsleben v. Oliver*, 502 N.W.2d 838 (N.D. 1993), for instance, the child's mother sent the child to live on her

grandparent's remote farm to avoid the father, who had been harassing and abusive toward the child and mother. About its jurisdiction, the North Dakota Supreme Court wrote:

> "[The child] was placed with [mother's] parents by [mother's] own action and initiative. Through the voluntary action of [mother], her parents fed, clothed, and cared for [the child]. [Mother's] parents have a right to [the child's] custody superior to all except [mother] through the voluntary action of [mother] because their actions embody the common-sense definition of a "person acting as a parent." Therefore, [the child] lived with "persons acting as parents" for more than six months, and, arguably at the time of the commencement of the proceeding, North Dakota was Christine's home state.

Hangsleben, 502 N.W.2d at 843. *See also Mark L. v. Jennifer S.*, 506 N.Y.S.2d 1020 (N.Y. Fam.Ct. 1986) (grandparents were persons acting as parents); *In re B.R.F.*, 669 S.W.2d 240 (Mo. Ct. App. 1984) (grandmother was person acting as parent).

2. New Hampshire is Claire's Home State

New Hampshire is Claire's home state. She has lived here since May 1998. Her things, her relatives, her school, her church and her life are all in New Hampshire. It is likely that she has no memory of having lived anywhere but her aunt's and uncle's home in Nashua. The Superior Court wrote:

> It is undisputed that New Hampshire is the home state of the child and the Court finds that such residence has been with [Megan's] consent since May 1998 when she allowed the grandparents and the child to move to New Hampshire."

ORDER (Feb. 1, 2000), *N.O.A.* at 7-8.

Because New Hampshire is her home, the courts of this state have jurisdiction to determine her custody. *Hangsleben v. Oliver*, 502 N.W.2d 838 (N.D. 1993) (North Dakota child's home state after child placed there by mother).

New Hampshire is required to defer to another state that made an initial custody

determination. RSA 458-A:14; *Clarke v. Clarke*, 126 N.H. 753 (1985). There is no deference, however, when, as here, Virginia has explicitly declined jurisdiction. LETTER FROM JOAN C. SKEPPSTROM, CHIEF JUDGE, NORFOLK JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT TO MEGAN E. DONOVAN SPENCER (June 15, 1999), *N.O.A.* at 21. Moreover, "commencement of the custody proceeding" refers to the current case, not the 1998 Maryland filing. *Umina v. Malbica*, 538 N.E.2d 53 (Mass.App.Ct. 1989) (commencement of custody proceeding refers not to state of original divorce action, but rather state in which children have resided immediately preceding modification hearing); *State ex rel. Cooper v. Hamilton*, 688 S.W.2d 821, 824 (Tenn. 1985) ("[I]n the case of a modification proceeding, the statute has reference to the period of time prior to the institution of that proceeding, not to the months preceding the initial custody determination. Otherwise, no state other than that which originally rendered the custody decree could have authority under either the federal or the state statute to modify an initial award.").

Accordingly, the Superior Court was correct in regarding New Hampshire as Claire's home state and thus in recognizing it is in Claire's best interest for New Hampshire to exercise jurisdiction.

III. The Probate Court Has Jurisdiction over the Custody of Children

The New Hampshire Supreme Court has recently ruled that:

> [a]bsent divorce proceedings . . . , the superior court has no jurisdiction to appoint a custodian of a minor. The right of custody is s legal incident of guardianship, and the appointment of guardians is a matter within the exclusive jurisdiction of the probate court.

McLaughlin v. Mullin, 139 N.H. 262, 265 (1994) (quotations omitted). The superior court has "the ability to make child custody determinations only in cases where there shall be a decree of divorce or nullity." *Bodwell v. Brooks*, 141 N.H. 508 (1996).

This case does not involve divorce. It involves, rather, the modification of custody between a parent and grandparents. Moreover, prior to the hearing in this case, Claire's aunt and uncle requested guardianship by filing in the probate court. PETITION FOR GUARDIANSHIP OF MINOR, *Appx. to Writ of Prohibition, In re Claire Spencer, N.H. Sup.Ct. No. 2000-511* at 31-48. It is thus apparent that jurisdiction lies in the probate court, and not in the superior court.

CONCLUSION

In accordance with the foregoing, Valerie Donovan and Norman Larsen, request that the order of the superior court be affirmed, and that the case be remanded to the probate court for further action.

Respectfully submitted,

Valerie Donovan and Norman Larsen,
By their Attorney,

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Dated: October 31, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Valerie Donovan and Norman Larsen requests that Attorney Steven J. Frasca be allowed 15 minutes for oral argument.

I hereby certify that on October 31, 2000, copies of the foregoing will be forwarded to J. Campbell Harvey, Esq., Ellen M. Joseph, Esq., and Stephen J. Frasca.

Dated: October 31, 2000

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APPENDIX