State of New Hampshire
Supreme Court

IN THE MATTER OF

JAMES J. MILLER

and

JANET S. TODD

N.H.Sup.Ct. No. 2009-0806

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MOTION TO RECONSIDER
DECLINATION OF DISCRETIONARY APPEAL

NOW COMES James J. Miller, by and through his attorney, Joshua L. Gordon, and respectfully requests this honorable court to reconsider its declination of his discretionary appeal, to accept this case for appellate review, and to address the issues presented herein.

As grounds it is stated:

1. On November 9, 2009, James Miller filed a discretionary notice of appeal, raising several issues: Whether a parent's unfounded allegations of sexual abuse against the other parent is itself a form of abuse that must be taken into account by the court when making parenting-plan determinations, and whether the court should have disclosed tapes of interviews with the children which contained statements exculpating the accused parent.[1] The appeal was declined by order without explanation. ORDER (Dec. 23, 2009).

[1]Of the six questions posed in his notice of appeal, Mr. Miller is asking for reconsideration regarding only questions I, II, III, and IV.

I. Rule 3 Mandatory Versus Discretionary Appeals

2. 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 are discretionary, except "an appeal from a final divorce decree" which is mandatory. This leaves in the discretionary category appeals from parenting plans where the parents are unmarried. The Court's commentary to the rule emphases this. "Under paragraph (9), only appeals from final divorce decrees or decrees of legal separation are mandatory appeals. Any other appeal from a final decision on the merits issued in, or arising out of, a domestic relations matter filed … is not a mandatory appeal." SUP.CT.R. 3, *Comment*.

3. Treating the relationship between children and unmarried parents differently than the relationship between children of married parents is unlawful and unconstitutional.[2] Because the Court may have overlooked or misapprehended the law concerning discrimination based on

[2]Because the parenting plan governs the *relationship*, there is no issue that a party lacks standing to claim the rights of another.

bastardy and marital status, this motion for reconsideration is being filed.[3] SUP.CT.R. 22(2). The differing treatment of appeals being alleged here is that 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).

4. 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. 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.

5. 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

[3]Preservation law requires raising issues at the earliest possible time. *In re Parker*, 158 N.H. 499, 504 (2009). The issues addressed in this motion did not exist until this Court declined Mr. Miller's appeal, there was no prejudice until then, and no reason to raise them until now. In addition, the doctrine regarding cases capable of repetition but evading review applies here, *see* Joshua L. Gordon, *What's Moot and What's Not: The Law of Mootness in New Hampshire*, 36 N.H. B.J. 69 (March 1995), because as a practical matter it is unlikely that appellants subject to the discretionary review process will file a pleading such as this along with their notice of appeal, and there is no institutional appellant likely to petition for original jurisdiction regarding the discriminatory effect of Rule 3.

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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" caused 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) (copy attached).

6. 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).

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

7. 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.

8. Court rules may take precedence over statute only 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).

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

9. The differing appellate treatment of the relationship between children and parents based on the 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.

10. At its extreme, such differing treatment is simply offensive.

> I write specially … to express my concern over perpetuation of the offensive term "illegitimate" in referring to a child born to parents not married to each other. Certainly "illegitimate" is a better word than "bastard," a word common in earlier statutes and decisions. [The statute] at issue in this case, uses the term "illegitimate child." An innocent child is still stigmatized by that reference. We have made great strides in amending statutes to remove age-old terms which are offensive in our present-day society. The legislative process can use words which convey the same meaning, but are less demeaning to children.

Guard v. Jackson, 940 P.2d 642, 645-46 (Wash. 1997) (*Smith*, J., concurring) (constitutionality of statute which conditions joining wrongful death action of illegitimate child on regular payment of child support).

> Throughout history, illegitimate children were precluded from, among other legal rights, entering certain professions. The Book of Deuteronomy states: "a bastard shall not enter into the congregation of the Lord; even to this tenth generation shall he not enter into the congregation of the Lord." *Duet*. 23:2. At common law, a child born out of wedlock, referred to as a bastard, was considered a non-person and was not entitled to support from the father or inheritance from either parent. 1 W. BLACKSTONE, COMMENTARIES 459; *Davis v. Houston*, 2 Yeates 280 (1878).

Miscovich v. Miscovich, 688 A.2d 726, 728 n.2 (Pa.Super. 1997) (citations in original, quotation format altered) (admissibility of DNA evidence to establish paternity).

11. New Hampshire abandoned the distinction between legitimate and illegitimate children when in 1971 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).

12. New Hampshire comprehensively revised its parenting law in 2005, when it enacted the current Parental Rights and Responsibility Act, RSA 461-A. The Parental Rights and Responsibility 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.

13. 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).

14. The statute contains no known 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 ever were 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*, __ N.H. __ (decided Dec. 4, 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 Parental Rights and Responsibility Act treats all parents the same regardless of marital status in numerous 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).

15. Although the Parental Rights and Responsibility Act probably represents an evolution in focusing the court's attention on the children, compared with the pre-1971 law, it is the culmination of a departure. *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.

16. 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.

IV. Rule 3 Violates Constitutional Due Process and Equal Protection

17. 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).

18. Discrimination based on marital status generally gets low-level constitutional scrutiny. *Califano v. Jobst*, 434 U.S. 47 (1977). Discrimination based on illegitimacy, however, merits high-level scrutiny. *Levy v. Louisiana*, 391 U.S. 68 (1968).

19. 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 deprives appellate review of that document which determines their legal relationship to the other.

20. Thus, the relationship between children and their parents, where the parents got married, enjoys the comfort of an automatic review. But there is no appeal of the relationship between children and parents when the parents remain unwed. Accordingly, Rule 3 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).

WHEREFORE, James J. Miller respectfully requests this honorable Court to reconsider its declination of questions I, II, III, and IV in his notice of appeal, and to hear those questions on their merits. He also requests an opportunity to more fully address the matters in this motion – to file a brief-length pleading and to present oral argument – and suggests this Court issue a published opinion regarding the matters herein.

Respectfully submitted
for James J. Miller
by his attorney,

Dated: January 4, 2010

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I hereby certify on this 10nd day of January 2010, a copy of the foregoing is being forwarded to Elaine K. Dolph, Elizabeth B. Olcott, Esq., and John P. Carr, Esq.

Dated: January 4, 2010

Joshua L. Gordon, Esq.