

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2020-0110

Petition of New Hampshire Division for Children, Youth and Families

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APPEAL PURSUANT TO RULE 11 FROM A JUDGMENT OF THE  
10<sup>TH</sup> CIRCUIT—FAMILY DIVISION—PORTSMOUTH

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**REPLY BRIEF FOR THE NEW HAMPSHIRE  
DIVISION FOR CHILDREN, YOUTH, AND FAMILIES**

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THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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## ARGUMENT

### **I. B.B. IS NOT AT RISK OF PLACEMENT WITH DCYF IN CONNECTION WITH CHILD ABUSE OR NEGLECT.**

The arguments raised by amicus Warren B. Rudman Center For Justice, Leadership & Public Service (Amicus) warrant little attention as they rely on an incorrect assumption that B.B. is “at risk of placement with DCYF in connection with child abuse or neglect.” *See* AB<sup>1</sup> 4 (counterstatement of the questions presented for review, inserting allegation that B.B. is “at risk of placement with DCYF”); AB 13 (summary of the argument, claiming B.B. is “unsafe and at risk of placement with DCYF”); AB 16-20 (basing argument on claim that B.B. is “in unsafe circumstances” and “at risk of placement with DCYF”); AB 22 (stating, in response to DCYF’s separation of powers argument, that the trial court’s orders “promote judicial and executive cooperation to expeditiously protect children in unsafe situations”).

There is absolutely no reason to believe that B.B. is at risk of placement with DCYF in connection with child abuse or neglect.<sup>2</sup> Even if DCYF were to determine that B.B.’s father is incapable of safely parenting her, B.B. is already under legal guardianship with her maternal grandparents and there is no allegation that B.B.’s grandparents have

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<sup>1</sup> “AB” refers to the amicus brief filed by amicus Warren B. Rudman Center For Justice, Leadership & Public Service; “A.” refers to the Appendix to DCYF’s previously filed brief.

<sup>2</sup> Amicus’ reliance on the family court’s conclusory statement that “without resolution the child may be at risk of placement with [DHHS],” AB 16, n.4 (quoting A. 35), is misplaced because, as discussed herein, that statement is erroneous as a matter of law.

abused or neglected her. Amicus attempts to dodge the issues raised in DCYF's Petition by mischaracterizing this private family dispute as a case dealing with a child in an unsafe situation at risk of placement with DCYF. AB 15 (claiming that the record does not give rise to the issues raised in DCYF's Petition). Amicus' arguments lack merit because, as a matter of law, B.B. is not at risk of placement with DCYF due to her father's inability to care for her because she is already receiving substitute parental care by her grandparents under a legal guardianship.

The Child Protection Act, RSA chapter 169-C, defines "Abused child" as any child who has been:

- (a) Sexually abused; or
- (b) Intentionally physically injured; or
- (c) Psychologically injured so that said child exhibits symptoms of emotional problems generally recognized to result from consistent mistreatment or neglect; or
- (d) Physically injured by other than accidental means; or
- (e) Subjected, by any person, to human trafficking as defined in RSA 633:7; or
- (f) Subjected to an act prohibited by RSA 632-A:10-d.

RSA 169-C:3, II. The Act defines "Neglected child" as a child:

- (a) Who has been abandoned by his or her parents, guardian, or custodian; or
- (b) Who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the child's physical, mental, or emotional health, when it is established that the child's health has suffered or is likely to suffer serious impairment; and the deprivation is not due primarily to the lack of financial means of the parents, guardian, or custodian; or
- (c) Whose parents, guardian or custodian are unable to discharge their responsibilities to and for the child because of incarceration, hospitalization or other physical or mental

incapacity;

Provided, that no child who is, in good faith, under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for that reason alone, be considered to be a neglected child under this chapter.

RSA 169-C:3, XIX.

B.B.'s grandparents are her legal guardians; therefore, B.B.'s grandparents—not her father—are responsible for her care. *See* RSA 463:12, I (“[A] guardian of the person of a minor has the powers and responsibilities of a parent regarding the minor’s support, care and education . . .”). Nothing in either Judge Hall’s September 10, 2019 Order or Judge Pendleton’s January 29, 2020 Order raises any concern that B.B. is being abused or neglected by her guardians. *See* A. 25-28, 33-35. The concerns raised in Judge Hall’s order with respect to the guardians do not relate in any way to their care of B.B., but rather their alleged interference with the father’s attempts to expand his parenting time. A. 26-28. Similarly, Judge Pendleton’s order does not raise any concerns that the guardians are abusing or neglecting B.B.; rather, Judge Pendleton echoes Judge Hall’s concerns about the *father’s* ability to care for B.B. and the guardians’ interference with the father’s efforts to spend time with B.B. A. 33-35.

To the extent B.B.’s father may be incapable of safely parenting her on his own, that does not put B.B. at risk of placement with DCYF. As mentioned above, it is the guardians—not the father—who are responsible for B.B.’s care, *see* RSA 463:12, I, and there is no reason to believe that the

guardians have abused B.B. or are failing to provide B.B. the “proper parental care or control, subsistence, education as required by law, or other care or control necessary for [B.B.]’s physical, mental, or emotional health,” *see* RSA 169-C:3, XIX(b). If anything, the orders suggest that B.B.’s guardians might be overly protective of B.B. due to their concerns about the father’s ability to care for B.B. unsupervised. Moreover, the court’s orders indicate that the guardians have obtained appropriate services for B.B.’s special needs. B.B. underwent a Neurobehavioral Evaluation in May 2019, A. 27, and receives early intervention services through the Moore Center and additional services from Crotched Mountain, A. 26, 33. B.B. is not a child in need of state intervention to ensure that she receives adequate care and services.

To the extent the *father* could benefit from services to assist him in caring for B.B. during visits, it appears that the father *did* have the assistance of a family support worker until the guardians allegedly interfered with that service because they did not believe the worker was qualified to care for B.B. A. 26. It is unclear why the court did not order the father and the guardians to establish replacement support services acceptable to both parties rather than force state involvement. Moreover, in addition to previously having a family support worker to assist with visits, the father also can attend B.B.’s medical appointments and meet with her medical providers to learn about B.B.’s special needs, as well as attend bi-monthly meetings with the Moore Center staff to learn ways to work with B.B. A. 27. To the extent the father does not avail himself to these services due to the guardians’ alleged hostility toward him, that private family dispute does not constitute abuse or neglect placing B.B. at risk of

removal from her guardian's home and placement with DCYF. *See* RSA 169-C:3, II and XIX.

Because B.B. is not a child at risk of placement with DCYF in connection with child abuse or neglect, this Court should disregard Amicus' arguments to the extent they rely on that assumption.

**II. EVEN IF B.B. WERE AT RISK OF PLACEMENT, THE FAMILY COURT EXCEEDED ITS AUTHORITY BY JOINING DCYF AS A PARTY AND ORDERING IT TO PROVIDE SERVICES IN A PRIVATE GUARDIANSHIP MATTER.**

As detailed in DCYF's previously filed brief, even if B.B. were at risk of placement with DCYF, the family court lacked jurisdiction to join DCYF as a party to this private guardianship case and order it to provide services. No statute provided the family court authority to do so, and sovereign immunity barred the court's actions. In addition, by joining DCYF as a party and ordering DCYF to provide services to a child not under state supervision, custody, or guardianship, the court usurped the essential powers of the executive branch to decide the State's interest in civil litigation and to expend public funds.

Notably, Amicus does not respond to the statutory arguments DCYF raised in its brief regarding the family court's lack of jurisdiction and the proper interpretation of RSA 170-G:4, II. *Compare* DCYF's Brief at 13-17 *with* AB at 15-20. Instead, Amicus seeks to avoid addressing the legal



issues raised in this appeal by mischaracterizing the court's orders as "simply 'referring' the matter to DCYF within the meaning of RSA 170-G:4, II." AB 15. The court's orders go far beyond simply referring the matter to DCFY; they expressly,

- "join[] DCYF as a party to the case," A. 28,
- "order[] [DCYF] to provide the services of a parent aid to supervise visits between father and [B.B.] on a weekly basis for 8 hours per week" and "provide father with such other supports as may be necessary to facilitate future expansion of father's parenting time, including overnight visits," A. 28, and
- order DCYF to provide the court with a report "with copies of the parenting supervision records" and "perform [an] analysis as if the case had been referred to it," including authority to "review any medical records relating to the child and any cognitive evaluations, reports from early intervention services, and/or from Crotched Mountain, in the process of assessing the situation." A. 35.

Had the court simply referred the matter to DCYF for investigation in the regular course, DCYF would not have filed this Petition.

In addition to mischaracterizing the orders on appeal, Amicus also mischaracterizes RSA 170-G:4, II by asserting that the statute grants the family court "referral power." *See* AB 16, 18. Amicus conducts no statutory analysis to support its claim that the statute grants powers to the family court, nor does Amicus explain the precise nature or extent of this alleged "power."<sup>3</sup> *See* AB 16-20. As detailed in DCYF's previously filed

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<sup>3</sup> While not describing the extent of this "power," Amicus does acknowledge that "one could conceive of a hypothetical circuit court order that goes too far in ordering DCYF to provide services." AB 19. Amicus suggests that "this court could police ultra vires orders on a case-by-case basis." *Id.*

brief, RSA 170-G:4 describes powers and duties granted to DHHS, not the family court. The family court's powers with respect to guardianship proceedings are set forth in RSA chapter 463. Nothing in RSA 170-G:4, II purports to extend the family court's jurisdiction beyond that set forth in the guardianship statute, and nothing in RSA 463 authorizes the family court to join DCYF as a party to a private guardianship case or order DCYF to provide services to parties in a private guardianship proceeding. *See, generally*, RSA 463.

Whether or not B.B. is at risk of placement with DCYF in connection with child abuse or neglect, the family court lacked jurisdiction to join DCYF as a party to this private guardianship case and order it to provide services.

**CONCLUSION**

For the foregoing reasons, and the reasons set forth in DCYF's previously filed brief, the DCYF respectfully requests that this Court issue a writ of prohibition preventing the family court from ordering DCYF to become a party to this private guardianship matter, perform various tasks, and expend financial resources.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE  
DIVISION FOR CHILDREN, YOUTH  
AND FAMILIES

By Its Attorneys,

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October 2, 2020

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**CERTIFICATE OF COMPLIANCE**

I, Laura Lombardi, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 2,140 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

October 2, 2020

/s/ Laura E.B. Lombardi  
Laura E.B. Lombardi

**CERTIFICATE OF SERVICE**

I, Laura Lombardi, hereby certify that a copy of DCYF's brief shall be served on Kevin P. Chisholm, Esq. (counsel for B.B.'s father), and John F. Driscoll, Esq. (counsel for B.B.'s guardians), and John Greabe (counsel for *amicus* Warren B. Rudman Center) through the New Hampshire Supreme Court's electronic filing system, and shall be conventionally served on Kailyn Provencal.

October 2, 2020

/s/ Laura E. B. Lombardi  
Laura E. B. Lombardi