CONFIDENTIAL

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Petition of New Hampshire Division for Children, Youth and Families

Case No. 2020-0110

PETITION FOR A WRIT OF PROHIBITION TO THE 10TH CIRCUIT (FAMILY DIVISION) PURSUANT TO SUPREME COURT RULE 11

AMICUS BRIEF OF THE WARREN B. RUDMAN CENTER FOR JUSTICE, LEADERSHIP & PUBLIC SERVICE (FILED AT THE INVITATION OF THE NEW HAMPSHIRE SUPREME COURT)

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STATEMENT OF THE CASE AND FACTS

The New Hampshire Division for Children, Youth and Families (DCYF), a division of the New Hampshire Department for Health and Human Services (DHHS), petitions this court for 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."[1] (Pet. Br. 22). The petition arises from an ongoing guardianship case, *In the Matter of B.B.*, Case No. 670-2017-GM-00030, marred by persistent conflict between the guardians of a three-year-old minor with significant special needs and the child's father. (App. 26-28 & 33-35). The guardians are the child's maternal grandparents. (App. 33).

On September 10, 2019, Circuit Court Judge Polly L. Hall issued a written order following a hearing conducted on August 7, 2019, to address the father's Motion for Scheduled Parenting Time. (App. 26). That motion alleged that the guardians were willfully interfering with the father's rights, as established by prior court orders, to unsupervised parenting time and notice of his child's medical appointments. (*Id.*)

In the order, Judge Hall implicitly credited the father's allegations and expressed concerns that the case "has not progressed" (*id.*) and that "[t]he parties are, in essence, at a stalemate." (App. 27). Judge Hall reiterated the court's prior orders regarding the guardians' obligation to provide notice to the father of all medical appointments (*id.*), issued two additional

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[1] "Pet. Br." refers to the petitioner's brief dated June 9, 2020; "App." refers the appendix petitioner filed with its June 9, 2020 brief; "Tr." refers to the transcript of the Hearing on Motion to Reconsider held before the Honorable John T. Pendleton on January 29, 2020.

specific directives regarding the father's parenting time (*id.*), and concluded the order as follows:

> [Father's name] is young. He is trying to be self-reliant and to increase his parenting skills and experience to enjoy parenting time with [his child]. He needs assistance and the ability to learn to care for [his child] independently. It is imperative that the father be afforded the opportunity to do so.
>
> **DCYF is therefore ordered to provide the services of a parent aid [sic] to supervise visits between father and [his child] on a weekly basis for 8 hours per week. This order is entered pursuant to RSA 170-G:4, II. The Court joins DCYF as a party to the case. In addition to a parent aid [sic], the Court orders DCYF to provide father with such other supports as may be necessary to facilitate future expansion of father's parenting time, including overnight visits.**
>
> A further review hearing to address the implementation of the Court's Order shall be scheduled as the docket allows.
>
> **SO ORDERED.**

(App. 28).

On September 20, 2019, DCYF filed a motion asking the court to reconsider the provisions of its September 10, 2019, order quoted above. (App. 29). On January 29, 2020, Circuit Court Judge John T. Pendleton held a hearing to address DCYF's

motion to reconsider. (Tr. 1).[2] In its motion and at the hearing, counsel for DCYF argued that, in a minor guardianship proceeding under RSA 463 in which the ward is not at risk of placement with DHHS in connection with child abuse or neglect, RSA 170-G:4, II does not authorize the court to order DCYF to supply the services mandated by Judge Hall's order. (Tr. 3-6). Counsel for the father disagreed that the statute should be read to contain the abuse-or-neglect limitation for which DCYF argued and expressed support for the order, given the obstacles that his client was facing. (Tr. 6). Counsel for the guardians also expressed support for the order; agreed with father's counsel that the statute authorized it; and asserted that, contrary to the premise of DCYF's argument, there was a risk of placement with DHHS in this case should his clients lose the guardianship, given the child's health challenges and need for many services that already are in place. (Tr. 6-8).

Counsel for DCYF replied by acknowledging that, if Judge Hall's order were authorized by statute, and if "there were resources behind it, then the resources of DCYF might be helpful to this particular situation." (Tr. 8). But, counsel continued, this

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[2] By the date of the hearing, Judge Hall was no longer regularly sitting in the court where this proceeding is pending. (App. 33). Judge Pendleton reviewed the file in its entirety before the hearing and was already familiar with the case, having sat on many of its previous hearings. (*Id.*)

is nothing more than a common custody battle involving a dispute between the guardians and a parent "on the proper division of time" between them. (*Id.*) Counsel further observed that, in his dozen years working for the agency, he had never seen the statute used to order DCYF to provide services to ameliorate problems between "warring parties" in a guardianship case. (Tr. 8). Counsel concluded by asserting that the statute was not "clear enough or intended for the purposes that are being argued for here." (Tr. 9).

In response, Judge Pendleton began by stating that he appreciated DCYF's concern about use of the statute to order services in contexts where services had not previously been provided. (*Id.*) But he disagreed with DCYF that this was just a typical guardianship case. (*Id.*) Instead, he characterized the case as one "that's been bumping along." (*Id.*) Immediately thereafter, Judge Pendleton stated:

> And you have an expression from Judge Hall -- and I've read the entire file; I sat on a bunch of the file, prior to that -- that there's concerns both with the care being given by the guardian and the impact on the child and the care that -- and whether or not the father's an option and whether or not the father should be having more contact.

(Tr. 9).

In response to this statement, counsel for DCYF asked whether, if the court's concern were for the welfare of the child,

"wouldn't the normal approach of the Court be to call in concerns to [DCYF]'s intake unit and ask [DCYF] to assess whether or not abuse or neglect has occurred?" (Tr. 10). Judge Pendleton agreed that this is how things normally would be done but stated that such an approach is not mandated by RSA 170-G:4, II, which "clearly gives the Court the ability to order DCYF to provide services." (*Id.*) He then qualified this statement by acknowledging that the statute "has to be used very sparingly, if it's going to be used that way, because what's going to happen is exactly what you talked about: it's going to become an issue before the legislature because you have, as a Department, limited resources to provide to families." (*Id.*) He added that this case involved "a unique example of a judge ordering something that, if it became common, would really shake the system. And I guess I'm sympathetic to [DCYF]'s concerns about that." (*Id.*)

After colloquy with DCYF's counsel regarding whether RSA 170-G:4, II contemplates orders to DCYF as part of its grant of authority to issue orders to DHHS (Tr. 11-12), Judge Pendleton returned to the question of whether the challenged orders strayed into uncharted territory. After restating that he found "reasonable [DCYF]'s concerns about . . . open[ing] a door to a huge new area of orders that you guys, again, don't have the resources to meet," and emphasizing that he was "sympathetic"

to such concerns, Judge Pendleton stated: "But I think this specific case is not your average case." (Tr. 12).

Conversation with counsel then turned to the scope of RSA 170-G:4, II. Counsel for DCYF reiterated that the authority to issue orders conferred by the statute is triggered only in cases involving abuse and neglect of children (Tr. 12-13), while Judge Pendleton and guardians' counsel again offered that they read the statute more broadly. (Tr. 13-14). Judge Pendleton then stated, "I think DCYF's right to assume that there be some risk [of abuse or neglect], but I think there's some risk any time it's appropriate to institute a guardianship, because you're saying the child's in need of -- if the parents can't meet their obligations, a child's in need of [sic] some risk." (Tr. 14).

Emphasizing the State's obligation to support parents, Judge Pendleton stated that he understood Judge Hall's order of services to be a temporary measure designed to provide the court with some independent insight into whether the father is capable of parenting his child. (Tr. 14-15). Summing up the portion of the hearing devoted to the issues that are the subject of this petition, Judge Pendleton stated:

> I think, at a minimum, I would clarify that the intent is that this not be a long-term solution but this be some sort of a solution to determine whether the child has some unique special needs, whether the father's appropriate, or -- so I guess I see it almost asking for help in a minor investigation into seeing

> what's going on and whether the father actually has skills to parent the child appropriately....
>
> I think there's some feeling in Judge Hall's order, and having read the entire file again today ... [i]t is my impression that there's more concern than just, we're looking to have someone do supervised parenting for an indefinite period of time so the father gets to have his parenting time.
>
> That's not what it's about.

(Tr. 16-17).

Later that same day, Judge Pendleton issued a written order summarizing and explaining the court's positions on the principal issues. (App. 33-35). First, Judge Pendleton clarified that he understood Judge Hall's September 10, 2019, order as a de facto "referral" of the type contemplated by RSA 170-G:4, II. The written order stated: "Judge Hall's Order in effect was a *referral* to DCYF .... The Court 'joined' DCYF to the case, which is a means of allowing [DCYF] input into the case." (App. 34) (emphasis supplied; internal quotation marks in original). It also stated: "The Court is asking [DCYF] to perform its analysis as if the case had been referred to it with the addition of addressing Judge Hall's specific requests." (App. 35).

Second, Judge Pendleton situated the orders in this case within the provision of RSA 170-G:4, II, which contemplates DCYF's involvement in cases where there is concern that a child

is "at risk of placement with [DHHS] in connection with child abuse or neglect." In his written order, Judge Pendleton stated that, "read in the context of prior orders and the rest of [Judge Hall's September 10, 2019 Order], the [September 10] Order is expressing concern with the child's current safety." (App. 34). He subsequently reiterated this point by stating that he read "Judge Hall's Order to be a request for information from [DHHS], the information being necessary to ensure that the child is being properly cared for, in light of the alleged special needs of the minor child." (App. 34). And he connected this safety concern with the risk of placement mentioned in the statute: "[The court clarifies] that it considers this situation a unique or special circumstances [sic], in part because it deems that without resolution the child may be at risk of placement with [DHHS]." (App. 35).

Third, Judge Pendleton emphasized that he intended the social-work services that he was ordering to be limited and temporary:

> The Court also sends the message that it does not intend this to be an open-ended obligation. The Court intends to schedule a further hearing after approximately 6 weeks of the supervised parenting to review the information obtained by the supervisor, and to assess whether the child is significantly at risk with either the father or the guardians.

(App. 35) (emphasis supplied).

DCYF thereafter invoked this court's original jurisdiction under Sup. Ct. R. 11 and petitioned for a writ of prohibition seeking the relief specified in the first paragraph of this section. The petition also raised sovereign immunity and separation-of-powers arguments that were not presented to the circuit court. By order dated August 5, 2020, this Court invited the Warren B. Rudman Center for Justice, Leadership & Public Service to file this *amicus curiae* brief in support of the circuit court's decision.[3]

SUMMARY OF THE ARGUMENT

The circuit court ordered limited and temporary parental supervision and reporting services because it was concerned that the child was unsafe and at risk of placement with DCYF. The court's orders did not exceed, let alone clearly and inarguably exceed, its statutory authority under RSA 170-G:4, II. The court's orders also did not violate, let alone clearly and inarguably violate, DCYF's sovereign immunity, which if implicated by the court's order was waived by RSA 170-G:4, II. Finally, the court's orders did not usurp, let alone clearly and inarguably usurp, the executive branch's essential powers.

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[3] *Amicus* recognizes with gratitude the research and editorial assistance provided by third-year law students Tess Farley and Jennifer Lyon in the preparation of this brief.

ARGUMENT

I. STANDARD OF REVIEW

This court exercises its original jurisdiction to issue a writ of prohibition only "when there are special and important reasons for doing so." Sup. Ct. R. 11(1). Prohibition is an extraordinary writ. *Petition of CIGNA Healthcare, Inc.*, 146 N.H. 683, 687 (2001) (citing *Rockhouse Mt. Prop. Owners Assoc. v. Town of Conway*, 127 N.H. 593, 602 (1986); *Petition of Mone*, 143 N.H. 128, 132 (1998)). It is used "to prevent subordinate courts or other tribunals, officers or persons from usurping or exercising jurisdiction with which they are not vested." *Id.* (citation and internal quotation marks omitted). "This court exercises its discretionary power to issue such a writ with caution and forbearance and then only when the right to relief is clear." *Petition of Cigna Healthcare, Inc.*, 146 N.H. at 687 (citation and internal quotation marks omitted); *see also Petition of Mone*, 143 N.H. at 132 (1998).

This court's reticence in issuing writs of prohibition accords with the practice in other jurisdictions. *See, e.g.*, 63C Am Jur 2d Prohibition § 1 ("A writ of prohibition is a drastic measure, which a court may issue only when two conditions are met: (1) the party subject to the writ is acting with a total and inarguable absence of jurisdiction, and (2) the party seeking the writ does not have a plain, speedy, and adequate remedy in law.")

II. PROHIBITION IS UNWARRANTED ON STATUTORY GROUNDS

The court should deny DCYF's petition. In this case, there is no reason for this court to decide the broad questions raised in the petition and brief: whether the lower court has the power to involuntarily join DCYF as a party; whether RSA 170-G:4, II should be read to empower the lower court to order DCYF to provide services in RSA 463 guardianship cases where there is no reason for concern about the safety of the child; or whether orders such as these would raise sovereign-immunity or separation-of-powers problems. For the record, fairly construed, does not give rise to these questions.

Regardless of whether they are more fairly characterized as clarifications or modifications of Judge Hall's September 10, 2019, order, Judge Pendleton's January 29, 2020, order on DCYF's September 20, 2019, motion to reconsider made three points very clear: (1) the court was simply "referring" the matter to DCYF within the meaning of RSA 170-G:4, II (App. 34-35); (2) the court was referring the matter to DCYF because it was concerned that the minor child under guardianship pursuant to RSA 463 was unsafe and "at risk of placement with [DHHS] in connection with child abuse or neglect," (*Id.*); and (3) the court sought from DCYF only limited and temporary parental supervision and reporting services that would enable it to make

an informed judgment about the safety of a child believed to be at risk of placement with DCYF in connection with child abuse or neglect. (App. 35).

Thus, framed in terms of the applicable standard of review, the issues raised by this petition are whether (1) the court clearly and inarguably acted without statutory authority in ordering limited and temporary services that would aid it in assessing the child's safety; (2) the court's order clearly and inarguably infringed DCYF's sovereign immunity; and (3) the court's order clearly and inarguably violated separation-of-powers doctrine by usurping the executive branch's essential powers.

A. The Court's Orders Do Not Exceed, Let Alone Clearly and Inarguably Exceed, Its Authority Under RSA 170-G:4, II.

DCYF does not dispute the adequacy of the basis for the court's safety concerns.[4] Nor does it deny either the court's referral power or DCYF's mandatory duty to provide services on behalf of a child under guardianship pursuant to RSA 463 as to

[4] In its brief, DCYF states: "The minor has not been found to be abused or neglected, is not in an out-of-home placement, and has not been found to be at any risk of placement." (Pet. Br. 21). *Amicus* respectfully disagrees with this characterization of the record. In his January 29, 2020 order, Judge Pendleton stated that "without resolution the child may be at risk of placement with [DHHS]." (App. 35). In any event, DCYF does not develop an argument that the court's expressed concerns about the child's safety and the risk of placement were unsupported.

whom there are safety concerns--especially when those concerns put the child at risk of placement with DCYF. (Pet. Br. 16). Rather, DCYF contends that, in making a "referral" of the sort described in RSA 170-G:4, II, the court is entirely without the power to play a role in directing the services that the statute requires DCYF to provide. More specifically, after conceding that the statute "could be interpreted as recognizing that the family court can refer a child or youth to DHHS if the court is concerned that the child may be at risk of abuse or neglect," (*id.*), acknowledging that DCYF would take action upon receiving such a referral (*id.*), and laying out the various actions it would and might take upon receiving such a referral, (Pet. Br. 16-17), DCYF argues:

> In any event, it is DCYF--not the family court--that is charged with the responsibility of investigating reports of abuse and neglect and determining the "protective treatment, and ameliorative services that appear necessary to help prevent further child abuse or neglect and to improve the home environment and the parents' ability to adequately care for the child[]." RSA 169-C:34, II(e).

(Pet. Br.17).

As an initial matter, the circuit court's orders did little to intrude on DCYF's unquestioned authority under RSA 169-C:34, II(e) to prescribe protective treatment and ameliorative services responsive to child abuse or neglect. True, the court's orders

enlisted the assistance of a parental supervisor. But they did so only temporarily and for a limited purpose: providing the court with information necessary for an informed judgment on what measures *it* should take in fulfilling *its* statutory obligations under RSA 463 with respect to a minor guardianship (1) beset by conflict between the guardians and father that had reached a point of "stalemate" (App. 27), and (2) as to which the court harbored concerns about the safety of the child sufficient to conclude that the child was at risk of placement with DCYF. (App. 35).

In any event, RSA 170-G:4, II's referral power should not be read to authorize, let alone to clearly and inarguably authorize, only a general referral power of the sort for which DCYF argues. Such a narrow understanding of the court's authority would undermine the ability of the judiciary and executive branch to work cooperatively, efficiently, and expeditiously to protect children in unsafe situations who are already under court supervision pursuant to RSA 463, as well as persons already under court supervision pursuant to RSA 169-C; 170-B; and 170-C. Nothing would be gained, and much would be lost in terms of waste and delay, if an experienced circuit court judge concerned about the safety of a child under the judge's jurisdiction were limited to requesting a de novo investigation by an agency that likely would lack prior knowledge of the case, and

could not direct a targeted provision of limited and temporary services deemed necessary for an informed judgment about what actions to take.

DCYF argues that a construction of the statute authorizing the orders in this case would be problematic because it would put in the hands of the judiciary a power that would require it, an executive branch agency, to expend public resources. But as noted above, DCYF concedes that, upon referral in a guardianship matter where the court expresses concern about child abuse or neglect, it is under a duty to investigate pursuant to RSA 169-C:34. (Pet. Br. at 16). Investigations consume resources. So, there is no hard-and-fast rule preventing the circuit court from issuing orders that require DCYF to take actions that require it to expend public resources. Other provisions of the state's Child Protection Act make this clear. *See, e.g.*, RSA 169-C:18, V (authorizing courts to order DHHS, among others, to take actions requiring the expenditure of resoures); RSA 169-C:21, II (similar).

Surely, one could conceive of a hypothetical circuit court order that goes too far in ordering DCYF to provide services. But this court could police ultra vires orders on a case-by-case basis. The orders in this case do not go too far, and certainly do not clearly and inarguably go too far. Indeed, insofar as they invite inter-branch cooperation designed to promote efficient and

expeditious relief for children in unsafe circumstances, they might fairly be thought to *conserve* state resources, at least when compared to the lawful alternative that DCYF says was the court's sole option: a referral directing DCYF to initiate a de novo investigation. RSA 170-G:4, II

B. The Court's Orders Do Not Infringe, Let Alone Clearly and Inarguably Infringe, DCYF's Sovereign Immunity.

Although it did not do so below, DCYF argues that the circuit court infringed its sovereign immunity by involuntarily joining DCYF as a party and ordering it to provide services. But, as explained above, the circuit court has not formally joined DCYF as an involuntary party to this litigation. *See supra* at 11. Moreover, even if sovereign-immunity principles are implicated by the court's orders that DCYF provide services, DCYF's immunity is waived to the extent that the orders are statutorily authorized. *See, e.g., Chase Home for Children. v. N.H. Div. for Children, Youth & Families*, 162 N.H. 720, 730 (2011) (acknowledging that sovereign immunity may be waived by statute). Thus, the question of whether DCYF enjoys sovereign immunity from having to comply with the circuit court's orders is coextensive with the question of whether the court's orders were within its statutory authority. This court's answer to the statutory question will resolve any sovereign-immunity problem.

III. PROHIBITION IS UNWARRANTED ON CONSTITUTIONAL GROUNDS

Although it did not do so below, DCYF argues that separation-of-powers principles prohibit enforcement of the circuit court's orders. This argument should be rejected, regardless of whether it is considered de novo or under exacting plain-error review standards. *See* Sup.Ct. R. 16-A ("A plain error that affects substantial rights may be considered even though it was not brought to the attention of the trial court or the supreme court."); *State v. Russell*, 159 N.H. 475, 489-90 (2009) (elaborating the stringent showing necessary to establish plain error).

DCYF first argues that the circuit court's order that DCYF be joined as a party to the underlying minor guardianship case usurped the executive branch's exclusive power to decide whether to join the State as a party to litigation. (Pet. Br. at 20). But again, as explained above, the circuit court has not formally joined DCYF as an involuntary party to this litigation. *See supra* at 11.

DCYF also argues that the circuit court's order to DCYF to provide services in the context of this family dispute usurped the executive branch's essential power to determine how to spend state revenue. (*Id.*) But here too, as explained above, there is nothing inherently unconstitutional in a court order that results in the executive branch having to expend resources. *See supra* at

19-20. Indeed, to the extent that the court's orders promote judicial and executive cooperation to expeditiously protect children in unsafe situations who are already under court supervision pursuant to RSA 463, they are entirely consistent with this court's realistic understanding that separation-of-powers doctrine should not undermine the efficient operation of government. *See, e.g., In re Opinion of Justices,* 162 N.H. 160, 165 (2011) (acknowledging that "the complete separation of powers would interfere with the efficient operation of government," and that, as a practical matter, "there must be some overlapping of the power of each branch") (citation omitted); *Ferretti v. Jackson*, 88 N.H. 296, 300 (1936) (stating that the New Hampshire Constitution does not require "an absolute separation of functions" because, "if it did, it would really mean that we are to have no government, whereas our Constitution was ordained for the establishment of an efficient government") (citation omitted); *see also Smith Ins., Inc. v. Grievance Comm.*, 120 N.H. 856, 863 (1980) (stating that "the wisdom, effectiveness, and economic desirability of a statute is not for us to decide").

CONCLUSION

For the foregoing reasons, this court should deny DCYF's petition for a writ of prohibition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, John Greabe, hereby certify that pursuant to New Hampshire Supreme Court Rule 16(11), this brief contains 4324 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.

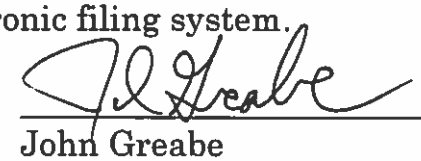
September 14, 2020

John Greabe

CERTIFICATE OF SERVICE

I, John Greabe, hereby certify that a copy of the Rudman Center's brief shall be served on the Attorney General; Laura E.B. Lombardi, Esq.; John F. Driscoll, Esq.; Ms. Kailyn Provencal; and Kevin P. Chisolm, Esq., through the New Hampshire Supreme Court's electronic filing system.

September 14, 2020



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