



August 19, 2024

Justice Patrick E. Donovan, Chairperson
Ms. Sherri L. Miscio, Secretary
New Hampshire Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301
Via email to rulescomment@courts.state.nh.us

Re: Amendments to Supreme Court Rule 48

Dear Justice Donovan and Secretary Miscio,

The Children's Law Center of New Hampshire is a legal services nonprofit dedicated to improving outcomes for at-risk children. A primary focus of ours is providing high-quality, integrated direct representation to children in delinquency (RSA 169-B), child protection (RSA 169-C; also referred to as abuse and neglect), and CHINS (RSA 169-D) cases. Collectively, these chapters of the New Hampshire Code comprise our state's child welfare proceeding laws.

I am writing to urge the Rules Committee to adopt the amendments proposed to Supreme Court Rule 48, and in the future to consider the other amendments suggested here.

Fee increases. The proposed amendments increase the per-hour fees for representation of children in RSA 169-B, -C, and -D cases from \$90 to \$125, and from \$90 to \$150 in the most serious delinquency cases. We believe that the increase in rates is critical to ensuring best outcomes for court-involved at-risk children in New Hampshire.

Children who are the subject of child welfare proceedings are uniquely vulnerable.¹ They are predominantly poor, living with significant household dysfunction, experiencing childhood trauma, and challenged by mental health and educational disabilities. Their complex legal and social services needs make it imperative that they receive quality legal representation.

Children petitioned with delinquencies have long enjoyed not only the statutory right to counsel, but in the vast majority of cases, the right to representation by a skilled New Hampshire Public Defender. However, there is a significant cohort of children whose right to representation is in effect not unequivocal, but primarily dependent on the willingness of the private bar to take court-appointed cases. This group consists of the children petitioned with

¹ See, e.g., *The Crisis of Childhood Poverty, Trauma, and the Child Welfare System: Challenging the Status Quo*, New Hampshire Bar News (November 15, 2023), attached.

delinquencies whose cases the Public Defender cannot accept, all children in CHINS cases, and beginning in July 2025, all children in child protection cases who are institutionalized or at substantial risk of institutionalization.²

Lawyers in private practice have little incentive to accept cases for which they are paid poorly—especially cases which can be surprisingly complex, as these can be. The child welfare statutes afford children a panoply of legal rights, and in April of this year, the Judicial Council promulgated standards of child representation which complement those rights. The law and these standards protect vulnerable children, but those protections are only enforced through competent legal representation.

We think that increasing hourly fees is critical to recruiting and retaining skilled attorneys in child welfare cases, and thus to ensuring better outcomes for the children these proceedings serve.

Maximum compensation. The proposed amendments increase hourly fees but do not increase the maximum compensation threshold.

The current cap for RSA 169-B, -C, and -D cases is \$2,550, or 28.33 hours of work at the \$90 hourly rate—about three-and-a-half 8-hour workdays. At the increased hourly rate of \$125, that already dangerously low ceiling on representation would be reduced to 20.4 hours of work, or about two-and-a-half 8-hour days.

At a minimum, we recommend that the Committee consider in the future increasing the cap commensurate with the increase in hourly fees.

Language. The term “juvenile” is an antiquated one which is pejorative and stigmatizing to children. It is typically not a term used in common parlance other than to describe court-involved children—usually children who are the subject of delinquency petitions.

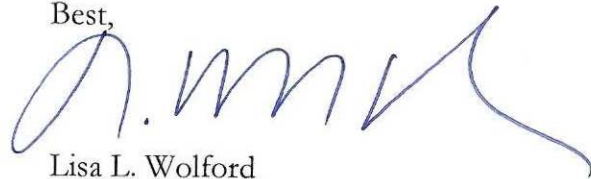
We prefer the word “child” because it broadly describes a person younger than 18, the legal age of adulthood. However, we understand that some adolescents and others feel that the word “children” is not a good fit for teens.

We suggest that the Committee consider in the future replacing the term “juvenile” in Rule 48 with the phrase “children and youth.” Thus, references in Rule 48 to “juvenile cases in the circuit court” and “all juvenile cases pursuant to RSA chapters 169-B, C, and D” would instead read, “circuit court cases related to children and youth pursuant to RSA chapters 169-B, C, and D.”

² On July 26, 2024, Governor Sununu signed SB 463 into law, providing the right to counsel for the first time to victims of abuse and neglect in RSA 169-C proceedings. That right, which is afforded only to children placed by the State in institutions or at substantial risk of such placement, has a rolling implementation schedule which begins in July 2025.

Thank you for the opportunity to provide these comments in support of amendments to Rule 48.

Best,

A handwritten signature in blue ink, appearing to read 'L. Wolford', with a long, sweeping flourish extending to the right.

Lisa L. Wolford
Executive Director
Lisa.Wolford@clc-nh.org
(603) 479-5601

Attachment.

The Crisis of Childhood Poverty, Trauma, and the Child Welfare System: Challenging the Status Quo

By Lisa Wolford

In 2021, more than 23,000 children in New Hampshire lived in poverty. Of that number, more than half – 14,000 children – were living in extreme poverty. For a family of four, extreme poverty means living on less than \$14,000 a year – less than \$38 a day.



Growing up in poverty puts children at a high risk of experiencing emotional, behavioral, social, and health challenges. Poverty is also highly associated with increases in child maltreatment rates and entanglement in delinquency, CHINS, and abuse and neglect proceedings. Research has found that extreme poverty tends to be a chronic condition that persists generation after generation. So does childhood trauma.

Poor kids who are abused or neglected face bad outcomes in both childhood and adulthood. The 1998 Kaiser-Permanente ACEs study, a seminal study of ten adverse childhood experiences (ACEs), found a dose response between ACEs scores and poor life outcomes. One of the most robust investigations of the relationship between childhood abuse, neglect, and household dysfunction and later-life health and well-being, the ACEs study determined that adults with four or more ACEs showed a 12-times-higher prevalence of health risks



such as alcoholism, drug use, depression, and suicide attempts. Other research has demonstrated that people with four or more ACEs were over 32 times more likely to have been diagnosed with learning and behavioral problems. They are twice as likely to be obese and are at increased risk for chronic health conditions like coronary heart disease and stroke. With six or more ACEs, a child faces the prospect of premature death; life expectancy is 20 years shorter than for someone with no ACEs.

The impact of significant adversity on brain development, which tends to explain the learning and behavioral data just described, is disquieting. ACEs and other traumatic events in childhood over-activate the

stress response system, leaving the child's brain hyper-alert to threat even when threat isn't there. That constant vigilance against danger over stimulates the brain's fear-response system, bypassing the prefrontal cortex and resulting in poorly developed executive functioning skills, which include the ability to reason, plan, and exercise considered judgment and decision-making. The deficits in these skills manifest in emotional and behavioral dysregulation: chronic anxiety, sleeplessness, meltdowns, swearing, threatening, and fighting.

Not surprisingly, children with trauma-induced executive functioning challenges are disproportionately subject to restraint, seclusion, suspension at school, arrest, and

other court involvement through delinquency and CHINS proceedings.

Despite all that is known about the impact of childhood adversity and trauma on the developing brain, our child welfare system centers accountability for emotional and behavioral dysregulation squarely on the backs of children. Once in court for status offenses in CHINS cases, minor delinquencies in delinquency cases, or as victims of abuse and neglect in child protection cases, the message to children with dysregulated stress response is that if they can't behave, they'll be displaced to group homes; once there, they're told they'll stay until they behave.

Children impacted by ACEs – and their still-developing brains – are resilient, and there are school- and community-based supports that both mitigate the adverse impact of childhood trauma and strengthen executive functioning skills. But New Hampshire does not fund sufficient community-based services for these kids and their families, with some families reporting waits of six to 12 months for access to basic mental health treatment for children at the state's community mental health centers. Nor does New Hampshire recruit or retain sufficient licensed foster homes to care for kids in state custody.

Last year, New Hampshire had 257 fewer licensed homes than in 2019, accounting for less than half the number of foster homes in Vermont, a state with less than half our population.

CRISIS *continued on page 40*

HOW TO PROTECT YOUR ASSETS AND ESTATE FROM A NURSING HOME

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Vice President, Senior
Care Advisor
Catherine Cournoyer

(603) 934-8386

Cournoyer@strategic
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Let us help you live your best life!

Strategic Caring Solutions is an organization that is ready to assist in times of crisis or before one begins. We understand there are many families who do not know where to turn when a long-term care crisis strikes. Let our team of professionals help guide you through a successful outcome.

During this workshop, our team will discuss:

- The importance of Medicaid planning as part of an overall long-term care plan.
- How to protect assets and preserve your estate.
- Identify the legal documents you need in place.
- The professionals needed for an effective plan.
- The keys to a successful outcome.

■ COUNSEL *from page 34*

contentious temporary hearing to step out of the litigation zone and extend the olive branch of settlement. Even if the attorney has no qualms about the dual roles, opposing counsel or the other party may remain suspicious to a degree that it inhibits negotiations. Settlement counsel can overcome these challenges for the right case.

Obviously, enlisting settlement counsel outside of a firm brings with it the loss of revenue for the settlement efforts that might otherwise be generated by the firm. For this reason, and to maximize firm efficiency, developing the role of settlement counsel within your firm may be a better fit.

At our firm, we have experimented with a settlement counsel model with success. As we discuss the services of the firm at the initial client meeting, we introduce clients to the option that they may have two attorneys working with them and taking the lead at different times in their case – one to exhaust settlement, and in the event settlement is not achievable, the other to litigate the case. We frame this as an added benefit to the client at no additional cost to them. We are clear in our fee agreement when a client has opted into this approach.

One benefit of developing settlement counsel within a firm is flexibility. With the flexibility to allocate duties of settlement and litigation to two different people, one family law colleague can assist the other by exhausting settlement during the other's busy litigation period, thus increasing the efficiency of the firm.

The use of settlement counsel within a firm also allows attorneys to play to their strengths and may provide viable opportunities for certain attorneys (for example, *of counsel*) to remain involved in litigation without the commitment of a full litigation caseload.

Clients also see the involvement of an additional attorney in their case as a major benefit. The colleague stepping in for vacation coverage or emergencies is well received because the client has a history with both attorneys.

Finally, the use of settlement counsel reinforces to clients that the firm is committed to exploring all available settlement options when settlement is the client's goal. Given the stakes of litigation on children and the emotional intensity unique to family law cases, it is incumbent upon the experienced family lawyer to avail themselves of all possible paths to the client's best outcome. Settlement counsel may be the right fit for your next challenging family law case. ♦

Kimberly A. Weibrecht has 25 years of experience and focuses her practice on family law, including collaborative divorce and mediation at Weibrecht & Ecker, PLLC, in the seacoast.

Endnote

1. William F. Coyne, Jr., *The Case for Settlement Counsel*, Ohio St. J. on Disp. Res., Vol. 14:2, 385 (1999).

■ CRISIS *from page 29*

As a result, according to at least one report, our state places 27 percent of its foster children in institutions in New Hampshire and as far away Mississippi and Arkansas, the highest rate of congregate care placement in the country. We don't know whether programming for kids in these facilities is worthwhile or effective – to the best of our knowledge, they don't publish results data – but we do know that institutional placement generally produces poorer outcomes for children than family-based settings, in no small part because institutions often fail to offer consistent caring relationships and frequently are experienced as punitive, prison-like, and traumatic.

We also know that the treatment of children in at least one facility in Tennessee was so punitive and atrocious that the New Hampshire Child Advocate in August 2023 demanded the immediate return of the New Hampshire children placed there.

We also know that at the high end, these institutions cost more than \$700 per day, or more than \$250,000 per year, per child. In 2021, New Hampshire entered contracts with at least 14 state and regional institutions totaling more than \$220 million over the course of three years, a staggering amount of money even assuming the possibility of a federal funding offset of 49 percent.

New Hampshire's reliance on court and institutionalization to make traumatized children behave only harms them more. Already stigmatized and demoralized by poverty, household dysfunction, separation from general education classrooms, and referrals to law enforcement, these kids are further traumatized when they are not only subjected to court proceedings, but separated by institutional placement from their families, schools, and communities.

A solution to the intersecting problems of poverty, childhood trauma, and the institutionalization of children is a child welfare system which is not merely "trauma-informed" – a sobriquet that just about anyone can claim these days – but which sources and implements trauma-specific interventions, including solutions as simple as identifying a single trusted adult, unaffiliated with court proceedings, to provide mentorship for a child. This means building and supporting a system of care premised on community-based supports and services and ending the system's default reliance on child institutionalization. It also means shrinking the child legal system; far too many children and families are unnecessarily entangled in our child welfare courts, with little demonstrable benefit either to them or society.

Finally, for children who are court-involved, it means assuring them the legal rights to which they are entitled, including due process of law in every child welfare matter, not the least of which are child protection proceedings. ♦

Lisa Wolford is the founder and executive director of the Children's Law Center of New Hampshire, a legal services nonprofit dedicated to improving outcomes for at-risk kids through direct representation and advocacy for systemic reform. She is a former trial and appellate litigator at the New Hampshire Public Defender and the New Hampshire Attorney General's Office and practiced special education law at the Disability Rights Center of New Hampshire.

■ TRENDS *from page 30*

divorce rate in families with a child with autism is about 80 percent."

How a family handles financial matters along with the emotional needs of their children with special needs during a divorce is important for the future success of the children.

Next Steps and Benefits

The benefits of the collaborative law process are seen in all aspects of family law:

- For the public: It is an option to minimize conflict and help the parties work together, even if they have not been successful at that in the past. This sets the family up for success and good co-parenting communication moving forward.
- For family law litigation attorneys: Referring cases that may be a good fit for the collaborative law process to trained attorneys will create a mutually beneficial referral source as collaborative attorneys usually wish to do less litigation and can refer cases that are more aligned with your business model.
- For the courts: Courts should discuss the collaborative law process at the first appearance, as many people have never heard of this option as an alternative. Even though it may not be for everyone, moving some cases toward the collaborative law process frees up time on the court's docket for more pressing matters that cannot be resolved amicably.
- For the Bar: Applying the collaborative principles of privacy, communication, and client-focused resolution to other legal disputes could lead to less litigation and better results for all clients.
- For children of divorce: One of the goals of the collaborative law process in divorce is that it will lead to less arguing and less weaponizing of the children as the parents focus on working cooperatively to ensure that their children's needs are at the forefront of every decision they make.

Practicing collaborative law is a rewarding way to help families through the divorce or separation process. We encourage you to check out the Collaborative Divorce New Hampshire website to learn more about the process and to see if becoming certified is right for your practice. There will be a training to become certified next spring. More information can be found at collaborativedivorcenh.com. ♦

Katherine Morneau is the founding attorney of Morneau Law, a Nashua-based law firm focusing on family law, collaborative law, mediation, estate planning, and probate matters. She will also be accepting family law mediations starting in January 2024. She can be reached at katherine@morneaulaw.com.

Penina McMahon is a member of Morneau Law's family law group as well as the estate planning group. She handles all matters in family court, as well as collaborative matters. She can be reached at penina@morneaulaw.com.

Ryan Correia is a member of Morneau Law's family law group. His practice is a healthy mix of litigation, mediation, and collaborative matters. He can be reached at ryan@morneaulaw.com.

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Identifying & Addressing Severe Parent/Child Contact Problems in Parenting & Divorce Cases

11/16/2023 – 360 NHMCLE min.

This program will focus on the challenges that occur when a child resists or refuses contact with a parent in parenting and divorce cases. The often used but sometimes misunderstood phrase "parental alienation" will be explored, as will many associated family systems dynamics to include estrangement and enmeshment. Perspectives from the field of psychology, from the bench, and from the family law practitioner will be offered, and there will be discussion about how to identify severe parent-child contact problems and how to address them in the context of parenting and divorce litigation.

The Confidential Mediation Statement: An Overlooked Tool for More Productive & Successful Family Law Mediations

12/11/2023 – 60 NHMCLE min.

This program will discuss the benefits of confidential mediation statements and provide tips on how to prepare them. This program will be beneficial for anyone who practices family law as an attorney and/or mediator.

Domestic Violence

3/29/2023 – 300 NHMCLE min., incl. 60 ethics/prof.

This program, a collaboration between the bench and the bar, includes presenters from the judicial branch, the public and private bars, the DOVE program, and victim advocacy organizations. The program covers everything you need to know about handling both sides of a domestic violence case, including the law, appeals, managing family law cases when domestic violence is involved, the intersection between criminal and civil restraining order cases, and the ethical issues that can arise in domestic violence cases.ry

Modification of Parenting Plans

4/3/2023 – 60 NHMCLE min.

This program provides an overview and review of case law and statutory requirements necessary for modification of parenting plans.

Register online at <https://nhbar.inreachce.com>