



State of New Hampshire

GENERAL COURT

CONCORD

MEMORANDUM

DATE: November 20, 2023

TO: Honorable Sherman Packard, Speaker of the House

FROM: Representative Mark Pearson, Chairman

SUBJECT: Interim Report of the Special Committee on the Family Division of the Circuit Court

Enclosed please find the Interim Report of the Special Committee on the Family Division of the Circuit Court.

If you have any questions or comments regarding this report, please do not hesitate to contact me.

I would like to thank those members of the Special Committee who were instrumental in this study. I would also like to acknowledge all those who testified before the Special Committee and assisted the Special Committee in our study. Special thanks go Christina Dyer, Children and Family Law committee researcher and to Kristin Grant Esq., Judiciary Committee researcher, for all the hard work they did for the Special Committee and the people of New Hampshire.

Enclosures

cc: Members of the Special Committee on the Family Division of the Circuit Court.

INTERIM REPORT

Members Appointed to the Special Committee:

Members Appointed from the Children and Family Law Committee	Members Appointed from the Judiciary Committee
Mark Pearson, Chairman	Marjorie Smith, Vice Chair
Patrick Long	Katelyn Kuttab
Alicia Gregg	Rebecca McBeath
Charles McMahon	Joe Alexander
Lori Ball	Judi Lanza

Speaker Packard’s Charge and Study Purpose for the Special Committee:

There is hereby established a Special Committee on the Family Division of the Circuit Court to investigate allegations of irregularities, including failure to follow or enforce statutes, unwarranted waiver of or failure to follow court rules, delay in rendering decisions, denial of due process, and other procedural issues. The Special Committee shall consist of twelve members of the House from the Committees on Children and Family Law and Judiciary who shall conduct hearings relative to the process of the family division of the Circuit Court and may make recommendations for future legislation. This Committee shall schedule hearings and receive testimony as necessary from:

- Guardians ad litem who have participated in proceedings before the family division,
- Employees of the Division of Children, Youth and Families,
- Employees of the Bureau of Child Support Services,
- Members and employees of the Judicial Branch (excluding judges who may be in violation of the rules of judicial conduct),
- Representatives of the NH Bar Association,
- Representatives of New Hampshire Legal Assistance, and
- Any other persons who may have interest in the family court process.

Process and Procedures:

Rep. Mark Pearson of the Children and Family Law Committee was appointed as Chair and Rep. Marjorie Smith of the Judiciary Committee appointed as Vice Chair, by Speaker Packard. Representative Katelyn Kuttab and Lori Ball were appointed by the Chairman to act as clerk.

The Special Committee met 10 times throughout the 2023 period, seven of which included an opportunity for public testimony.

Before the Special Committee had its first meeting, Chairman Pearson met with leaders of the state judiciary, particularly Judge David King Chief Administrative Judge of the New Hampshire Circuit Court, Judge Susan Ashley, Deputy Administrative Judge of the New Hampshire Circuit Court, and the Hon. Gordon MacDonald, Chief Justice of the New Hampshire Supreme Court.

Chairman Pearson expressed his wish that the Special Committee would be collaborative and non-confrontational, even where there were matters of disagreement. The Judicial Branch leaders agreed and expressed the view that they know there is always room for improvement.

The Special Committee held its organizational meeting on April 25, 2023. Evidence was presented in a variety of ways including orally via testimony during public hearings, in written form of both testimonies and position papers, and via reports done for us by various researchers. From this, the Special Committee identified several topics for us to explore in depth. Representatives from relevant agencies, stakeholder groups, and members of the Judicial Branch were invited to present to the Special Committee in May. The members of the Special Committee also visited three area courts to observe day to day proceedings and procedures.

Four initial subcommittees were formed, the findings of which are part of this initial report. They addressed the following topics:

- Rules of Evidence
- Court Forms
- Judicial Training and Continuing Education
- GAL/Parent Coordinators

Chairman Pearson saw little need to balance the membership of these subcommittees according to political party or House committee because he observed the collaborative spirit of all the members as the Special Committee's work unfolded. Rather, selection was made primarily on the basis of interest.

The plan was that as the subcommittees' work came to an end, we would determine which subcommittee had finished their task and which would desire further time. Additionally, would there be additional subcommittees formed to consider other matters that became apparent as we received testimony. On November 9, 2023, a full committee work session was convened to report on the interim findings of the four subcommittee work groups.

Besides our work together, individual members of the committee discussed the work of the Special Committee with members of the judiciary, fellow legislators in New Hampshire and elsewhere, stake holders in and out of state, and members of the public.

As stated in the Introduction, the hope as we began our work was that the Special Committee and the Judiciary would work together to identify and address matters needing attention in the Judicial system in New Hampshire.

Two of subcommittees, that on Rules of Evidence and on Court Forms, believe their formal work was completed with the issuance of the reports contained in this document. We were delighted that the Judicial system is encouraging our continued collaboration with them as they start to implement changes. Two other subcommittees, that on Judicial Training, Education, Supervision and Accountability; and on the Guardian ad Litem (GAL) / Parenting Coordinator Role, wish to continue with their work.

Other issues were deemed not necessary for the Special Committee to address as they are the subject matters of various LSRs submitted. Still other issues were seen to be more the province of other groups already in existence.

As Chairman of the Special Committee I wish to thank the many members of the public who communicated with us orally in the public hearings and by sending emails and documents to us. You spoke and, although we did not always agree, we listened.

As well, I thank both the members of the Judiciary and my fellow Special Committee members for the respectful, collaborative way in which we all did our work. From the beginning, my hope was that we would “gang up together against problems and not gang up against each other.” It was so.

Respectfully Submitted,

Representative Mark Pearson, Chairman

Attached:

- Interim reports from each subcommittee

SUBCOMMITTEE ON THE RULES OF EVIDENCE

Subcommittee Members: Representatives Pearson (Chair), Ball, Gregg, Long, and MacMahon

The Subcommittee on the Rules of Evidence met on October 10, 2023, and was chaired by Special Committee Chairman Mark Pearson. Additional members were Representatives Ball, Gregg, Long, and McMahan. These five are all from the Children and Family Law committee because that committee would study and decide on HB 475, establishing a right to submit evidence and testimony in family court proceedings; and on HB 499, requiring the rules of evidence to apply in family court cases and relative to the admission of certain evidence in family court proceedings.

The subcommittee officially met as a subcommittee of Children and Family Law yet, in doing so, were also the subcommittee on the same subject matter in the Special Committee on the Family Division of the Circuit Court.

Chairman Pearson had been given a copy of *Rules of Evidence*, subtitled “With Reporter’s Notes as updated by N.H. Bar Association Rules of Evidence Committee” 2023. It is nearly 300 pages long and he read it slowly and carefully, the main text as well as footnotes, sometimes even reading the cases referred to in the footnotes, and this was done four times.

Testimony before the Special Committee often centered around how a judge refused to accept proffered pieces of evidence from one of the litigants, or refused an objection to the acceptance of evidence from the other litigant.

Bill sponsors and others testifying before both committees demanded that judges accept all evidence proffered, and in any form, unlimited by the presiding judge, magistrate, or marital master, or by the New Hampshire rules of evidence, or the rules of the circuit court family division.

Assertions were made that this or that judge was biased in one direction or another based on a perceived imbalance in rulings about evidence. Most of us from this Special Committee attended sessions of Family Court in three different locations in the state. Some of us have had conversations, some extensive, with judges, after these sessions, or on other occasions, or both.

1. *Rules of Evidence* allows a judge to refuse a piece of evidence to be admitted if it does not enhance the case, that is, it does not aid in the judge coming to a verdict.

We wonder, however, that if the judge did not have the power to refuse to accept particular pieces of evidence, might the trial not go on indefinitely? This flies in the face of what several said during our public hearings that the other litigant keeps dragging things out and that cases go on far too long. Page 31 of *Rules of Evidence* states, “Each single piece of evidence must have a plus value.” This begs the question, “according to whom?” One of the bills demands the court admit any evidence “which the respondent

believes will be favorable to his or her case.” Of course, the respondent so believes. Should the judge not hold the discretionary power?

2. *Rules of Evidence* (page 39) allows the judge to refuse a piece of evidence to be admitted if its probative value was substantially outweighed by the danger of unfair prejudice. In lay person’s terms this means, the value of a piece of evidence to prove something is much smaller than potential inappropriate harm to either the case or to another person. We heard testimony from some indicating their opponent was trying to introduce evidence irrelevant to the case but likely to embarrass.
3. *Rules of Evidence* allows the judge to accept evidence pertaining to other crimes when “prior bad acts [are] in some significant way connected to material events constituting the crime charged and not so remote in time as to eliminate the nexus” (page 65). Here the legal term *nexus* means connection. Proffered evidence describing prior crimes which do not materially relate to the crime alleged in the court case should not be accepted. For example, if an individual’s past sexual experiences are not significantly relevant to the case at hand, but are presented as evidence seemingly to embarrass, that evidence should not be admitted.

Each of these three examples demonstrates how it must be up to the judge to decide whether something is relevant, inappropriately harmful, connected and more. These are judgment calls and no fixed law or rule can accurately decide in every case.

This is why on several occasions *Rules of Evidence* states clearly that the rules of evidence are not mandatory in circuit court. These rules give guidance, but judges need discretion. This is how civil court works in most states. In the few states where a wooden, literal following of the state’s rules of evidence is by law mandated, it is believed that a substantial advantage is given to the litigant who is a lawyer or has studied the law extensively, over against a litigant *pro se* who is neither a lawyer nor well studied. (A *pro se* litigant is a litigant who represents him or herself without legal counsel.)

The conclusion is, we must not tie the hands of the judges.

However, testimony before the Special Committee alleged there are a few judges where bias, intentional or otherwise, might be true. That is, a particular judge seems to admit virtually any piece of evidence proffered, another particular judge seems to admit almost nothing, another judge seems to favor males in divorce hearings, while another one seems to favor females.

During the Executive Session in Children and Family Law, Chairman Pearson introduced amendment 2023-2324h which would replace the entire bill of HB 475. It read:

If the court admits evidence or testimony over the objection of one of the parties, or the court chooses not to admit evidence or testimony offered by one of the parties, the court shall note in the record the reason for its decision.

If the belief is that judges always or nearly always rule in a wise, fair and impartial manner, it should admit of no embarrassment for the judge to give his or her reason for the rulings about admission of evidence.

A suggestion to the judiciary is that they significantly increase the review of cases, particularly of those judges where a more than normal number of concerns have been raised about evidentiary rulings. Such review of case transcripts could be handled by retired judges or by law clerks, should the position of law clerk be restored to the Circuit Court.

Such reviews of cases may correctly conclude that the judge in question was wise, fair and impartial in most, if not all, his or her rulings. Or the conclusion might go in another direction, warranting some continuing education and monitoring of that particular judge, (something that does presently happen,) and if the problem persists, some disciplinary action.

Implementation of this suggestion would address the question of alleged impropriety while not hamstringing the judges where they need to have discretion. In the event, House Bill 475 as amended passed the CFL Committee 16-0. The somewhat parallel bill was voted ITL 16-0.

---The Hon. Mark A. Pearson, MA (Oxon), DMin

Chairman, Children and Family Law Committee

Chairman, Special Committee on the Family Division of the Civil Court

SUBCOMMITTEE ON COURT FORMS

Subcommittee Members: Representatives Gregg (Chair), Pearson, and Ball

In Attendance From the Courts:

Circuit Court Senior Administrator, Heather Kulp

Ossipee/Conway Clerk, Elaine Lowe

The subcommittee met on 10/10/23 and revisited Judge Susan Ashley's testimony heard previously by the House Special Committee on 10/03/2023, regarding the Court's plan to address possible issues with their forms. The Court explained they have American Rescue Plan Act (ARPA) funds that they will be able to utilize for this process. They are in the beginning stages of acquiring Requests for Proposal (RFP) and expect that to be done in October of 2023, with the overall work done in 6-9 months. This will be looking at many aspects of the court forms such as highest use forms, accessibility, and ease of use.

The subcommittee looked at the court website together with members of the Court to see the ease of getting to the forms. It was noted that this process is confusing and might need to be looked at as well.

Overall, the subcommittee felt comfortable with the Court's plans to take an in-depth look at this process and make improvements. The court representatives and the subcommittee agreed to keep the lines of communication open for future conversations as legislators hear from constituents.

The House Special Committee on the Family Division Circuit Court has been provided the email to send correspondence to regarding any possible future issues.

At this time, we do not feel the need for future meetings of this subcommittee.

SUBCOMMITTEE ON JUDICIAL TRAINING, EDUCATION, SUPERVISION, AND ACCOUNTABILITY

Subcommittee: Representatives Smith (chair) Kuttab, Lanza, Pearson,

Family Court cases are among the most complex that a circuit court judge faces. Even if a judge is familiar with the law – and almost no judges appointed to the circuit court are, the application of the law might very well have no bearing on solving the painful, complex, idiosyncratic questions that brought the parties to the court.

This is a preliminary report about training, education, supervision and accountability. Some of our recommendations would require legislative action, some judicial action, and some rethinking of long held assumptions. While the primary focus are the judges, it is also important that the staff be trained to best provide support to the judges, but also to carry out responsibilities unique to the staff including best practices in applying informational technology resources.

We have relied on material from multiple sources, but particularly on “Family Justice Initiative: Principles for Family Justice Reform,” published in 2019 by the National Center for State Courts. While direct quotes are acknowledged, the general thinking is reflected without necessary attribution:

“Divorce, separation, and parental responsibility cases often present complicated emotional and non-legal issues, requiring a family court judge to have familiarity with theories and research in disciplines such as social work, psychology and dispute resolution.”

The principles discussed in this report and others include understanding child development and family dynamics, child abuse, and substance abuse. Relevant intervention strategies and standards should be applied to help shape essential outcomes. In addition, there is a level of sophistication required in understanding the complexity of bankruptcy law, immigration law, and criminal law

The subcommittee questions the basic premise that the judicial process is the appropriate arena to resolve these cases. Such as:

- Who is looking at each case to identify child development issues, implicit bias, and other non-judicial but extremely relevant factors?
- Who is skilled at evaluating the mental health of the principals involved in the case?
- What about evaluating the logic of not interviewing age-appropriate children to capture their thoughts?

However, charged with addressing the obvious problems within the existing structure, there are certain threshold issues.

The need to ensure that those appointed to sit on family court matters on the circuit court have relevant education and experience. For instance, RSA 490-F:6, II states: “The assignment of a circuit court judge to a division within the circuit court shall be based upon the judge's knowledge of, commitment to, and expertise in the subject matter of the division.” Once appointed, the newly seated judges should undergo training focused on the intricacies of family court.

In order for a judge to carry out his/her judicial duties, the circuit court staffing must mirror that of the superior and supreme courts in that there must be a sufficient number of clerks to support the judges. Among the myriad benefits would be technical assistance, appropriate record keeping, and timeliness in issuing findings.

Supreme Court Rule 45. Continuing Judicial Education. States:

(1) Continuing judicial training and education is essential to maintain public confidence in the judiciary and the highest level of professional standards.

Accordingly, at a minimum, the judges, masters and clerks of our respective courts and the Director of the Administrative Office of the Courts shall be required to attend continuing judicial education programs, subject to the availability of funds, as follows: ...

(c) All circuit court judges and marital masters shall attend a judicial orientation and training program as determined by the Administrative Judge of the Circuit Court within two years of their appointment and shall attend at least one in-state, regional, or national educational program approved by the Administrative Judge of the Circuit Court every year thereafter. All circuit court clerks shall attend at least one in-state, regional, or national court-related educational program approved by the Administrative Judge of the Circuit Court each year. The Administrative Judge of the Circuit Court shall coordinate all educational activities within the Circuit Court with the New Hampshire Judicial Branch Educational Committee.

(e) Exceptions to this rule for good cause shown may be approved by the Supreme Court.

The thought that it would be timely for judges to receive essential training within two years of appointment, as specified in the Supreme Court Rules, demonstrates to the committee that the Supreme Court does not take seriously the need for training BEFORE the judge is assigned cases.

The committee would like to continue its investigation of best practices, its conversations with court personnel, and other research and analysis to explore:

- The possibility of having experienced judges or court staff sit with new judges for a reasonable period of time.
- The benefits and costs of establishing a regular schedule of supervision. establishing across the entire family court regular training on matters specific to the family court
- If there are categories of cases that could best be handled outside the judicial system.
- How to institute a system by which judges be required, and given the essential support staff to include in their decisions an explanation of why they reached their decisions.
- If requiring neutral case evaluation would effectively reduce case load and therefore the time that any case is in the system.
- What specific staff should be added to the court with responsibilities to best manage in house and external training.

This list is not exclusive. Rather it represents some of the thinking of the committee at this point in our work.

SUBCOMMITTEE ON Guardian ad Litem (GAL)/Parenting Coordinator Role

Sub-committee: Representatives Kuttab (Chair), Gregg, Lanza, Long

This subcommittee was formed to focus on issues related to Guardians ad Litem and the potential role of parenting coordinators. Particularly, the subcommittee wanted to look into funding, training, issues surrounding mental health evaluation, potential benefits of social workers, psychologists, etc. rather than attorneys, and how other states handle GAL and domestic violence matters.

During the summer, House Committee Researcher, Kristin Grant, Esq. provided the subcommittee a document reviewing guardian ad litem and parenting coordinator models throughout the US, specifically including: the processes and applicable law, the qualifications of the professionals involved, and the apportionment of fees. An LSR relative to parenting coordinators in high-conflict cases, # 2024-2008, sponsored by Rep. Kuttab and co-sponsored by Rep. Gregg, was submitted to the House. The subcommittee felt this LSR would likely resolve the issue of Parenting Coordinators, and decided that further work should be focused on GALs.

During the first subcommittee meeting on 10/7/2023, Attorney Erin Creegan, General Counsel for the Judicial Branch, took many questions from the subcommittee and later spoke with Judges Ashley, Lemire and Luneau, Ms. Susan Duncan, Chair of the GAL Board, and the Judicial Council. The subcommittee will continue to explore the state's GAL program and the funding, training and how other states handle these issues. In 2011, the fund for indigent parents who cannot afford to pay upfront for GAL services, was eliminated. The subcommittee would like to explore if the void of GALs for indigent parties was fulfilled by an alternate method, or if perhaps, funding is needed to bring the program back for indigent parties