IN THE SUPREME COURT OF THE STATE OF VERMONT

Supreme Court Docket Number 2009-473

LISA MILLER-JENKINS, Plaintiff-Appellant

v.

JANET MILLER-JENKINS, Defendant-Appellee

Appeal
From the
Rutland Family Court
Docket Number 454-11-03 Rddm

BRIEF OF THE DEFENDANT-APPELLEE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the "law of the case" doctrine precludes revisiting the constitutional issued raised by the Plaintiff-Appellant in this third appeal to this Court? (pp. 6-12).

2. Whether, apart form the "law of the case" doctrine, the constitutional issues asserted by the Plaintiff-Appellant are foreclosed on this appeal because they were not properly preserved for review? (pp. 13-14).

3. Whether the Family Court properly granted the Defendant-Appellee's motion to modify parental rights and responsibilities? (pp. 14-25).

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This is the third full-blown appeal pursued by the Plaintiff-Appellant, Lisa Miller-Jenkins ("Lisa") since this action commenced on November 24, 2003.[1] The first appeal, interlocutory in nature, addressed several orders of the Family Court, including: (1) a June 17, 2004 order awarding the Defendant-Appellee, Janet Miller-Jenkins ("Janet"), parent-child contact with IMJ, the child born during the parties' civil union; (2) a September 2, 2004 order holding Lisa in contempt for violation of the temporary visitation order; and (3) a November 17, 2004 order holding that both Lisa and Janet are parents of IMJ. *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶¶3-9, 180 Vt. 441, 445-447, 912 A.2d 951, 956-957 (2006)(hereinafter *Miller-Jenkins I*).

This Court determined that the parties had a valid civil union; that Janet is a parent of IMJ; and that Lisa was in contempt. *Id*. at ¶2, 180 Vt. 445, 912 A.2d at 956. In addition, the Court also addressed Lisa's asserted federal constitutional claim as to her parental rights. While noting that this "argument was not adequately raised below and has been waived," this Court went on to address its merits:

> In any event, we reject it. Janet was awarded visitation because she is a parent of IMJ. Lisa's parental rights are not exclusive. See In re L.B., 122 P.3d 161, 178 (Wash. 2005).

Miller-Jenkins I, *supra*, 2006 VT 78, ¶59, 180 Vt. at 467, 912 A.2d at 971.[2]

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[1] The Plaintiff-Appellant has also docketed two additional appeals in this Court, but they were subsequently withdrawn before briefing.

[2] Lisa filed a Motion to Reargue in *Miller-Jenkins I*, raising, among other things, the asserted violation of Lisa's federal constitutional rights as a parent. That motion was denied on November 9, 2006. *Miller-Jenkins I*, *supra*, 2006 VT 78, 180 Vt. at 441, 912 A.2d at 951.

Lisa filed a Petition for Writ of Certiorari in the United States Supreme Court on February 7, 2007. *Miller-Jenkins v. Miller-Jenkins*, 2007 WL 432468 (Petititon for Writ). The Petition was denied April 30, 2007. *Miller-Jenkins v. Miller-Jenkins*, 550 U.S. 918, 127 S.Ct. 2130 (2007).

Following these interlocutory appellate proceedings, this case returned to the Rutland Family Court for trial which occurred on April 2-5, 2007. The Family Court (Cohen, J.) issued "Findings of Fact, Conclusions of Law, and Order" on June 15, 2007. (PC 118-133).[3]

Among many other things, Judge Cohen made a finding that, as of the time of trial, "Lisa continued to refuse to allow Janet contact with IMJ, although she testified that she would comply with such an order after trial." (PC 123).

In his conclusions of law, Judge Cohen considered each of the factors set out in 15 V.S.A. §665(b). (PC 126-131). He ultimately determined that Lisa should have physical and legal parental rights and responsibilities for IMJ but went on to say:

> Nevertheless, this is a close case. Continued interference with the relationship between IMJ and Janet could lead to a change of circumstances and outweigh the disruption that would occur if a change of custody were ordered. See Sundstrom v. Sundstrom, 2004 VT 106, 177 Vt. 577.

(PC 131).

Finally, Judge Cohen entered an order which spelled out a visitation schedule for Janet with IMJ that included a very detailed schedule from the date of the order in June through the end of August 2007 followed by parent-child contact between Janet and IMJ

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[3] "(PC ___)" refers to the Appellant's Printed Case.

every other weekend, alternating between Virginia and Vermont from 5 p.m. Friday until 5 p.m. Sunday. (PC 131-133).

Lisa took an appeal to this Court. Notably, she did not challenge any of the Family Court's findings of fact or conclusions of law as to the application of the §665(b) factors, including that court's conclusion that "Lisa has demonstrated through her contemptuous refusal to permit parent-child contact and her statement to IMJ regarding Janet that she is not able to foster [a positive] relationship with Janet." (PC 129). Rather, as this Court described Lisa's second appeal:

> On appeal, plaintiff argues that the family court: (1) ignored Vermont's choice-of-law principles in validating the parties' civil union and accepting defendant's parentage; (2) violated her constitutional rights by establishing parentage and awarding parent-child contact to a non-biological, non-adoptive person; (3) erred by not giving full faith and credit to Virginia parentage orders; and (4) abused its discretion by not allowing her to amend her complaint.

See Miller-Jenkins v. Miller-Jenkins, 2008 WL 2811218, at *1 (Vt. 2008)(hereinafter *Miller-Jenkins II*).[4]

This Court rejected all but the last of Lisa's arguments on the ground that they had been resolved in *Miller-Jenkins I* and that their resolution had established the "law of the case." *See Miller-Jenkins II, supra*, at *1.

Lisa again filed a Petition for Writ of Certiorari in the United States Supreme Court on August 11, 2008. *Miller-Jenkins v. Miller-Jenkins*, 2008 WL 3540290 (Petititon for Writ). The Petition was denied October 6, 2008. *Miller-Jenkins v. Miller-Jenkins*, 129 S.Ct. 306 (2008).

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[4] It is worth noting that, in *Miller-Jenkins II*, Lisa sought to relitigate the federal constitutional issues in a mere two pages of her brief that simply incorporated by reference her arguments to this Court in *Miller-Jenkins I*. *See* Plaintiff-Appellant's Brief in Docket Number 2007-271, pp. 25-27.

Following the Family Court's June 15, 2007 Order of parenting time for Janet, Lisa continued to obstruct visitation. In response, Janet eventually filed a motion to transfer custody. That motion was refiled on January 27, 2009. (PC 39). The judge held a hearing on the motion on January 28, 2009 along with a motion filed by Lisa in September, 2007, to annul visitation based on allegations of improper conduct that Lisa asserted occurred during IMJ's visits with Janet on the few occasions during which Lisa complied with the Court's orders. Following the motion and testimony heard in support and opposition to both motions, the judge ruled from the bench denying the motion to annul, finding Lisa in contempt, and denying the motion to transfer custody at that time. (PC 39).

On May 28, 2009, Janet again moved to Modify Parental Rights and Responsibilities. (PC 1, 41). A hearing was held on August 21, 2009. (PC 1, 41). Lisa did not appear but submitted an affidavit which was introduced into the record. (PC 141-160).

Once again, Judge Cohen issued "Findings of Fact, Conclusions of Law, and Order," dated November 20, 2009. (PC 1-21). They include a detailed recitation of instances in which Lisa has failed to comply with visitation orders as well as the various times Lisa has been held in contempt since June 2007. (PC 5-9; *see also*, PC 12-13, 17). The court concluded that Janet had parent-child contact for approximately 24 hours in all of 2008 and approximately 24 hours in the first 11 months of 2009. (PC 9).

Ultimately, Judge Cohen concluded that there had been a real, substantial and unanticipated change in circumstances and that a change in parental responsibilities was in the best interest of IMJ. (PC 1, 19-20). Therefore, the Family Court ordered that Janet

shall have sole physical and legal custody of IMJ and that the transfer was ordered to occur in Virginia on January 1, 2010. (PC 21).

The transfer did not occur as ordered as Lisa has disappeared and taken IMJ with her.[5] Nonetheless, her attorneys have now filed this third appeal to this Court.

In this latest appeal from the Family Court Order of November 20, 2009, Lisa's lawyers raise, once again, Lisa's asserted federal constitutional rights as a parent as well as a challenge to certain of the Family Court's findings of fact and conclusions of law. Again notably, Lisa's lawyers do not challenge any of the findings of fact concerning Lisa's willful violation of nearly every instance of Janet/IMJ parent-child contact ordered by the court.

Statement of Facts

The facts relevant to this case have been well traversed both by this Court, *Miller-Jenkins I, supra*, 2006 VT 78, ¶¶3-5, 180 Vt. at 445-446, 912 A.2d at 956; by the Family Court after trial on the merits, "Findings of Fact, Conclusions of Law, and Order," June 15, 2007 (PC 118-121); and, most recently – with particular relevance to the portion of this appeal challenging findings of fact – by the Family Court ruling on the motion to modify parental rights and responsibilities (PC 1-21).

[5] As a result of Lisa's disappearance, her attorneys moved to withdraw representation of Lisa before the Rutland Family Court arguing in support of their motion that "counsel for Plaintiff are unable to fulfill their duties as officers of the Court." (Addendum, p. 1). As attested to by attorney Rena Lindevaldsen in an affidavit accompanying the motion to withdraw representation, none of Lisa's attorneys had been able to contact her since the Family Court issued its November 20, 2009 order. (Addendum, p. 5). Accordingly, "Plaintiff's Counsel are no longer able to consult with their client concerning the means of accomplishing the client's objectives in the ongoing, or future, enforcement proceedings" before the Family Court. (Addendum, p. 2). The motion to withdraw was denied on January 22, 2010.

ARGUMENT

I. THE DOCTRINE OF "LAW OF THE CASE" PRECLUDES REVISITING LISA'S CONSTITUTIONAL OBJECTION TO GRANTING JANET PARENTAL RIGHTS AND RESPONSIBILITIES.

This Court has twice confirmed that adjudicating Janet as a parent – and protecting the legal rights and obligations that go along with that status – does not infringe on Lisa's parental rights. Nonetheless, Lisa's lawyers devote two-thirds of their brief to arguing that the Court's November, 2009 order transferring custody of IMJ to Janet is an unconstitutional intrusion on her rights to parentage. (Plaintiff-Appellant's Brief, pp. 5-17). Because this Court has twice resolved this legal argument in Janet's favor – once on the merits (*Miller-Jenkins I*) and subsequently as a matter of "law of the case" (*Miller-Jenkins II*) – the matter is resolved once again by "law of the case."

In *Coty v. Ramsey Associates, Inc.*, 154 Vt. 168, 573 A.2d 694 (1990), this Court explained, "It is a rule of general application that a decision in a case . . . of last resort is the law of that case on the points presented throughout all the subsequent proceedings therein, and no question then necessarily involved and decided will be reconsidered by the Court in the same case on a state of facts not different in legal effect." *Id*., 154 Vt. at 171, 573 A.2d at 696. Allowing relitigation of issues previously resolved by this Court on permissive interlocutory review – as in this case – undermines a "central purpose" of such appeals "which is to advance the ultimate termination of a case." *State v. Hunt*, 150 Vt. 483, 492, 555 A.2d 369, 375 (1988).

In her first appeal to this Court challenging the initial interim order granting visitation rights to Janet, Lisa argued that granting parent-child contact between Janet and

IMJ intruded on Lisa's constitutional parental right. This Court found that notwithstanding Lisa having inadequately raised the issue below and therefore having waived it, Janet is a legal parent. Accordingly, Lisa's parental rights are "not exclusive" and her constitutional objection to the grant of parent-child contact failed. *Miller-Jenkins I*, *supra*, 2006 VT 78, ¶59, 180 Vt. at 466-467, 912 A.2d at 971.

In her second appeal to this Court, Lisa again argued that the Family Court's adjudication of Janet as a parent and its award of "parent-child contact to a nonbiological, non-adoptive person," violated her constitutionally protected parental rights. *Miller-Jenkins II*, *supra*, at *1. Acknowledging that the same issue had been presented in the first appeal, this Court rejected Lisa's challenge to the parent-child contact order on "law of the case" grounds. *Id*.

As this Court explained,

> Notwithstanding plaintiff's arguments to the contrary, the issues that she raises in this appeal fall squarely within the scope of this rule of practice precluding courts from reexamining issues previously decided in the same case by the same court or a higher appellate court. See Coty v. Ramsey Assocs., Inc., 154 Vt. 168, 171 (1990) (defining doctrine). If, in the instant context, we were to regard these questions "as still open for discussion and revision in the same cause, there would be no end to the litigation until the ability of the parties or the ingenuity of their counsel were exhausted." Id. (quotations omitted).

Id.

Having twice previously asserted the exact same claim on appeal, Lisa once again tries to distinguish it on this third effort by saying this court has never considered her argument in the context of a custody transfer as opposed to in the context of parent-child

contact.[6] However, Lisa's lawyers never explain how this is "new evidence" that avoids the "law of the case" doctrine. Moreover, this is a distinction without a constitutionally significant difference.

Once adjudicated a parent, Janet had all of the inchoate rights (and obligations) that flow from that status. Those rights include parent-child contact up to and including the rights and obligations of full legal and physical parental custody. That status, in addition, guarantees that her daughter IMJ will enjoy benefits that derive from the parent-child relationship including, for example, rights of intestacy. The legal reality is that Vermont makes no distinction among types of legal parents. A parent is a parent is a parent whether the person is a parent by biology, adoption, marriage, civil union or some other combination of factors. *Miller-Jenkins I* expressly resolved that issue as to Janet as confirmed by this Court's citation to *In re L.B.*, 155 Wash.2d 679, 710-712, 122 P.3d 161, 178 (2005). *Miller-Jenkins I, supra*, 2006 VT 78, ¶59, 180 Vt. at 467, 912 A.2d at 971.[7] Accordingly, even assuming for the sake of argument alone – a position that Janet

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[6] In *Miller-Jenkins II*, Lisa also attempted to avoid the "law of the case" doctrine by arguing that somehow her constitutional claim fell within an exception to the rule. However, exceptions are limited to cases where "the evidence pertinent to the [previously decided] issues at the retrial was materially different." *Barclay v. Wetmore & Morse Granite Co.*, 94 Vt. 227, 110 A. 1, 2 (1920). As this Court stated in *Miller-Jenkins II*, "None of the exceptions to the doctrine apply. There is no new evidence or facts to consider that would affect our prior legal conclusions. Moreover, plaintiff's argument that the interests of justice compel foregoing the doctrine in this instance because a young child is being forced into contact with a stranger is nothing short of disingenuous in light of the family court's unchallenged findings regarding the child's best interests and plaintiff's contemptuous conduct." *Miller-Jenkins II*, *supra*, at *1. Similarly, on this appeal, Lisa can point to no new evidence that would affect this Court's prior legal conclusions.

[7] The Washington court in *In re L.B.* ruled that its holding that a non-biological parent had the common law status of *de facto* parent rendered "the crux of [the biological parent's] constitutional arguments moot," because the holding "places [*de facto* parents]

does not accept – that a wholly state law determination that recognized Janet as a parent could somehow be an unconstitutional intrusion upon Lisa's constitutional rights as a parent[8], that intrusion would have arisen at the point Janet's legal status as parent was recognized. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1989)(although "immediate benefit" sought was visitation, a person adjudicated a parent "embraces the sum of parental rights with respect to the rearing of a child" including the right of custody). Lisa made her constitutional argument at that point at which the Family Court adjudicated Janet a parent. This Court properly rejected it. *Miller-Jenkins I*, *supra*, 2006 VT 78, ¶59, 180 Vt. at 167, 912 A.2d at 971. Lisa cannot be heard to relitigate the question now.[9]

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in parity with biological and adoptive parents" such that "*both* have a 'fundamental liberty interest[]' in the 'care, custody and control' of L.B. *Troxel* [*v. Granville*], 530 U.S. [57,] at 65, 120 S.Ct. 2054 [(2000)]." (emphasis in text). *In re L.B.*, 155 Wash.2d 679, 710, 122 P.3d 161, 178 (2005).

[8] Indeed, the Supreme Court has made it clear that determining *who* has parental status is a "question of legislative policy and not constitutional law." *Michael H. v. Gerald D.*, 491 U.S. 110, 128-129 (1989). *Michael H.* also establishes that state law may define a legal parent to be someone who has neither a biological nor an adoptive relationship to a child. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

[9] Notwithstanding the irrelevance of the substantive argument Lisa makes because of the "law of the case" doctrine, it cannot go without mention that the Plaintiff-Appellant misstates the central holding of *Troxel v. Granville*, 530 U.S. 57 (2000), the singular case on which she relies. Contrary to Lisa's argument, the *Troxel* Court did not declare "Washington's third-party visitation statute unconstitutional." It was careful not to do so and, notably, rejected the approach taken by the Washington State Supreme Court which did strike down the statute. Rather, the Court in a plurality opinion held that the statute was unconstitutional *as applied*. Even in the context of a non-parent – which Janet emphatically is not -- seeking visitation rights over the objection of a parent, the United States Supreme Court acknowledged that there could be circumstances where a court could, as long as it gave "some special weight" to the parent's view, grant visitation to a third party over the objection of a fit parent. *Id*. at 70.

The three cases Lisa's lawyers rely upon are simply not on point. Indeed, one of those cases, involving grandparent visitation, *Koshko v. Haining*, 398 Md. 404, 921 A.2d 171 (2007), makes the exact opposite point, i.e., that, while visitation involves a lesser degree of intrusion on the parental right, "it is not a difference of constitutional magnitude." *Id*., 398 Md. at 430-31, 921 A.2d at 186. One of the other cases, *In the Matter of Kosek*, 151 N.H. 722, 871 A.2d 1 (2005), involves an issue of contempt around visitation and raises no issue about a parent's substantive constitutional rights. The court simply notes that there is a meaningful difference between custody and visitation, a proposition with which Janet agrees as did this Court in *Miller-Jenkins I*. *Miller-Jenkins I*, *supra*, 2006 VT 78, ¶46, 180 Vt. at 460-461, 912 A2d at 967. The third case to which Lisa's lawyers point is *Egan v. Fridlund-Horne*, 221 Ariz. 229, 211 P.3d 1213 (2009). However, *Egan* is wholly inapposite as there, among other things, the court held that the petitioner (former same-sex partner) was not a "parent" and was in no "different legal position from grandparents or other nonparents under the in loco parentis statute." *Id*., 221 Ariz. at 236, 211 P.3d at 1220. The Arizona court also expressly rejected *In re L.B.*, *supra*. *Egan*, *supra*, 211 Ariz. at 237, 211 P.3d at 1221. Here, of course, Janet has been held a parent, equivalent to Lisa; and this Court has cited *In re L.B.* favorably in *Miller-Jenkins I*.[10]

[10] Lisa's brief also includes two sets of string cites to state law cases either extending parental rights to non-biological parents (Plaintiff-Appellant's Brief, p. 14 n.5) or denying such parental rights (*Id*., p. 15 n.6). The brief then asserts that "[n]one of those cases, however, put the third party (including former same-sex partners) on precisely the same constitutional footing as the fit biological parent for purposes of switching custody." (*Id*. p 15). Of course, this line of argument is wholly irrelevant as this Court has put Janet on the same constitutional footing as Lisa; and that issue is decided and foreclosed here. Second, the string cite ignores, for example, *In re L.B.*, which does put a biological parent and a de facto parent on equal constitutional footing.

Ultimately, the simple fact is that Lisa will not accept that Janet has been adjudicated a full, legal parent of IMJ. First, couching the heart of her argument now as one of waiver of rights (see Plaintiff-Appellant's Brief, pp. 10-13), she rejects this Court's standards in *Miller-Jenkins I* for determining parenthood in this case and argues that the "relevant legal inquiry" must be "whether the biological parent was fully aware of her fundamental parental rights and knowingly intended to relinquish those rights to a third party." (Plaintiff-Appellant's Brief, pp. 12-13).[11]

Second, and perhaps most revealing, Lisa's lawyers on her behalf now baldly assert:

> Regardless of the parentage label attached to Jenkins' status by this Court or the trial court, the fact is that Jenkins is not the biological or adoptive parent of IMJ. Miller is IMJ's only biological parent and as such, has fundamental parental rights conferred on her that are not afforded to third parties, *regardless of who they are or what label is attached to them. No court (or legislature, or executive) in the United States has the authority to strip a fit, biological parent of her fundamental rights* without affording her the constitutionally required due process. (Emphasis added).

(Plaintiff-Appellant's Brief, pp. 15-16).

Third, even the parentheticals in fn. 4 seem to contradict the brief's sweeping statement, e.g., "*V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (psychological parent stands in parity with biological parent); … *T.B. v. L.R.M.*, 874 A.2d 34 (Pa. Super. Ct. 2005) (rights of persons standing in loco parentis are the same as that of biological parent) …."

[11] Lisa also accuses this Court in *Miller-Jenkins I* of lessening her parental rights "because she is a single parent." (Plaintiff-Appellant's Brief, pp. 13-14). This is nonsense. *Miller-Jenkins I* precisely held that Lisa is not a single parent; that IMJ has two legal parents. The Court simply made the point, in discussing the factors "that support a conclusion that Janet is a parent," that "there is no other claimant to the status of parent, and, as a result, a negative decision would leave IMJ with only one parent." *Miller-Jenkins I*, *supra*, 2006 VT 78, ¶56, 180 Vt. at 465, 912 A.2d at 970. That discussion in no way explicitly or implicitly lessened Lisa's acknowledged parental rights.

Therefore – so the argument goes – as the Declaration of Independence proclaims certain unalienable rights and as the Declaration "goes on to proclaim that there comes a time when government abuses require the people to throw off abusive government… **there can be no argument that government has authority to strip a fit, biological parent of her unalienable right to parent her child**" (emphasis added). (*Id*., p. 16).

In short, in the express view of Lisa's lawyers, this Court had no authority to declare Janet an equal legal parent of IMJ. What clearer statement could there be that neither Lisa nor her lawyers will acknowledge and accept the rulings of Vermont's courts in this case and that they have no legal support for the proposition advanced in this appeal.[12]

In sum, having twice before entertained and rejected Lisa's constitutional argument, this Court should reject this third appeal – as it did the second one - as a matter of the "law of the case" doctrine.

[12] Given these expressed views of Lisa's lawyers and given that Lisa has gone into hiding with IMJ constituting her ultimate defiance of Vermont's courts and laws, it would not be unreasonable to question whether the views of Lisa's lawyers have contributed to the unlawful conduct of their erstwhile client. In such circumstances, it would seem that this Court must at least consider whether it has an obligation to take appropriate action or inform appropriate authorities of the substantial likelihood of a violation of the Vermont Code of Professional Responsibilities. *See* Vt. Constitution, Ch. II, §30; Vt. Code of Judicial Conduct, Canon 3(D)(2); Vt. Rules of Professional Conduct, Preamble ("While it is a lawyer's duty, when necessary to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process"); *id*. Rule 8.4(d) ("It is professional misconduct for a lawyer to: … (d) engage in conduct that is prejudicial to the administration of justice").

II. EVEN APART FROM THE APPLICATION OF THE "LAW OF THE CASE" DOCTRINE, LISA'S CONSTITUTIONAL ARGUMENTS ARE FORECLOSED ON THIS APPEAL BECAUSE THEY WERE NOT PROPERLY PRESERVED FOR REVIEW.

It is axiomatic that "matters not raised at trial may not be raised for the first time on appeal." *Jordan v. Nissan N. Am., Inc. et al.*, 2004 VT 27, ¶10, 176 Vt. 465, 470, 853 A.2d 40, 45 (2004)(citing *Harrington v. Dep't of Employment & Training*, 152 Vt. 446, 448, 566 A.2d 988, 990 (1989)); *Limoge v. People's Trust Co.*, 168 Vt. 265, 270, 719 A.2d 888, 891 (1998); *see also* V.R.A.P. 28(a)(4)(brief of the appellant must set out "how the issues were preserved").

Here, Lisa's lawyers baldly assert that "the trial court ordered a transfer of custody without even addressing the constitutional arguments squarely raised by Miller …." (Plaintiff-Appellant's Brief, p. 14). However, whatever this statement is meant to aver, it cannot be that Lisa's constitutional arguments were presented to the Family Court in the specific context of the motion to transfer custody – which is, of course, the only proper subject of the present appeal.

Specifically, the docket reflects that Lisa's lawyers filed no formal written opposition to Janet's motion to transfer (PC 41); and, therefore, constitutional arguments were not raised at that juncture. Second, a review of the transcript of the August 21, 2009 hearing on the motion to transfer reveals that Lisa's counsel never raised or attempted to argue Lisa's asserted federal constitutional rights. Third, following the hearing, Lisa's lawyers did file, on August 31, 2009, proposed findings of fact and conclusions of law; however, they contain no assertions of any federal constitutional rights. Finally, at the August 21, 2009 hearing, an affidavit of Lisa was introduced into the record. (PC 141-160). While that affidavit contains Lisa's assertions as to her parenthood and allusions to

disagreements with the Family Court's prior rulings about de facto parenthood, the asserted application of new parentage rules retroactively and "serious constitutional implications" (PC 156-158), it cannot be maintained that these affidavit statements properly preserved a federal constitutional legal argument for review.

Not surprisingly then, as a result, no federal constitutional question concerning Lisa's asserted parental rights was addressed in the trial court's "Findings of Fact, Conclusions of Law, and Order" (*see generally* PC 1-21) and have thus not been properly preserved for review.

For this independent reason, this Court should not address the constitutional issues raised in the Plaintiff-Appellant's brief.

III. THE FAMILY COURT PROPERLY GRANTED JANET'S MOTION TO MODIFY PARENTAL RIGHTS AND RESPONSIBILITIES.

In its November 20, 2009 decision, the Family Court painstakingly set forth its findings of fact, conclusions of law, and resulting order following the hearing that had been held on August 21, 2009. It acknowledged that: (1) it could modify a parental rights and responsibilities order only upon a showing of real, substantial and unanticipated change of circumstances; and (2) a "moving party bears a heavy burden to prove changed circumstances, and the court must consider the evidence carefully before making the threshold finding that a real, substantial and unanticipated change of circumstances exists." (PC 12, *quoting Sundstrom v. Sundstrom*, 2004 VT 106, ¶29, 177 Vt. 577 (mem.)). The court also acknowledged that " '[t]he moving party bears the burden of showing that a transfer of custody in a child's best interest and due to the value of stability in a child's life, it is a heavy one.' *Id*. 2004 VT 106, ¶37." (PC 13-14). Lastly,

the court noted that it "must consider the statutory factors set forth in 15 V.S.A. §665(b)." (PC 13).

The Plaintiff-Appellant does not dispute these basic standards that the Family Court applied. Rather, Lisa's lawyers challenge certain of the trial court's findings of fact, conclusions of law and the court's ultimate decision, i.e., that Janet should have sole physical and legal custody of IMJ with appropriate visitation time for Lisa.

A. The Standards of Review.

First and foremost, the Family Court has "wide discretion in custody matters, and [this Court] must affirm the custody decision when it examines the attributes of each parent in light of the factors enumerated in 15 V.S.A. §665(b)." *Hubbell (Gault) v. Hubbell*, 167 Vt. 153, 156, 702 A.2d 129, 132 (1997); *Kasper v. Kasper*, 2007 VT 2, ¶5, 181 Vt. 562, 563, 917 A.2d 463, 465 (2007) ("family court has broad discretion in awarding custody"); *Cloutier v. Blowers*, 172 Vt. 450, 452, 783 A.2d 961, 963 (2001) ("Trial courts have broad discretion in determining the best interests of the child").

> That the evidence could have been weighed or balanced differently towards a different result does not render the court's opposite conclusions an abuse of discretion. See *Chick v. Chick*, 2004 VT 7, ¶10, 176 Vt. 580, 844 A.2d 747 (mem.) (in evaluating best-interest factors under §665(b), "[w]e afford the trial court wide discretion … to assess the credibility of witnesses and weigh the evidence").

Rogers v. Parrish, 2007 VT 35, ¶20, 181 Vt. 485, 494, 923 A.2d 607, 613 (2007).

Also, in determining the best interests of the children in custody matters, the court may draw upon its own common sense and experience in reaching a reasoned judgment. *See Bissonette v. Gambrel*, 152 Vt. 67, 69-70, 564 A.2d 600, 601 (1989).

As to findings of fact, this Court "will not disturb the family court's factual findings unless, viewing the evidence in the light most favorable to the judgment and excluding the effect of modifying evidence, there is no credible evidence to support them." *Rogers v. Parrish, supra*, 2007 VT 35, ¶15, 181 Vt. at 491, 923 A.2d at 611; *Borden v. Hofmann*, 2009 VT 30, ¶26, 974 A.2d 1249, 1257 (2009)(Reiber, J., dissenting)("Findings are reviewed for clear error, and will not be disturbed even if contradicted by substantial evidence.")(*quoting Stannard v. Stannard Co.*, 2003 VT 52, ¶8, 175 Vt. 549, 830 A.2d 66 (mem.)).

Furthermore, where an appellant makes no claim or showing "that the alleged inaccuracies, whether considered singly or in combination, undermine the court's ultimate decision" as to custody, there is "no basis to disturb the judgment." *Rogers v. Parrish, supra*, 2007 VT 35, ¶30, 181 Vt. at 498, 923 A.2d at 616.

As to conclusions, they will "stand if the factual findings support them." *Spaulding v. Butler*, 172 Vt. 467, 475, 782 A.2d 1167, 1174 (2001). "Where there is conflicting testimony on such a factual issue, '[w]e will not set aside a judgment solely because we would reach a different conclusion on the facts.'" *Payrits v. Payrits*, 171 Vt. 50, 54, 757 A.2d 469, 472 (2000) (*quoting Price v. Price*, 149 Vt. 118, 120-121, 541 A.2d 79, 81 (1987)). In such situations, "the credibility of the witnesses, the weight of the evidence, and its persuasive effect are questions for the trier of fact" and must stand "if supported by credible evidence." *Payrits, supra*, 171 Vt. at 54, 757 A.2d at 472-473.

In the instant case, it is important to attempt to clarify the exact nature of the challenge to the Family Court's ruling. With that clarity, it cannot be doubted that the Family Court's order must be affirmed.

B. The Findings Of Fact Challenged By Lisa's Lawyers Are Unassailable.

Lisa's lawyers put in issue ten (10) separate findings of fact from November 20, 2009. (See Plaintiff-Appellant's Brief, pp. 17-22). It is important to assess each one separately.

Finding of Fact No. 12: "A trial on the merits was held April 2-5, 2007." (PC 2).

This is really not subject to dispute. (See PC 32-33).

Finding of Fact No. 18: "The Court found that Ms. Jenkins demonstrated an ability to foster a relationship between Ms. Miller and herself, and Ms. Miller and IMJ. Ms Jenkins refrained from accusatory statements with respect to Ms. Miller's parenting abilities and indicated a willingness to respect Ms. Miller's religious and moral instruction of IMJ." (PC 3).

This factual finding simply reiterates findings the Family Court made in 2007 following the trial on the merits. Those findings went unchallenged in 2007 as this Court expressly noted in *Miller-Jenkins II*, and they cannot be challenged now.

Finding of Fact No. 20: "Pursuant to 15 V.S.A. §665(b)(5), the Court found that Ms. Jenkins had the ability to foster a positive relationship and frequent and continuing contact between Ms. Miller and herself, and IMJ and Ms. Miller, including physical contact. However, Ms. Miller has demonstrated through her contemptuous refusal to permit parent-child contact and her statements to IMJ regarding Ms. Jenkins that she was not able to foster such a relationship with Ms. Jenkins." (PC 4).

Again, this factual finding simply reiterates a conclusion reached by the Family Court at the 2007 trial; and it was not challenged in the 2007 appeal and cannot be challenged now.

Finding of Fact No. 39: "At the hearing, the Court explicitly warned Ms. Miller that failure to comply with the ordered visits could lead to a transfer of custody. Ms. Miller testified that she would comply with the ordered visits." (PC 7).

The hearing referred to in this finding was a hearing on January 28, 2009 regarding parent-child contact. See Finding of Fact No. 38 (PC 7). That hearing led to an Order of February 10, 2009, (Finding of Fact No. 40 (PC 7), that was not appealed. Further, Lisa's lawyers point to no record evidence from the January 28, 2009 hearing to contradict the court's finding; they simply make the bald assertion that Lisa was "careful not to offer any blanket assurance of compliance …" (Plaintiff-Appellant's Brief, p. 21). Moreover, there is not a shred of explanation as to how an error on this point could undermine the court's judgment where the absolutely uncontradicted fact is that Lisa has repeatedly disregarded nearly every Family Court order on visitation and continued her contemptuous conduct. Lisa has absolutely no credibility in this area, and her statements are really of no ultimate relevance in the face of her conduct.

Finding of Fact No. 60: "Ms. Miller has no justification for denying parent-child contact between Ms. Jenkins and IMJ." (PC 9).

Lisa's lawyers assert that this finding is erroneous because: (1) the court disregarded testimony that IMJ engaged in "frightening behavior" after her visits with Janet; (2) Janet disagrees with Lisa's and IMJ's religious beliefs; and (3) the court failed to receive evidence that Janet exposed IMJ to "the homosexual lifestyle, which is documented to be emotionally, psychologically, and physically unhealthy." (Plaintiff-Appellant's Brief, pp. 21-22). The simple fact is that Lisa's extra-legal justifications for her contemptuous conduct do not change the fact that Lisa has no legal justification for non-compliance.

Finding of Fact No. 67: "There is no evidence that if Ms. Jenkins were to have primary custody of IMJ that she would block Ms. Miller or Ms. Miller's family out of IMJ's life." (PC 9).

Although Lisa's lawyers reference this finding in their brief (Plaintiff-Appellant's Brief, Section II.A.2., p. 18), they point to no evidence whatsoever that contradicts this finding which goes to the question of whether Janet, if the primary custodian, would block visitation by Lisa or Lisa's family. Therefore, this finding is wholly uncontroverted on the record before this Court.

Finding of Fact No. 68: "Ms. Jenkins testified that she would allow IMJ to continue to attend church events with Ms. Miller, in addition to regularly scheduled contact." (PC 10).

This finding simply states what Janet testified to at the hearing, no more. And Lisa's lawyers acknowledge in their brief that "Jenkins testified that Miller would be able to take IMJ to church when she had visitation with IMJ …." (Plaintiff-Appellant's Brief, p. 18). Moreover, this is all born out by the transcript of the August 21, 2009 hearing where Janet testified that Lisa could take IMJ to her church while Janet would take her to hers and even that IMJ could go to a local Baptist church. (Transcript, pp. 42, 44). Therefore, this finding is undisputed and supported by credible evidence in the record.

Finding of Fact No. 69: "Ms Jenkins testified that if she were to have primary custody of IMJ, she would continue to allow Ms. Miller to make decision regarding IMJ's religious education to the greatest extent possible, including making sure IMJ could attend a Baptist church in the area, even if Ms. Jenkins herself, was not welcome there." (PC 10).

Again, this finding simply states what Janet testified to at the hearing, no more. And Lisa's lawyers again acknowledge that Janet so testified. (Plaintiff-Appellant's Brief, p. 18). They simply assert that Janet later testified that "she believes that the church Miller and IMJ attend teaches 'hatred and bigotry' and that she wouldn't allow

IMJ to attend a church that taught that homosexuality is a sin." (*Id*., p. 19). However, this finding does not concern Miller's church in Virginia but a possible Baptist church in Vermont. Therefore, Lisa's lawyers point to nothing that contradicts this finding and so it stands uncontroverted.

Finding of Fact No. 74: "Ms. Jenkins has the ability to foster a positive relationship and frequent and continuing contact between IMJ and Ms. Miller, including physical contact." (PC 10).

There is considerable record evidence to support the Court's finding that Janet will foster a good relationship between Lisa and IMJ. For example, Janet testified that she purchased a webcam "specifically so that [IMJ] could have visual contact through the computer with Lisa." Further, Janet testified that she "would not ever block" Lisa from having time with IMJ and that, specifically, Lisa would be provided her court-ordered time and any additional time that was mutually desired. (Transcript pp. 113-114). She testified that she would sign necessary medical and educational releases for Lisa and that she wouldn't deny her access to school records, medical records, or educational information. (Transcript p. 41). As Janet testified, "What I'm saying is I would never block Lisa from her visitation time. What she does in her time with our child is her time …. I have no animosity or anything towards Lisa …." (Transcript, p. 86). And in answer to whether "when Isabella would be in your care whether you would block Lisa from communicating with her?," Janet testified, "Oh no, absolutely not." (Transcript, p.86).

While Lisa's lawyers point to testimony and sworn statements which they believe contradict this finding, they have certainly not demonstrated that this finding is without any credible evidence to support it; and, therefore, this finding must stand.

Finding of Fact No. 79: "There is no evidence of abuse of IMJ by either Ms. Miller or Ms. Jenkins." (PC 11).

This statement is a truism. There was absolutely no evidence introduced at the August 21, 2009 hearing as to any abuse or allegations of abuse by either of the parties; and Lisa's lawyers do not suggest otherwise. (Plaintiff-Appellant's Brief, pp. 20-21). Rather, they point to a 2007 affidavit of Tammara Canfield that they have placed in the Printed Case but which was not before the court at the 2009 hearing. (*Id*., p. 21; PC 136-137).[13]

Furthermore, this Court would have to look further back into the history of this case well before the August, 2009 hearing to even find allegations of abuse much less evidence of it.[14] The only live testimony presented at the August, 2009 hearing was by Janet, Janet's mother Ruth Jenkins, expert witness Jan Tyler, and Kimberly Izzo, a client of Janet's. None of the witnesses testified that any family members had abused IMJ and Lisa points to no record evidence from the hearing in support of her argument. To the

[13] Lisa's lawyers also reference testimony by Lisa "in the past" about "IMJ's disturbing behavior after visits with Ms. Jenkins." (Plaintiff-Appellant's Brief, p. 21). Beyond the fact that this testimony was admittedly "in the past," Janet can see no evidence of this assertion on pages 151-152 of the Printed Case as alleged in the brief.

[14] Lisa did move to annul visitation by motion on alleged grounds of abuse filed with the Family Court in September, 2007. (PC 34). The Family Court held a hearing on that motion in January, 2009 at the same time that it heard testimony on Janet's motion to transfer custody and for contempt. (PC 39). Following the motion, the judge ruled from the bench denying the motion to annul, found Lisa in contempt, and denied the motion to transfer custody giving Lisa another opportunity to comply with an amended visitation schedule. (PC 39). Lisa did not appeal the judge's order and cannot be heard to do so through this appeal.

extent Lisa's affidavit contained any allegations of "abuse,"[15] the judge acted well within his discretion to assess the validity of the allegations and reject them as unsupported.

In sum, each of the ten (10) Findings of Fact arguably put in issue by Lisa's lawyers must be upheld by this Court.

Based upon those ten (10) Findings of Fact, Lisa's lawyers make six specific claims of error. (Plaintiff-Appellant's Brief, pp. 4-5, 17-22). Three of those alleged errors are precisely three individual findings of fact, (see Plaintiff-Appellant's Brief, Sections II.A.4. [Finding of Fact No. 79], II.A.5 [Finding of Fact No. 39] and II.A.6. [Finding of Fact No. 60], pp. 20-22). For the reasons stated above, these three claims of error must be dismissed.

The fourth claim of error is couched as an amalgam of three findings of fact (Nos. 12, 20, 74). (See Plaintiff-Appellant's Brief, Section II.A.1, pp. 17-18). However, it is essentially the single finding that Janet can foster a good relationship between Lisa and IMJ as made by the Family Court in both 2007 and 2009. Therefore, for the reasons stated above with respect to Finding of Fact No. 74, this claim of error must be dismissed.

Similarly, the fifth claim of error is couched as an amalgam of two findings of fact (Nos. 18, 67). (See Plaintiff-Appellant's Brief, Section II.A.2, p. 18). However,

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[15] Arguably, Lisa did not set forth such allegations even in the affidavit submitted to Family Court. (See PC 141-160). In Paragraph 10 of her affidavit, the only paragraph that could even arguably be construed as one containing such allegations, she focuses on her perspective that "Janet insisted that Isabella hug Janet even though Isabella stated that she did not want to." (PC 145-146). It is only in following up to that point that Lisa obliquely refers to allegations she made in prior proceedings about Janet engaging in improper conduct during a visit with IMJ. Lisa does not state that the improper conduct occurred but only that such conduct, if it occurred would "not foster a good relationship" between Janet and IMJ. (PC 146). Even granting that the Court failed to consider the allegation, it can hardly be called evidence of anything, much less of abuse.

Lisa's lawyers frame the question as concerning Janet's "ability to communicate and cooperate with Miller." (*Id*.). Nothing in Finding of Fact No. 67 bears on that question. As to Finding of Fact No. 18, it is relevant to the question but concerns the unchallenged findings from 2007 and, therefore, not subject to challenge in this appeal.

Finally, the sixth claim of error is couched as an amalgam of three findings of fact (Nos. 18, 68 and 69). (See Plaintiff-Appellant's Brief, Section II.A.3, pp. 18-19). While three separate findings, the theme is singular, i.e., a finding that Janet would respect Lisa's religious and moral instruction of IMJ. For all the reasons set forth above with respect to Findings of Fact Nos. 18, 68 and 69, this claim of error must be dismissed.[16]

C. The Conclusions Of Law Challenged By Lisa's Lawyers Are Also Unassailable.

In the closing section of their brief, Lisa's lawyers suggest that the Family Court erred in the conclusions it made in applying the factors found in 15 V.S.A. §665(b) as part of its discretionary determination as to the best interests of IMJ vis a vis custody. (Plaintiff-Appellant's Brief, pp. 22-24). Specifically, Lisa's lawyers assert error as to factors §665(b)(1) and §665(b)(9).

As to §665(b)(1), Lisa's lawyers must argue that evidence cannot support the Family Court's conclusion as to the relationship between Janet and IMJ and the ability and disposition of Janet to provide IMJ with love, affection and guidance. Lisa's lawyers do not make any attempt to challenge that Janet has the requisite ability and disposition to love and care for IMJ. Rather, they argue that it was error to conclude that IMJ has a

[16] Regardless, the Court's findings of fact regarding IMJ's religious education were central to none of the analysis of the Section 665(b) factors and, therefore, do not undermine the Family Court's ultimate decision.

good relationship with Janet. (Plaintiff-Appellant's Brief, pp. 22-23). However, as the trial court explained in its unchallenged findings as to IMJ's best interests in 2007:

> The Court concludes that IMJ has a positive relationship with both Lisa and Janet given her age and development. In reaching the conclusion, the Court notes that it does not take into consideration the effect of Lisa's failure to permit parent-child contact between Janet and IMJ, such as any diminishment of the relationship between IMJ and Janet that resulted from that contemptuous conduct. As a result, the Court views the evidence of Janet's relationship with IMJ from the perspective of the time preceding Lisa's initial termination of parent-child contact. There is, moreover, no direct evidence that this relationship has deteriorated over this period of time.
>
> All evidence indicates that both Lisa and Janet having loving and nurturing relationship with IMJ.

(PC 127).

Again, in its November 20, 2009 Order, the trial court concluded:

> In the June 15, 2007 Order, the Court found that the relationship between IMJ and Ms. Jenkins had been significantly affected by Ms. Miller's refusal to allow parent-child contact. This situation has only become worse since that time. As the Court did in its previous Order, it views the evidence of Ms. Jenkins's relationship with IMJ from the perspective of the time preceding Ms. Miller's initial termination of parent-child contact.
>
> The evidence indicates that both Ms. Miller and Ms. Jenkins have a loving and nurturing relationship with IMJ.

(PC 14).

Lisa's lawyers make no attempt to argue with the Family Court's analysis and conclusion as framed by the court. Rather, they simply change the subject to focus on the period of time in which Janet has not seen IMJ – as a result of Lisa's contemptuous conduct. That is simply not adequate to overturn the trial court's conclusion as to §665(b)(1).

Also, with respect to §665(b)(1), Lisa's lawyers take umbrage at the trial court's concern about Lisa's parenting and its quotation from this Court that the deliberate sabotage of visitation "bears adversely on the fitness of the custodial parent …." (PC 15, *quoting Wells v. Wells*, 150 Vt. 1, 4 (1988)). Given the undisputed evidence of Lisa's deliberate, ongoing and near total sabotage of every court order of visitation, it is startling that Lisa's lawyers have the temerity to even raise a point of argument in this area. Nonetheless, it cannot be doubted that the Family Court's conclusion that the factor in §665(b)(1) weighs in favor of Janet is well within the court's wide discretion.

As to §665(b)(9), Lisa's lawyers simply reiterate, as to the Family Court's conclusion on the "abuse" factor the same challenge they made to the court's Finding of Fact No. 79 as to abuse. For the reasons set forth at length above in Section III.B. with respect to Finding of Fact No. 79, the court's conclusion that "[t]here has been no abuse in the family" and that the court did "not weight this factor to either parent" is clearly unassailable.

For all of these additional reasons, the Family Court's conclusions are supported by its findings of fact and its assessment of all the relevant factors in determining that custody should be transferred from Lisa to Janet is comfortably within the wide discretion of the Family Court.

CONCLUSION

For all of the foregoing reasons, the Defendant-Appellee submits that the November 20, 2009 Order of the Family Court should be affirmed in its entirety.

JANET MILLER-JENKINS

By her attorneys,

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RULE 32(a)(7)(C) CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation of V.R.A.P. 32(a)(7)(C) because this brief contains 7,969 words, excluding the parts of the brief exempted by V.R.A.P. 32(a)(7)(B). The brief was composed using Microsoft Word 2003 with a 12-point Times New Roman font.

_____
Jennifer L. Levi, Esq.

DATED: March 28, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Brief of Defendant-Appellee by mailing two copies of the same, postage prepaid, and transmitting an electronic version of the same to:

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Rena M. Lindevaldsen, Esq.
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March 26, 2010

ADDENDUM

TABLE OF CONTENTS

STATE OF VERMONT
RUTLAND COUNTY, SS

LISA MILLER-JENKINS,
Plaintiff-Respondent

V.

JANET MILLER-JENKINS,
Defendant-Petitioner

RUTLAND FAMILY COURT

DOCKET NO. F454-11-03Rddm

NOW COME Plaintiff's attorneys Liberty Counsel (Mathew D. Staver, Steve Crampton, Rena M. Lindevaldsen, David Corry, and Harry Mihet) and Norman C. Smith, pursuant to V.R.F.P. 15(f) and hereby request permission to withdraw their representation of Plaintiff Lisa Miller in the above-captioned matter in the Rutland Family Court as counsel for Plaintiff are unable to fulfill their duties as officers of the Court. In support of this Motion, Plaintiff's Counsel state as follows:

1. As stated in the accompanying affidavit of Rena M. Lindevaldsen, the last known address of Plaintiff is 203 B Green Tree Drive, Forest, Virginia 24551. However, Plaintiff's counsel has been unable to reach Plaintiff to verify that this is her present address. When asked by this Court during the December 22, 2009 hearing whether Attorney Lindevaldsen or Liberty Counsel had spoken with Plaintiff Lisa Miller since this Court issued its order on November 20, 2009, Attorney Lindevaldsen stated that neither she nor any other attorney in the firm had spoken with her since the order was issued. As set forth in the accompanying affidavit, Attorney Lindevaldsen has left voice mail messages several times for Ms. Miller since November 20, 2009, all of which have been unanswered. Accordingly, Plaintiff's Counsel is unable to provide Plaintiff with notice of this motion and asks that the requirement be waived pursuant to V.R.F.P. 15(f)(4).

2. Counsel request permission to withdraw as Plaintiff's attorney in this matter, while continuing as counsel for purposes of the current, pending appeal from this Court's November 20, 2009 order. As discussed below, in paragraph four, Counsel believe that they can continue as Plaintiff's attorneys for purposes of appealing the November 20, 2009 order.

3. First, Plaintiff's Counsel are no longer able to consult with their client concerning the means of accomplishing the client's objectives in the ongoing, or future, enforcement proceedings before this Court. Rules 1.2 and 1.4 of the Vermont Rules of Professional Conduct require that we (i) "abide by a client's decisions concerning the objectives of representation" and (ii) "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Given our inability to consult with our client, we are unable to consult with her about the means to accomplish her defense in the enforcement proceedings.

4. In contrast, Plaintiff's Counsel believe they are able to continue to represent Plaintiff for purposes of appealing the November 20, 2009 order because clear instructions were given to Plaintiff's counsel shortly after the August 21, 2009 hearing as to Plaintiff's desire to appeal any decision granting Defendant's motion to award her legal and physical custody of IMJ. The means of accomplishing that objective were also discussed – Plaintiff's Counsel would continue to press before the Vermont Supreme Court and United States Supreme Court her arguments that the orders treating Defendant as a parent to IMJ violate Plaintiff's constitutional rights.

5. Second, Plaintiff's Counsel request permission to withdraw as counsel because, aside from pointing out technical deficiencies in the current motion, or any future contempt or enforcement motions, of which this Court can itself consider sua sponte, Plaintiff's Counsel are not able to confer with their client to be able to mount a substantive defense to the motions on

her behalf. For example, this Court does not need the participation of Plaintiff's Counsel to inform it that (i) Defendant's motion for contempt is defective on its face, because the verification of Defendant is legally insufficient (stating that "the foregoing Petition for Expedited Enforcement is true and correct *to the best of my knowledge*"); (ii) the motion was not properly served, as required under Rule 4 (requiring personal service on the party, or at least service by mail); and (iii) the relief sought is futile or without legal authority. *See generally* Vt. Fam. Proc. Rules 4 and 16; *see also Levy v. Town of St. Albans Zoning Bd. of Adjustment* 152 Vt. 139, 145-146, 564 A.2d 1361, 1365 (Vt. 1989) (affidavit based only "upon information and belief" insufficient as a matter of law in summary judgment context); *In re Dobbins* 2007 WL 2501365 (Tex.App.- Dallas 2007) (striking affidavit attesting that facts were true "*to the best of my knowledge*") (emphasis added).

WHEREFORE, Plaintiff's Counsel move this Court to grant their motion to withdraw as Plaintiff's Counsel before the Family Court, and for such other and further relief to which they may be entitled.

Respectfully submitted,

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STATE OF VERMONT
RUTLAND COUNTY, SS

LISA MILLER-JENKINS,
Plaintiff-Respondent

RUTLAND FAMILY COURT

V.

JANET MILLER-JENKINS,
Defendant-Petitioner

DOCKET NO. F454-11-03Rddm

AFFIDAVIT IN SUPPORT OF MOTION TO WITHDRAW AS COUNSEL

I, RENA M. LINDEVALDSEN, being duly sworn, hereby state as follows in support of the motion by Plaintiff's Counsel to withdraw:

1. Although the last known address of Plaintiff is 203 B Green Tree Drive, Forest, Virginia 24551, I, as counsel to Plaintiff, have not been able to reach Plaintiff to verify that this is her present address. When asked by this Court during the December 22, 2009 hearing whether I had spoken with Plaintiff Lisa Miller since this Court issued its order on November 20, 2009, I explained that I had not. To my knowledge, none of Plaintiff's attorneys has spoken to her since that time. I have left several voice mail messages for Ms. Miller, all of which have been unanswered.

Rena M. Lindevaldsen
Rena M. Lindevaldsen

CERTIFICATE OF NOTARY

STATE OF VIRGINIA:

The forgoing Affidavit was subscribed and sworn before me this 19th day of January, 2010 by Rena Lindevaldsen.

Beverly K. Smith
Notary Public

My commission expires the 31st day of August, 2011.

BEVERLY K. SMITH
Notary Public
Commonwealth of Virginia
7095081
My Commission Expires Aug 31, 2011

5.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the MOTION TO WITHDRAW AS COUNSEL and the AFFIDAVIT IN SUPPORT OF MOTION TO WITHDRAW AS COUNSEL has been furnished by regular U.S. Mail delivery and via facsimile this 20th day of January, 2010, to the following:

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Rena M. Lindevaldsen

6.