State of New Hampshire
Supreme Court

2000 TERM

OCTOBER SESSION

NO. 2000-____

IN THE MATTER OF GERARD F. COTE

AND

AMY L. MILLER (f/k/a) COTE

NOTICE OF APPEAL OF PETITIONER, GERARD F. COTE
Pursuant to Supreme Court Rule 7

By: Joshua L. Gordon, Esq.
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SUPREME COURT DOCKET NO. 2000___
NOTICE OF APPEAL
(Rule 7)

Within thirty days from the date on the clerk's written notice of a decision on the merits, unless otherwise provided by law and except as otherwise provided by Rule 7 in criminal and probate appeals, the moving party shall file (a) 1 copy of this notice of appeal and of the attachments to it with each of the other parties, and with the attorney general in a criminal case; (b) either 2 or 3 copies with the clerk of the lower court depending upon whether a judge, or master and judge, decided the case; and (c) the original and 12 copies with the clerk of the supreme court. The moving party shall pay the filing fee simultaneously with the filing of the notice of appeal.

CASE TITLE (Full Name)

In the Matter of Gerard F. Cote
and
Amy L. Miller (f/k/a) Cote

Which side is the moving party: plaintiff, defendant, or other? **Petitioner**
If other, please specify:

If **CRIMINAL** case, please fill out the following:
Is defendant in jail or prison?
If so, where is the defendant incarcerated?

What is the sentence?
Was trial counsel court appointed?
Will the appellate defender be handling the appeal?

APPEAL FROM **Merrimack County Superior** COURT
Date of:
(a) clerk's notice: **February 10, 2000**
(b) sentencing (criminal):
(c) probate court filing:

Trial Judge; Master~~; Other~~:
George L. Manias, J.
Leonard S. Green, Master

Court Reporter ~~or Machine Operator~~:
July 28, 1999: **Joanne Smolen**
July 29, 1999: **Vicki Day**
Sept. 21, 1999: **Vicki Day**
Jan. 28, 2000: **Lillian Landry**

Docket No. below: **96-M-0552**

Trial Counsel below:
For Petitioner:
Graham Chynoweth, Esq.

For Respondent:
C. Michael Celenza, Esq.

If party is a corporation or association, give the names and addresses of parent, subsidiaries, and affiliates (to extent known): **none known**

	Name	*Address*	*Telephone*
MOVING PARTY'S COUNSEL IN SUPREME COURT:	**Joshua L. Gordon, Esq.**	**Law Office of Joshua Gordon** **26 S. Main St., #175** **Concord, NH 03301**	**(603) 226-4225**
OPPOSING PARTY'S COUNSEL IN SUPREME COURT:	**C. Michael Celenza**	**Law Office of C. Michael Celenza** **58 Pleasant St.** **Concord NH 03301**	**(603) 225-5152**

Number of days of trial: **Three**

Dates of hearing and/or trial: **July 28 & 29, 1999; Sept. 21, 1999; Jan 28, 2000**

Does the moving party waive oral argument? **no**

List the exhibits necessary to determine the questions raised on appeal:

All exhibits.

BRIEF DESCRIPTION OF NATURE OF CASE AND RESULT:

This is a post-divorce proceeding involving the custody of a six-year old child.

The parties were divorced in 1997 after a three-year marriage. One child, Danielle, resulted from their relationship. Upon divorce, Gerard (Jerry) and Amy entered a stipulation (approved by the court) which provided joint legal and joint physical custody, rough guidelines for each party's time with the child, and aspirations for continuing negotiation of the visitation details. The stipulation was intended to avoid either party having to prove harm in order to adjust the schedules.

A year after the stipulation, in July 1998, Amy filed a petition to modify the physical custody arrangement, and seeking physical custody of Danielle. Amy's allegation was that the visitation was not working well. She did not allege, as required by *Perreault v. Cook*, 114 N.H. 440, 443 (1974), any great alteration in circumstances affecting Danielle's welfare, nor any strong possibility of harm caused by the then-current situation.

The guardian *ad litem* (*Paul B. Shagoury*) investigated the case. His report confirmed that the parties do not negotiate well, but noted that both parents are equally good, involved, warm, and caring, and that Danielle has equally close relationships with them. The GAL found no harm likely to be caused by either parent, but rather by their mutual inability to shield Danielle from their anger toward each other. The GAL effectively gave the matter a toss-up.

Amy has re-married, and is solely supported by her husband. She lives close to her parents, and uses them as childcare providers when she is unable to be with Danielle. Jerry also has remarried and now has an infant daughter. He works full time in his home-based computer engineering consulting firm, and has arranged his work so that he is available to Danielle most of the time. His wife is a full-time mother, who cares for Danielle when Jerry cannot.

The GAL was initially careful to make no recommendation regarding custody. Nonetheless, the GAL suggested that it is better for Danielle to be cared for by a family member than someone else, but apparently considered Jerry's wife not a member of the family. Although no financial records were examined, the GAL considered Amy more financially stable. Ultimately, the GAL recommended custody go to Amy.

The court reiterated New Hampshire's policy of no preference in custody determinations

based on the sex of the parents. Nonetheless, after a hearing (*Leonard S. Green*, Master), the court awarded Amy custody based on the "best interest" of the child.

Jerry filed a motion to reconsider the award. He noted that the *Perreault* standard applies to the case, that the court used a lower standard, and that the facts do not warrant a change in custody.

After a further hearing, the court issued its final order employing *Perreault*, and said that the facts met its standard. The court wrote:

> "[W]e are not dealing with the issue of a particular parent being abusive, alcoholic, a sexual predator, or any of the other types of activities normally consistent [sic] serious harm to the child. The Court finds in this case that the actions of both parents and their inability to communicate is so harmful, as a totality, that to leave the prior order intact would more probably than not result in serious harm to the child."

Court's *Decree on Reconsideration* (Feb. 10, 2000), *Appx. to N.O.A.* at 73, 74-75.

The court's order, however, does not deal with the second half of the *Perreault* standard. Once the determination has been made that there is enough harm to warrant a change in custody, the Supreme Court directed lower courts that the inquiry as to which parent gets custody "must necessarily concentrate on the circumstances of the family in which the child has been placed" – where the harm occurred. *Perreault*, 114 N.H. at 444.

The GAL's report and the court's order concentrated instead on the interface between the two parents, and found that Amy was largely the cause of the communication problems. There was no finding of harm caused by Jerry's parenting or the time Danielle spends in his home.

During the hearing on reconsideration, Jerry presented testimony of an expert psychologist, who told the court that joint physical custody can be maintained even with conflict between parents. Amy challenged the expert by presenting testimony, over Jerry's objection, by the GAL *as an expert psychologist*, finding that the matter was generally within the knowledge or GALs.

Because the final order resulted from a motion for reconsideration, no further pleadings were filed, and this appeal followed.

STATUTE, ORDINANCE, REGULATION, RULE, OR OTHER LEGAL AUTHORITY UPON WHICH THE CLAIM OF CIVIL OR CRIMINAL LIABILITY WAS BASED:

RSA 458:17

SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE. BUT WITHOUT UNNECESSARY DETAIL. SEE RULE 7(7). STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE RULE 16(3)(b).

1. To change custody, the court must find a great alteration in circumstances affecting the child's welfare, and a strong possibility of harm caused by the current custody situation. The court found harm here caused by the parents' inability to effectively negotiate, but not caused by Jerry. Did the court err in changing custody?

2. Once harm has been found, the court must "necessarily concentrate on the circumstances of the family" which caused it. There is no evidence showing that Jerry's family has caused any harm. Did the court err in taking custody from Jerry?

3. Custody determinations cannot be driven by sexual discrimination. In a society where still more women than men have the luxury of not working, basing custody on the ability of one parent to stay at home is sexual discrimination by another name. Did the court err in changing custody based on these considerations?

4. GALs are appointed to advocate for the interests of minor children. In this case, the court allowed the GAL to testify as an expert even though he had not been noticed as one, and had not reviewed the case as one. Did the court err in allowing the GAL to testify as an expert?

5. The parties' divorce stipulation was drafted to ensure joint custody so that neither party would have to prove harm. With Amy now having been granted custody, if Jerry wishes to modify the arrangement to increase the time he spends with Danielle, he will have to submit *Perreault* evidence. Did the court err in failing to enforce the wishes of the parties contained in their stipulation.

WITH REFERENCE TO EACH SPECIFIC QUESTION RAISED ON APPEAL, IDENTIFYING THE QUESTION BY ITS NUMBER, SPECIFY:

(A) The proper standard of review to be applied by the court to the question, citing relevant authority;

(B) the parts of the proceeding you would designate the court reporter to transcribe, or whether an adequate written substitute could be provided in place of a transcript; and

(C) the case(s) most relied upon to support the moving party's position:

1. (A) Error of law.
   (B) Entire record.
   (C) *Perreault v. Cook*, 114 N.H. 440, 443 (1974).

2. (A) Error of law.
   (B) Entire record.
   (C) *Perreault v. Cook*, 114 N.H. 440, 443 (1974).

3. (A) Error of law.
   (B) No record necessary.
   (C) N.H. Const., pt. I, arts. 1, 2, 12; *Buckner v. Buckner*, 120 N.H. 402 (1980); *State v. Robert H.*, 118 N.H. 713 (1978); RSA 458:17, VI; Judith Bond Jennison, *The Search for Equality in a Woman's World: Fathers' Rights to Child Custody*, 43 RUTGERS L.REV. 1141, 1183 (1991).

4. (A) Error of law.
   (B) January 28, 2000 transcript.
   (C) RSA 458:17-a; *Richelson v. Richelson*, 130 N.H. 137 (19987).

5. (A) Error of law.
   (B) No record necessary.
   (C) *Sommers v. Sommers*, ___ N.H. ___ (decided July 2, 1999).

If the most extensive transcript designated above were ordered by the court, what is the court reporter's estimate (obtain directly from the trial court clerk) of the number of pages and the cost thereof:

Pages/Cost:	July 28, 1999:	195 pages /	$ 731.25
	July 29, 1999:	240 pages /	900.00
	Sept. 21, 1999	60 pages /	225.00
	Jan. 28, 2000:	308 pages /	1,155.00
			$3,011.25

A DIRECT AND CONCISE STATEMENT OF THE REASONS WHY A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE QUESTIONS AND WHY THE ACCEPTANCE OF THE APPEAL WOULD PROTECT A PARTY FROM SUBSTANTIAL AND IRREPARABLE INJURY, OR PRESENT THE OPPORTUNITY TO DECIDE, MODIFY, OR CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE:

This court has addressed the standard of harm to warrant a change in custody. But the cases have arisen where one parent is clearly not taking good care of the children. *See e.g., Matthews v. Matthews*, 142 N.H. 733 (1998). It is not clear what factors should be considered in determining which parent should be awarded custody when neither has obvious debilities. This court should accept this case to decide this issue, which has general importance to all responsible parents faced with a custody dispute.

The court below reiterated New Hampshire's statutory policy that there should be no sexual discrimination in custody determinations. Based on no more than Jerry's need to work and Amy's luxury of marrying a man willing to support her, however, the court awarded Amy custody of the child. While society is perhaps changing, still more women than men are in Amy's enviable situation, and still more men then women are forced to work. Awarding custody to the woman on the basis of the man working is sexual discrimination by another name. This court should accept this case to resolve the issue.

While this court has made clear it intends few restrictions on GALs, *see e.g., Howard v. Howard*, 124 N.H. 267 (1983), some parameters should be established to avoid confusion about their role, as occurred here. This court should accept this case to resolve this issue, for the benefit of GALs, the divorce courts, and the parties before them.

Because Amy has been awarded custody, any future modifications will require that Jerry submit evidence of harm to meet the *Perreault* standard, a result the divorce stipulation was specifically designed to avoid. Masters should *encourage* parents who attempt amicable custody arrangements, rather than undo their efforts. This court should accept this case to clarify whether parents considering entering such a stipulation can expect to have their efforts enforced.

The order below results in Jerry spending much less time with Danielle during her childhood, which happens only once for both of them. This is an irreparable injury which should be corrected by this court.

TITLE OF CASES WITH SIMILAR OR IDENTICAL ISSUES PENDING, OR EXPECTED TO BE ENTERED, IN THE SUPREME COURT (TO EXTENT KNOWN):

None known.

ATTACH TO THIS FORM THE DECISION BELOW, THE CLERK'S WRITTEN NOTICE OF THE DECISION BELOW, ANY ORDER DISPOSING OF A TIMELY-FILED POST-TRIAL MOTION, THE CLERK'S WRITTEN NOTICE OF ANY ORDER DISPOSING OF A TIMELY-FILED POST-TRIAL MOTION, AND ONLY SUCH OTHER PLEADINGS AND DOCUMENTS AS THE COURT NEEDS TO EVALUATE THE SPECIFIC QUESTIONS RAISED ON APPEAL AND TO DETERMINE WHETHER THE APPEAL IS TIMELY FILED. LEGAL MEMORANDA, INCLUDING LEGAL MEMORANDA FILED WITH THE TRIAL COURT, SHALL NOT BE SUBMITTED WITHOUT THE PRIOR APPROVAL OF THE CLERK. INCLUDE A TABLE OF CONTENTS LISTING EACH ATTACHMENT AND REFERRING TO SEQUENTIALLY NUMBERED PAGES. IF THE PARTIES' REQUESTS FOR FINDINGS AND RULINGS ARE ATTACHED, NOTE ON THE RIGHT SIDE OF PAGE WHETHER EACH REQUEST WAS GRANTED, DENIED, OR NOT RULED UPON [RULE 6(5)]. REGARDING THE TEXT OF RELEVANT CONSTITUTIONAL, STATUTORY, AND OTHER DOCUMENTS, SEE RULE 7(6).

CERTIFICATIONS

1. I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

_____
Counsel

2. I hereby certify that copies of this notice of appeal have been served on all parties to the case, and have been filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

_____
~~Moving Party or~~ Counsel

APPENDIX

1. GAL's *Report of the Guardian Ad Litem* (April 4, 199) 9

2. Parties' *Stipulated Proposed Final Order* (Aug. 26, 1997) 15

3. Amy's *Petition to Bring Forward and Modify* (July 30, 1998) 29

4. Jerry's *Plaintiff's Response to Defendant's Petition to Modify* (Nov. 2, 1998) 36

5. GAL's *Final Report of the Guardian Ad Litem* (April 5, 1999) 39

6. Jerry's *Request for Rulings of Law and Findings of Fact* (July 29, 1999) 48

7. Amy's *Findings of Fact* (July 28, 1999) 51

8. Court's *Decree* (Aug. 5, 1999) 57

9. Jerry's *Motion for Clarification* (Aug. 19, 1999) 61

10. Jerry's *Motion for Reconsideration* (Aug. 19, 1999) 62

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13. Jerry's *Request for Findings of Fact and Rulings of Law* (Jan. 28, 2000) 69

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