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1999 Survey of Rhode Island Law: Cases: Family Law

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Family Law. *Carr v. Prader*, 725 A.2d 291 (R.I. 1999). The probate court lacks jurisdiction to decide a petition for guardianship of a child where a parent opposes the petition. The party seeking guardianship must first file a petition for termination of parental rights with the family court, as only the family court may terminate parental rights or divest a parent of custody.

In *Carr v. Prader*,[1] the Rhode Island Supreme Court was asked to determine whether the probate court has jurisdiction to appoint a temporary or permanent guardian for a minor child where the parent of the child retains his parental rights and opposes the petition for guardianship. The court determined that a municipal probate court does not have the authority to terminate parental rights.[2] A person seeking guardianship of the person and the estate must first file a petition in the family court for the termination of parental rights.[3] Upon the granting of that petition by the family court, the person may either petition the family court for adoption of the child, petition the family court for the permanent guardianship of the child, or petition the probate court for the permanent guardianship of the child and the estate.[4]

FACTS AND TRAVEL

Heidi and Timothy Carr married on September 23, 1989.[5] The Carrs resided in the Spotsylvania, Virginia area, and their wedlock produced two children, Jonathan and Jamie.[6] After nearly six years of tumultuous marriage, Heidi Carr (Heidi) took the two boys and moved to Newport, Rhode Island in March of 1995.[7] Following the move, Heidi obtained sole custody of both children, first through an order of the Juvenile and Domestic Relations Court of Spotsylvania County, Virginia and thereafter from a July 17, 1996, restraining order issued by the Rhode Island Family Court.[8]

1. 725 A.2d 291 (R.I. 1999).
2. *See id.* at 295.
3. *See id.*
4. *See id.*
5. *See id.* at 292.
6. *See id.*
7. *See id.*
8. *See id.*

Heidi was diagnosed with terminal cancer in the summer of 1996.[9] Just before her last hospitalization, Heidi left Jamie with her cousin, Valerie Prader (Valerie), who resided in Newport, and left Jonathan with another cousin, Gina Prader, who resided in Massachusetts.[10] On January 18, 1997, Heidi died.[11] Following Heidi's death, Valerie's emergency petition for temporary custody of Jamie was granted by the family court ex parte.[12] Valerie petitioned the probate court in Newport for guardianship of Jamie.[13] At this point, Timothy Carr (Carr) moved to dismiss the petition based upon insufficient jurisdiction.[14] Carr argued that "the probate court lacked the authority to award permanent guardianship of a minor child over the opposition of a surviving parent," and furthermore, the "Family Court was the more appropriate forum for the dispute."[15]

Upon the probate court's denial of his motion to dismiss, Carr appealed to the superior court.[16] Awaiting a decision on the jurisdictional issue, the probate court entered a consent order, staying further proceedings and allowing Valerie to retain temporary custody of Jamie.[17] After a hearing on the jurisdictional issue, the superior court certified the following questions of law to be decided by the Rhode Island Supreme Court:

1. Does the probate court have jurisdiction to appoint a guardian of the person and estate of a six year old minor child who is not orphaned and who has a surviving natural parent whose parental rights have never been terminated but whose fitness to serve as the minor's guardian has been raised in the probate proceedings?
2. Does the probate court have jurisdiction to appoint a guardian, either temporary or permanent, of the person and estate of a six year old minor in a contest between the cousin of the deceased mother and the surviving natural father under the following facts:

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9. *See id.*
10. *See id.* Jonathan resides with Heidi's mother, and "his custody is not part of this litigation." *Id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *Id.*
16. *See id.* at 293.
17. *See id.*

a. at the time of her death, the natural mother was separated from, but legally married to the natural father;
b. prior to her death, the natural mother had been awarded sole custody of the minor [by] family court orders in Virginia and Rhode Island, and at the time of her death, she had sole custody of the minor;
c. the surviving natural father's parental rights have never been terminated but his fitness to serve as guardian of the child has been raised by the petitioner in the probate proceedings;
d. after the death of the natural mother, the Rhode Island Family Court awarded temporary sole custody of the minor child to said cousin of the deceased mother, but has held further hearing in abeyance pending disposition of the subject probate court petition filed by the cousin for guardianship of the minor?[18]

ANALYSIS AND HOLDING

Accepting that upon Heidi's death, Carr automatically received custody of Jamie, the Rhode Island Supreme Court framed the central issue in this case as "whether probate courts have the power to terminate a parent's natural guardianship and concomitant custody rights."[19] The court pointed out that both probate courts and the family courts possess limited jurisdiction as conferred by statute.[20] Although probate courts are permitted to appoint guardians,[21] they do not have the statutory authority to terminate parental rights and award custody.[22] Moreover, the statutory authority granted to the family court is limited, and parental rights may only be terminated upon a showing of "*inter alia*, willful neglect, abandonment, desertion, or parental unfitness demonstrated by 'cruel or abusive nature' or chronic substance abuse."[23]

Recognizing that the laws of the State of Rhode Island favor maintaining the integrity of the family unit,[24] the Rhode Island

18. *Id.*
19. *Id.*
20. *See id.*
21. *See* R.I. Gen. Laws § 33-15.1-4 (1956) (1995 Reenactment).
22. *See Carr*, 725 A.2d at 294.
23. *See id.* (quoting R.I. Gen. Laws § 15-7-7 (1956) (1996 Reenactment)).
24. *See id.* (citing R.I. Gen. Laws § 14-1-2 (1956) (1994 Reenactment); R.I. Gen. Laws § 40-11-1 (1956) (1997 Reenactment)).

Supreme Court addressed the family court's options upon a finding of neglect or abuse.[25] For example, the family court may allow the Department of Children, Youth and Families (DCYF) to supervise the placement of the child in the home, or may grant custody to DCYF until the child may be safely reunited with the parents.[26] In particular, the family court may only grant a petition for guardianship that is opposed by a parent once those parental rights are terminated.[27] This requires a finding of parental unfitness based upon "clear and convincing evidence."[28] In sum, the Rhode Island Supreme Court determined that under the facts presented "a parent only can lose guardianship or custody . . . if that parent has acted in a way deleterious to his or her child's well-being," and moreover, "[o]nly the Family Court has the statutory power to make such findings of parental unfitness."[29]

Looking at municipal probate courts, the Rhode Island Supreme Court acknowledged that such courts are well-suited for administering estates, but lack the "experience and resources of the family court to determine questions of parental fitness."[30] Contrary to Valerie's contention, the court resolved that probate courts are without the legal authority to terminate parental rights or deprive parents of custody.[31] According to the court, a broader reading of the probate court's authority would be "inappropriate given the detailed statutory regulation of family court decision-making on identical issues."[32] The court noted this construction would defeat the legislature's preference for keeping families intact, and raise due process issues by avoiding the requirement in the family court that a parent be deemed unfit before his parental rights

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25. *See id.*
26. *See id.* (citing R.I. Gen. Laws § 40-11-12(b) (1956) (1997 Reenactment)).
27. *See id.*
28. *Id.*
29. *Id.*
30. *Id.* at 295.
31. *See id.* Valerie argued that such power is implied in R. I. Gen. Laws § 33-15.1-1, reads in part:

> the father and mother shall be joint natural guardians of their minor children. . . . Provided, however, this section . . . shall not affect the right of the probate court duly to appoint a legal guardian . . . of the person or estate of any minor children . . . in which event the appointment of the probate court . . . shall supersede the natural guardianship insofar as the same shall be inconsistent with the appointment. . . .

Id. (quoting R.I. Gen. Laws § 33-15.1-1).
32. *Id.*

could be terminated.[33] Therefore, probate courts may only appoint permanent guardians after the family court has found the natural parents unfit.[34]

Having determined that a municipal probate court does not have the authority to terminate parental rights or divest a parent of custody, the Rhode Island Supreme Court proceeded to discuss how a person may obtain guardianship of a minor child where a surviving parent opposes the guardianship petition.[35] The court concluded that although the probate court does not have jurisdiction to appoint a permanent guardian, it may appoint a temporary guardian.[36] The temporary guardian may file a petition in the family court for custody of the child, or for the termination of parental rights on the ground of unfitness.[37]

Once the petition for termination of parental rights has been filed, the family court may terminate the parental rights, or pursuant section 14-1-32 of the Rhode Island General Laws, may find the child is dependent and neglected and award custody to the temporary guardian.[38] During the pendency of this petition, the family court should make reasonable efforts to unify the parent and child.[39] If the parental rights are terminated, the temporary guardian may petition the family court for adoption of the child.[40] Alternatively, the temporary guardian may file a petition in the family court to be named permanent guardian of the child pursuant section 40-11-12 of the Rhode Island General Laws, or may petition the probate court for appointment as a permanent guardian of the person and estate of the minor child pursuant to sections 33-15.1-4 and 33-15.1–5 of the Rhode Island General Laws.[41]

CONCLUSION

The Rhode Island Supreme Court declared that the family court is the appropriate forum for guardianship petitions which are opposed by a parent. Consequently, municipal probate courts

33. *See id.*
34. *See id.*
35. *See id.*
36. *See id.*
37. *See id.*
38. *See id.* at 296.
39. *See id.*
40. *See id.*
41. *See id.* at 295-96.

must defer such decisions to the family court, "which alone has the express statutory power to divest a parent of custody and/or parental rights along with the expertise and resources essential to exercise such power."[42]

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42. *Id.*

Family Law. *Desper v. Talbot*, 727 A.2d 1233 (R.I. 1999). In a civil action seeking to reach and apply a decedent's equity in marital property to satisfy a judgment, the superior court has jurisdiction over the action under section 9-28-1 of the Rhode Island General Laws.

FACTS AND TRAVEL

In 1971, plaintiff Evelyn Desper (Evelyn) and decedent Donald Desper (Donald) were divorced.[1] Prior to their divorce, they owned and lived in a home in Franklin, Massachusetts, as tenants by entireties.[2] After the divorce, Evelyn continued to live at the Franklin residence with the couple's five children.[3] By divorce decree, Donald was ordered to pay thirty dollars per week for child support.[4] However, Donald failed to make the child support payments for a nineteen year period beginning in 1971 until his death on October, 5, 1990.[5] Donald had been living in Woonsocket for a number of years with his live-in girlfriend and therefore, upon his death, his last will and testament was admitted to probate in the Woonsocket Probate Court.[6] Donald intentionally excluded each his five children and devised his undivided one-half interest in the Franklin estate to his live-in girlfriend.[7]

Evelyn filed a claim in probate court for $41,562.79, the amount of unpaid child support due under the divorce decree.[8] Evelyn requested that Leah Talbot, the executrix of Donald's estate, transfer to her all of Donald's one-half interest in the Franklin property, which had a value of $35,500.[9] Talbot denied

1. *See* Desper v. Talbot, 727 A.2d 1233, 1233 (R.I. 1999).

2. *See id.* The 1971 divorce rendered the estate by entirety to be terminated and for Evelyn and Donald then to each own one half of the Franklin estate as tenants in common. *See id.* at 1234 n.1 (citing Blitzer v. Blitzer, 361 Mass. 918, 920 (1972)).

3. *See id.* at 1233.

4. *See id.* at 1233-34.

5. *See id.* at 1234.

6. *See id.* Although Donald died October 5, 1990, his last will and testament was only presented for probate in 1992 and the executrix was appointed on November 12, 1992. *See id.* at 1235.

7. *See id.* at 1234.

8. *See id.*

9. *See id.* Evelyn asserted that the entire property had an appraised value of $71,000.00. *See id.*

Evelyn's request and claims.[10] Evelyn then filed a civil action in the Providence County Superior Court against Talbot, seeking the $41,562.79 in unpaid child support, as well as one-half of the mortgage, insurance and tax payments Evelyn had made to maintain the Franklin property.[11]

Summary judgment was entered for Evelyn on July 25, 1997, for $101,488.57.[12] The judgment was executed on September 2, 1997, and was returned wholly unsatisfied.[13] In order to satisfy her July 25, 1997 judgment, Evelyn filed a post judgment motion on September 5, 1997, seeking to have Donald's one-half interest in the Franklin property transferred to her and alternatively, a motion to reach and apply the Franklin property pursuant to section 9-28-1 of the Rhode Island General Laws.[14] Evelyn also sought an order to require the executrix's attorney to vacate and remove his notice of attorney's lien against the property.[15] In addition, Evelyn filed a separate petition in superior court to satisfy her judgment, seeking to reach and apply the Franklin property.[16]

Evelyn's two actions were consolidated and were heard before the superior court on December 18, 1997.[17] The superior court remanded the matter to the Woonsocket Probate Court on the basis that it did not have subject matter jurisdiction over the action.[18] Evelyn appealed this ruling.[19]

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10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.* R.I. Gen. Laws § 9-28-1 provides:

> Any judgment creditor, after his or her execution has been returned wholly or in part unsatisfied, may, by a civil action in the nature of a creditor's bill, reach and apply and subject to the payment and satisfaction of his or her judgment any equitable estate, any equitable assets, or any choses in action of the judgment debtor. . . . The remedy provided by this section shall be cumulative and shall not supersede any existing remedy.

R.I. Gen. Laws § 9-28-1 (1956) (1997 Reenactment).

15. *See Desper*, 727 A.2d at 1234. The executrix obtained an attorney to contest Evelyn's claims once an action was filed in superior court. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

ANALYSIS AND HOLDING

The Rhode Island Supreme Court concluded that the superior court erred in concluding that it lacked subject matter jurisdiction over a judgment creditor's equitable action brought pursuant to section 9-28-1 of the Rhode Island General Laws.[20] Evelyn is not precluded from filing a creditor's equitable action as a remedy under the reach and apply provision of the statute because it clearly provides for "any judgment creditor" to reach any equitable estate or assets to satisfy her judgment.[21] The court found that Donald maintained an equitable interest in the Franklin property because according to Massachusetts law, Donald's interest as a tenant in common qualifies as a one-half interest in the equity of the property.[22] In addition, the court concluded that the complex procedural posture of the instant case required them to "fashion what we believe will be a fair and finite resolution of the procedurally entangled litigation that has generated from Donald's insolvent probate estate proceedings."[23]

The supreme court ruled that Evelyn's claim for unpaid child support should not have been denied by the executrix because Donald's death did not relieve him of his obligations.[24] The court recognized that Donald's estate was insolvent, but remanded the case to the superior court in order to: grant Evelyn's reach and apply petition; order the executrix to convey all of Donald's equity interest in the Franklin property to Evelyn to satisfy her July 25, 1997 judgment against Donald's estate; order Evelyn to pay Donald's funeral expenses, the executrix's attorney's fees and the executrix's fees; order the attorney's lien against the property to be lifted upon his payment; and, order Donald's estate to be closed by having the executrix file all necessary documents.[25]

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20. *See id.*

21. *Id.* at 1234-35.

22. *See id.* at 1235.

23. *Id.*

24. *See id.* (citing Calcagno v. Calcagno, 391 A.2d 79, 83 (R.I. 1978) (holding that final judgments include unpaid child support allowances); Centazzo v. Centazzo, 556 A.2d 560, 562 (R.I. 1989) (holding that death does not relieve one of his pre-death obligations)).

25. *See id.* at 1235-36.

CONCLUSION

In *Desper v. Talbot*, the Rhode Island Supreme Court held that the superior court has jurisdiction over a civil action in the form of a creditor's bill seeking to reach and apply a decedent's marital property in satisfaction of a judgment pursuant to section 9-28-1 of the Rhode Island General Laws. The remedy under the statute is cumulative and does not supersede any existing remedies.

Melissa Coulombe Beauchesne

Family Law. *D'Onofrio v. D'Onofrio*, 738 A.2d 1081 (R.I. 1999). At a hearing on a motion to modify a child-custody award, the court need not give greater weight to the report and recommendations of a guardian ad litem than to other evidence presented.

FACTS AND TRAVEL

The plaintiff, Maureen E. D'Onofrio, and the defendant, David P. D'Onofrio, divorced in 1996.[1] In January of that year the family court, pending entry of final judgement on the divorce, awarded custody of the parties' minor child to the plaintiff and defendant jointly, with physical placement with the mother.[2] At the time of the initial custody arrangement both parties lived in Rhode Island.[3] However, before the final divorce judgement was entered, the plaintiff moved to England to reside with the man that would later become her husband.[4] Because of the plaintiff's relocation, she and the defendant agreed to amend the interlocutory decree to maintain joint custody but place the child with the father, subject to extended visits with the mother.[5]

In October of 1996, the plaintiff filed a motion to change the custody arrangement so that the child would be placed with her, and petitioned that she be allowed to relocate with the child to England.[6] Her petition alleged that the child's maternal grandmother was in fact the child's primary caretaker, despite indications that the mother knew this at the time she agreed to placement of the child with the father.[7] In November of 1996 before a hearing on the plaintiff's motion, the family court appointed a guardian ad litem for the child.[8] The guardian interviewed the child's parents, grandparents, and teachers, as well as the child herself.[9] In April of 1997 the guardian traveled to England with the child to visit the mother.[10]

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1. D'Onofrio v. D'Onofrio, 738 A.2d 1081, 1082 (R.I. 1999).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.* at 1083.
10. *See id.*

At the hearing on the mother's motion, the family court heard from numerous witnesses.[11] The guardian testified that the child spent a significant amount of time with her maternal grandmother because of the father's work schedule and that the child had expressed a desire to remain in one place.[12] The guardian also testified that both the father and the maternal grandmother had demonstrated hostility toward the plaintiff's remarriage, and that the mother had concerns about the father's ability to foster a relationship between her and the child due to that hostility.[13] The guardian further testified that after visiting England, the child told the guardian that she definitely wanted to stay with her mother.[14] The trial justice found that the mother had chosen to "put her romantic interest ahead of her child's interest,"[15] and that the father provided a stable life for the child.[16] Noting that the mother had the burden of proof, the trial justice did not find that there had been a change in circumstances sufficient to warrant a change in physical possession.[17] An order denying plaintiff's motion was entered in September of 1997, and the mother appealed.[18]

ANALYSIS AND HOLDING

The plaintiff asserted on appeal that the trial justice disregarded the recommendation of the guardian ad litem that residing with the mother in England was in the child's best interest.[19] The plaintiff suggested that the trial justice's failure to give the guardian's testimony more weight was an abuse of discretion.[20] The Rhode Island Supreme Court disagreed, noting that the standard of review of a child-custody award is abuse of discretion,[21] and that a trial justice should not modify a custody decision unless that moving party has shown changed circumstances.[22] Furthermore, the court explained that the burden of proof on the moving party at

11. *See id.* at 1082.
12. *See id.* at 1083.
13. *See id.*
14. *See id.*
15. *Id.* at 1082.
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.* at 1083.
21. *See id.* (citing Pettinato v. Pettinato, 582 A.2d 909, 914 (R.I. 1990)).
22. *See id.* (citing Suddes v. Spinelli, 703 A.2d 605, 607 (R.I. 1997)).

the trial level is by a preponderance of the evidence.[23] The court went on to state that it should not disturb findings of fact made by the trial justice unless they were "clearly wrong" or the trial justice "overlooked or misconceived evidence relevant to the issues decided."[24]

The court explained that in Rhode Island, the appointment of a guardian ad litem is discretionary rather than mandatory in child-custody disputes.[25] In this case, the guardian was appointed to investigate the parties' living arrangements, and although the guardian's report included recommendations, the trial justice was not required to follow them.[26] The court also noted that the trial justice had sustained the defendant's objections to the plaintiff's attempts to elicit the guardian's recommendations at the hearing.[27] The court stated that Rhode Island, like other jurisdictions, does not require that a guardian's recommendations or report carry any greater weight than other evidence presented.[28] The court claimed that this conclusion does not minimize the significance of the guardian's role,[29] and pointed out that where the guardian possesses special expertise in child psychology or child-care, greater evidentiary weight might be lent to his or her testimony.[30] However, such a result was not required as a matter of law.[31]

The supreme court declined to conclude that the trial justice had overlooked the evidence in the guardian's report, despite the fact that the trial justice's decision did not specifically refer to the report.[32] Moreover, the supreme court explained that because the trial justice did not find changed circumstances, and the guardian's report did not address that issue, the trial justice had no cause to refer to the report when rendering his decision.[33] Because the trial justice was not required to give more weight to the guardian's recommendations, the Rhode Island Supreme Court denied and dis-

23. *See id.* (citing Parillo v. Parrillo, 495 A.2d 683, 686 (R.I. 1985)).
24. *Id.* (citing Lembo v. Lembo, 677 A.2d 414, 417 (R.I. 1996)).
25. *See id.* (citing *Parillo*, 495 A.2d at 686).
26. *See id.* at 1083-84.
27. *See id.* at 1084.
28. *See id.*
29. *See id.* (citing Richelson v. Richelson, 536 A.2d 176, 180 (N.H. 1987)).
30. *See id.*
31. *See id.*
32. *See id.*
33. *See id.*

missed the plaintiff's appeal and affirmed the order of the family court.[34]

CONCLUSION

The Rhode Island Supreme Court concluded that Rhode Island law does not require that a trial justice give greater weight to the recommendations or report of a guardian ad litem than to other evidence presented at a hearing to modify a child custody arrangement. The decision at such a hearing is based on whether there are changed circumstances from those that existed when the court made its previous custody decision, and not on the recommendation of the guardian ad litem.

Jennifer K. Towle

34. *See id.*

Family Law. *Lembo v. Lembo,* 729 A.2d 209 (R.I. 1999). Automatic stay provision of family court does not allow alleged contemnor to avoid appearance at show cause hearing. Procedural due process safeguards attach to contempt proceedings where alleged contemnor is absent. Only the alleged contemnor may exercise waiver of the safeguards.

FACTS AND TRAVEL

Donald and Carolyn Lembo were divorced after thirteen years of marriage in August of 1994.[1] The family court entered the final judgment of divorce and issued a number of accompanying orders.[2] Thereafter, Donald Lembo (Donald) made a habit of appealing any order issued by a family court justice.[3] In order to avoid compliance with any pending orders, he invoked Rule 62(d) of the Family Court Rules of Procedure for Domestic Relations, the automatic stay provision.[4] A frustrated trial justice held that Donald was abusing the appellate process and sanctioned him by ordering him to pay almost $40,000.[5]

In addition to the monetary sanction, the justice also ordered Donald to comply with all future orders, minus those subject to an appeal, within 45 days.[6] Donald was also required to appear at a show cause hearing on why he should not be incarcerated.[7] Donald appealed.[8]

Donald failed to appear at the show cause hearing.[9] The presiding justice declared Donald to be in contempt and continued the hearing to the following day so that Donald could be heard on why he failed to appear.[10] Again, Donald failed to appear at the hearing.[11] Instead, his counsel appeared and argued on Donald's behalf that he should not be required to appear because of the

1. *See* Lembo v. Lembo, 677 A.2d 414, 416 (R.I. 1996).
2. *See* Lembo v. Lembo, 729 A.2d 209, 210 (R.I. 1999).
3. *See id.*
4. *See id.*; R.I. Fam. Ct. R. P. 62(d).
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*

automatic stay.[12] The trial justice disagreed and held Donald in contempt.[13] As punishment, he imposed a six-month sentence of imprisonment.[14] Donald appealed both the contempt finding and the sentence.[15]

ANALYSIS AND HOLDING

The supreme court first resolved the frustration of the family court by addressing Donald's use of the automatic stay provision to avoid appearance on the contempt issue.[16] The court held that an appeal from a substantive order does not act to stay a hearing.[17] Nevertheless, the per curiam opinion of the Rhode Island Supreme Court found the family court's contempt finding infirm.[18]

The court then examined whether Donald's alleged contemptuous conduct was properly addressed by the family court.[19] In order to do so, they drew on the principles announced in *Peltier v. Peltier*.[20] In *Peltier*, an attorney failed to appear on time for a scheduled hearing.[21] In his absence, the trial justice adjudged him in contempt, and he was subsequently punished.[22] On review, the Rhode Island Supreme Court enunciated some basic principles applicable to contempt findings.[23] First, the *Peltier* court found that because the attorney was not present at the time of his contempt (i.e., his absence was the contempt), it was not direct contempt.[24] Direct contempt could only be committed in the "immediate view and presence of the court. . . ."[25] Second, because the attorney's conduct amounted to indirect contempt done outside of the court's presence, the attorney was entitled to a hearing prior to punishment.[26] The reasoning behind the distinction is that, in cases of

12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.*
20. 388 A.2d 22, 23 (R.I. 1978).
21. *See id.*
22. *See id.*
23. *See id.*
24. *See id.*
25. *Id.*
26. *See id.* at 23-24.

direct contempt, the court has personal knowledge and no other evidence is necessary.[27] Absent this personal knowledge, due process requires a hearing.[28]

The court in *Lembo* explained that these principles apply to an indirect contempt finding in the family court.[29] Therefore, Donald was entitled to "be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation" before he could be adjudged in contempt.[30] Further, the court found that these safeguards may only be waived by the appearance of the person allegedly in contempt and not by his attorney.[31] Therefore, the appearance of Donald's attorney did not act as a due process waiver.[32] The court remanded the case to the family court to afford Donald his due process rights.[33]

CONCLUSION

This case is an important statement of constitutional guarantees that must be afforded by the family court. Before a criminal contempt finding of the family court may stand, the person allegedly in comptempt must be afforded due process. Due process requires an evidentiary hearing before a contemnor can be found guilty when the charge is made in contemnor's absence.

Carly E. Beauvais

27. *See id.* at 24.
28. *See id.*
29. *See Lembo*, 729 A.2d at 211.
30. *Id.* (quoting *In re* Oliver, 333 U.S. 257, 275 (1948)).
31. *See id.*
32. *See id.*
33. *See id.*