STATE OF NEW HAMPSHIRE

SUPREME COURT

2017-0518

In the matter of

ERIC MCANDREWS

and

SACHET WOODSON

APPEAL FROM A DECISION ON THE MERITS
IN 9TH CIRCUIT – NASHUA FAMILY DIVISION COURT

BRIEF FOR PETITIONER/APPELLANT

Respectfully Submitted,

ERIC MCANDREWS

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Oral Arguments by Jennifer E. Warburton

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   Preserved: *Trial* at 8, 9; ORDER (June 26, 2017), *Brief Addendum* at 32; MOTION TO RECONSIDER (July 6, 2017), *Appendix* at 32; PETITIONER'S RESPONSE TO OBJECTION TO MOTION TO RECONSIDER (July 17, 2017), *Appendix* at 53.

2. Whether the trial court erred or abused its discretion in denying jurisdiction by determining that RSA 458-A:18 makes Indiana a more appropriate forum. The decision below conflicts with a statute and with prior decisions of this Court.
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   Preserved: ORDER (June 26, 2017), *Brief Addendum* at 32; MOTION TO RECONSIDER (July 6, 2017), *Appendix* at 32.

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   Preserved: ORDER (June 26, 2017), *Brief Addendum* at 32; PETITIONER'S RESPONSE TO OBJECTION TO MOTION TO RECONSIDER (July 17, 2017), *Appendix* at 53.

STATUTES

RSA 458-A:1 Uniform Child Custody Jurisdiction and Enforcement Act Definitions

See *Appendix* at 68

RSA 458-A:12 Initial Child-Custody Jurisdiction. –

I. Except as otherwise provided in RSA 458-A:15, a court of this state has jurisdiction to make an initial child-custody determination only if:

(a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.

(b) A court of another state does not have jurisdiction under subparagraph (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under RSA 458-A:18 or RSA 458-A:19, and:

(1) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(2) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

(c) All courts having jurisdiction under subparagraph (a) or (b) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under RSA 458-A:18 or RSA 458-A:19.

(d) No court of any other state would have jurisdiction under the criteria specified in subparagraph (a), (b), or (c).

II. Paragraph I is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.

III. Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

RSA 458-A:13 Exclusive, Continuing Jurisdiction. –

I. Except as otherwise provided in RSA 458-A:15, a court of this state which has made a child-custody determination consistent with RSA 458-A:12 or RSA 458-A:14 has exclusive, continuing jurisdiction over the determination until:

(a) A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(b) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

II. A court of this state which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under RSA 458-A:12.

RSA 458-A:14 Jurisdiction to Modify Determination. –

Except as otherwise provided in RSA 458-A:15, a court of this state may not modify a child-custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under RSA 458-A:12, I(a) or (b) and:

I. The court of the other state determines it no longer has exclusive, continuing jurisdiction under RSA 458-A:13 or that a court of this state would be a more convenient forum under RSA 458-A:18; or

II. A court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

RSA 458-A:18 Inconvenient Forum. –

I. A court of this state which has jurisdiction under this chapter to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

II. Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(b) The length of time the child has resided outside this state;

(c) The distance between the court in this state and the court in the state that would assume jurisdiction;

(d) The relative financial circumstances of the parties;

(e) Any agreement of the parties as to which state should assume jurisdiction;

(f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(h) The familiarity of the court of each state with the facts and issues in the pending litigation.

III. If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

IV. A court of this state may decline to exercise its jurisdiction under this chapter if a child-custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

RSA 546-B:7 Continuing, Exclusive Jurisdiction To Modify Child Support Order. –

I. A tribunal of this state that has issued a support order consistent with the law of this state has and shall exercise continuing, exclusive jurisdiction to modify its child support order if the order is the controlling order and:

(a) At the time of the filing of a request for modification this state is the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or

(b) Even if this state is not the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued, the parties consent in a record or in open court that the tribunal of this state may continue to exercise jurisdiction to modify its order.

II. A tribunal of this state that has issued a child support order consistent with the law of this state may not exercise continuing exclusive jurisdiction to modify the order if:

(a) All of the parties who are individuals file consent in a record with the tribunal of this state that a tribunal of another state that has jurisdiction over at least one of the parties who is an individual or that is located in the state of residence of the child may modify the order and assume continuing, exclusive jurisdiction; or

(b) Its order is not the controlling order.

III. If a tribunal of another state has issued a child support order pursuant to the Uniform Interstate Family Support Act or a law substantially similar to that act, which modifies a child support order of a tribunal of this state, tribunals of this state shall recognize the continuing, exclusive jurisdiction of the tribunal of the other state.

IV. A tribunal of this state that lacks continuing, exclusive jurisdiction to modify a child support order may serve as an initiating tribunal to request a tribunal of another state to modify a support order issued in that state.

V. A temporary support order issued ex parte or pending resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in the issuing tribunal.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The parties are parents of a five-year-old daughter, Delilah; they have never been married. The parties negotiated and filed a New Hampshire Joint Parenting Plan on January 13, 2014 when their daughter was eleven months old. *Appendix* at 4. In that Parenting Plan, the parties anticipated that when their daughter became closer to school age, the Parenting Plan would need to be modified. *Appendix* at 10. The Petitioner agreed to the immediate relocation of Delilah to the State of California only after Respondent agreed that the State of New Hampshire would retain jurisdiction for the anticipated modification of the Parenting Plan. *Appendix* at 10.

The Petitioner, Mr. McAndrews, has never moved from the State of New Hampshire since the original Parenting Plan was adopted in 2014. *Appendix* at 33. Mr. McAndrews exercises significant parenting time and has had Delilah living with him in New Hampshire for twenty of the forty-five months since Delilah relocated from the State of New Hampshire. *Appendix* at 33. Mr. McAndrews and Delilah have maintained on-going, significant connections with New Hampshire, specifically, Delilah has a doctor, dentist, pre-school, gymnastics class, and extended family who can provide information concerning the child's care and well-being. *Appendix* at 33. Mr. McAndrews has met all the statutory conditions for RSA 458-A:13, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) statute for parenting plan modifications, to provide New Hampshire with exclusive, continuing jurisdiction for the parenting plan modification. *Appendix* at 33.

On March 6, 2017, in New Hampshire, Mr. McAndrews filed a Petition to Change Court Order in New Hampshire to begin the modification process as originally anticipated. *Appendix* at 19. The Respondent, Ms. Woodson, now in Indiana after moving from California to Indiana at the beginning of 2016, was duly served notice of the March 6, 2017 New Hampshire petition to

modify in Indiana on April 18, 2017.

One week later, on April 25, 2017, in Indiana, Ms. Woodson filed a "Verified Petition for Custody and to Establish Parenting Time" in which Ms. Woodson does not inform the Indiana court that there was already a New Hampshire Parenting Plan that had been in force since January 2014. *Appendix* at 23. Further amplifying the misrepresentation of the custody status to the Indiana court, Ms. Woodson's Verified Petition quoted and relied on the Indiana UCCJEA statutes for initial parenting plans rather than the statutes for modifications. *Appendix* at 23.

On April 27, 2017, in New Hampshire, Ms. Woodson filed a Motion to Dismiss in which she incorrectly argued that pursuant to RSA 458-A:1, the "home state" of the child should have jurisdiction. *Appendix* at 26. RSA 458-A:1 defines the terms used in the New Hampshire RSA 458-A UCCJEA statutes but the "home state" test is only used for initial parenting plan determinations (*Appendix* at 69), not parenting plan modifications (*Appendix* at 70).

On May 3, 2017 a hearing was held in New Hampshire on the Petition to Modify and Motion to Dismiss and on June 23, 2017 an Order was issued dismissing the New Hampshire action. *Addendum* at 32. The Order found that Indiana is the child's home state and that both states have jurisdiction and the court applied a "more significant connection" finding to the child to dismiss New Hampshire jurisdiction. *Addendum* at 32-33.

On July 6, 2017, Mr. McAndrews filed a Motion to Reconsider. *Appendix* at 32. On July 11, 2017 Ms. Woodson filed an Objection to the Motion to Reconsider (*Appendix* at 46) and on July 17, 2017 Mr. McAndrews filed a Response to Objection to Motion to Reconsider (*Appendix* at 53). On August 21, 2017, an Order was issued denying the Motion to Reconsider. *Addendum* at 34.

In Indiana, a status hearing was held on January 26, 2018. While the Order from that hearing has not yet been issued, Mr. McAndrews' counsel in Indiana represented that from the bench the judge stated that she wanted to await the outcome from the New Hampshire appeal before proceeding with further hearings in Indiana.

SUMMARY OF ARGUMENT

A New Hampshire court made the initial parenting plan determination for these parents. *Appendix* at 4. Since Delilah maintained significant connections with this state, exclusive, continuing jurisdiction over this matter was preserved under RSA 458-A:13 and New Hampshire continues to have subject matter jurisdiction over this matter for future modifications. *Appendix* at 70

In its Final Order after a hearing on the Motion to Dismiss, the lower court conducted a partial Inconvenient Forum analysis under RSA 458-A:18, but never stated in the Order that New Hampshire was inconvenient and that Indiana was more appropriate. *Addendum* at 32. RSA 458-A:18 requires a two-step analysis before it can decline to exercise jurisdiction. Specifically, RSA 458-A:18 states, "A court of this state which has jurisdiction under this chapter to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances *and* that a court of another state is a more appropriate forum." [emphasis added] *Appendix* at 73. There is no language in the Final Order that the two-step inconvenient forum analysis required by RSA 458-A:18 was completed and there was no specific determination that the proceedings were being stayed pursuant to RSA 458-A:18.

Further, in their initial Parenting Plan, the parents had agreed to, and the lower court subsequently ordered, a forum agreement clause in which the parents determined that New Hampshire is to "retain jurisdiction over the child for future modifications." *Appendix* at 10. New Hampshire statute RSA 508-A:2 and this Court's precedent hold that forum agreement clauses are presumptively enforceable and the negotiated initial parenting plan's forum agreement clause should be upheld. *Appendix* at 81 and 107.

Additionally, the expediency goals of UCCJEA are supported by keeping UCCJEA jurisdiction in the same state that has Uniform Interstate Family Support Act ("UIFSA") jurisdiction, so long as custody subject matter jurisdiction is also in that state. *Appendix* at 90. New Hampshire has jurisdiction over Mr. McAndrews for purposes of his support order. Since New Hampshire also has subject matter jurisdiction, it is more expedient for New Hampshire to also keep UCCJEA jurisdiction over Mr. McAndrews' parenting plan orders.

In the Final Order of the lower court, the "home state" test for *initial* custody determinations was mistakenly used for determining jurisdiction in a custody modification. *Addendum* at 31. Under UCCJEA, there is no "home state" analysis for parenting plan modifications. *Appendix* at 70.

In the Final Order, the court erroneously conflated the test for exclusive, continuing jurisdiction with the analysis to determine the more appropriate forum. *Addendum* at 33. The lower court stayed the action based on a determination that Delilah had "more significant connections" with Indiana, (*Addendum* at 33) but that language references the test for exclusive, continuing jurisdiction for the state which created the initial parenting plan per RSA 458-A:13, a test which earlier in the Order the lower court already determined was met by New Hampshire (*Addendum* at 32). It is unknown whether the lower court stayed the proceeding based on the Inconvenient Forum analysis or based on lack of subject matter jurisdiction since the language from both tests are conflated and intermingled in the Final Order. *Addendum* at 32-33. Further, with an accurate separation of the tests for exclusive jurisdiction to modify and the test for inconvenient forum, and considering the freely negotiated forum selection clause between these parents, the lower court's order granting the Respondent's Motion to Dismiss should be reversed.

ARGUMENT

I. RSA 458-A:13 GRANTS NEW HAMPSHIRE "EXCLUSIVE, CONTINUING JURISDICTION" TO MODIFY A PARENTING PLAN THAT WAS CREATED HERE BECAUSE SIGNIFICANT CONNECTIONS HAVE BEEN MAINTAINED WITH THE STATE OF NEW HAMPSHIRE

In January 14, 2014, the New Hampshire trial court ordered an initial, final parenting plan for the parties. *Appendix* at 4. On March 6, 2017, Mr. McAndrews filed in New Hampshire to modify that parenting plan because under RSA 458-A:13, New Hampshire has exclusive, continuing jurisdiction for custody modifications of parenting plans that were made in this state. *Appendix* at 19.

Under New Hampshire's UCCJEA statutes, the first step in determining whether a parenting plan modification should be made in a New Hampshire court is to determine whether New Hampshire continues to have subject matter jurisdiction over the parenting plan. RSA 458-A:13 provides that except in cases of emergency, "[a] court of this state which has made a child-custody determination consistent with RSA 458-A:12 [providing for jurisdiction to make initial child-custody determination] or RSA 458-A:14 [dealing with jurisdiction to modify a child custody determination made by a court of another state] has exclusive, continuing jurisdiction over the determination" for custody modifications. *Appendix* at 69-71. Further, this exclusive, continuing jurisdiction to modify custody determinations shall continue until: "Neither the child, nor the child and one parent … have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships…." RSA 458-A:13. *Appendix* at 70.

Exclusive, continuing jurisdiction to govern custody modifications was adopted by New Hampshire "to achieve greater stability of custody arrangements and avoid forum shopping" by

parties dissatisfied with the custody outcome in one state; such forum shopping kept the "lives of the affected children in constant turmoil." *Clarke v. Clarke*, 126 N.H. 753, 756 (1985). *Appendix* at 96.

The child must have a "significant connection" with a state for that state to keep exclusive, continuing jurisdiction for custody modifications. The State of New Hampshire and a majority of jurisdictions have concluded that a child has a "significant connection" with a state when one parent resides and "exercises at least some parenting time" there, "even if the child has acquired a new home State." *In re Sheys and Blackburn,* 168 N.H. 35, 38 (2015). *Appendix* at 93.

In this matter, exclusive, continuing jurisdiction in New Hampshire should continue because the initial parenting plan was established in New Hampshire on January 14, 2014. *Appendix* at 4. The father, Mr. McAndrews, still lives in New Hampshire and Delilah is here for significant parenting time, parenting time that has amounted to Delilah living in this state for approximately twenty of the forty-five months since the child relocated from New Hampshire. *Appendix* at 33. Pursuant to the Parenting Plan in this matter, Delilah lives in the state of New Hampshire with her father every June, July, and August, as well as for the months of February and December in alternating years. In addition to the time allocated in the Parenting Plan, Delilah has lived here for additional months as requested by Ms. Woodson.

Additionally, exclusive, continuing jurisdiction in New Hampshire should continue because there is substantial evidence in New Hampshire about Delilah's care, protection, training, and personal relationships. *Appendix* at 33-34. Delilah has active, regular visits with her pediatrician, dentist, and eye doctor in New Hampshire. *Appendix* at 33. In New Hampshire, Delilah has weekly gymnastics classes, preschool twice a week, and child care at the YMCA; all places where Delilah is cared for and where she is known by name. *Appendix* at 34. Further

substantial evidence for the Delilah's personal relationships in New Hampshire are the many family members and friends that Delilah has here. *Appendix* at 34. Delilah has extended family members who provide weekly care for Delilah and would be able to provide substantial information about the Delilah's well-being. *Appendix* at 34.

Additionally, exclusive, continuing jurisdiction in this matter should remain in New Hampshire because of the actions by Ms. Woodson to forum shop. On March 6, 2017, Mr. McAndrews filed in New Hampshire for the custody modification (*Appendix* at 19) and Ms. Woodson was served notice on April 18, 2017. (*Appendix* at 130). The next week after service, on April 24, 2017, in Indiana, Ms. Woodson filed a "Verified Petition for Custody and to Establish Parenting Time." *Appendix* at 23. In this Indiana Verified Petition, Ms. Woodson never acknowledged to the Indiana court that there was already a New Hampshire Parenting Plan that had been in force since January 2014 or that Mr. McAndrews had seven weeks earlier filed for a modification of the original plan. *Appendix* at 23. Further amplifying the confusion to the Indiana court, Ms. Woodson's Verified Petition quoted and relied on the Indiana UCCJEA statutes for *initial* parenting plans, Indiana Code §31-21-5-1, rather than the Indiana statutes that govern modifications, I.C. §31-21-5-3. *Appendix* at 23-24, 74-75.

Further, pursuant to the RSA 458-A:13 language itself, the jurisdiction conferred on the state which made a child-custody determination has *exclusive* jurisdiction. [emphasis added] *Appendix* at 70. Relying on the plain meaning of a word, the word "exclusive" in the context of exclusive jurisdiction means it is the only state with jurisdiction; jurisdiction for modifications is not shared. However, the lower court in this matter stated, "This count finds that, statutorily, each court has jurisdiction." *Transcript* at 12, *Addendum* at 32. This statement from the lower court claiming shared jurisdiction is contrary to the meaning of "exclusive" and contrary to this

Court's language in *Clarke* which further amplified the exclusivity of jurisdiction. This Court stated, "In short, although more than one State may have initial jurisdiction, 'there is no concurrent jurisdiction to modify a decree under the act.'" (*Clarke*, 756, citing *Neger* v. *Neger*, 459 A.2d at 635, 636.) *Appendix* at 96.

Under all other factors of law and specific facts of this matter, New Hampshire should have exclusive, continuing jurisdiction for this custody modification for these parties. Jurisdiction to modify remains with New Hampshire because this state made the initial custody determination and because Mr. McAndrews' continued presence in New Hampshire, his exercising significant parenting time which creates a significant connection to New Hampshire for Delilah, and because of the availability of substantial evidence concerning Delilah's well-being in New Hampshire provides the State of New Hampshire exclusive, continuing jurisdiction over child-custody modifications for Delilah. This jurisdiction to modify a previous parenting plan determination is exclusive and not shared.

II. THE TWO-STEP INCONVENIENT FORUM ANALYSIS REQUIRED BY RSA 458-A:18 WAS NOT COMPLETED AND NEW HAMPSHIRE WAS NOT FOUND TO BE AN INCONVENIENT FORUM AS REQUIRED BY THE STATUTE.

In order for an UCCJEA proceeding to be stayed for Inconvenient Forum grounds, a two-step analysis is to be completed wherein this state is found to be inconvenient and the other state is found to be more appropriate based on the factors in RSA 458-A:18. *Appendix* at 73. There is no language in the Order stating that New Hampshire is inconvenient and no language determining Indiana is more appropriate. *Addendum* at 32-33.

Once subject matter jurisdiction over a custody modification is determined under RSA 458-A:13, a court has the option to perform an inconvenient forum analysis under RSA 458-A:18. *Appendix* at 73. This New Hampshire UCCJEA statute, and the Uniform Child Custody Jurisdiction Act ("UCCJA") statute previously, provide a two-step test whereby a court can determine that even though it has subject matter jurisdiction for the custody modification, it can stay the proceedings if the court finds that 1) this state is inconvenient and 2) another state is a more appropriate forum. *Appendix* at 73. In relevant part, RSA 458-A:18,III states, "If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings." *Appendix* at 73.

This Court also noted the two-step aspect of the inconvenient forum analysis when this Court determined that a "court that has jurisdiction, however, may decline to exercise that jurisdiction 'if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum.'" *In re Yaman*, 167 N.H. 82, 88 (2014), citing RSA 458-A:18. [emphasis added] *Appendix* at 120. *Yaman* sets forth the same two-step test as stated in the RSA 458-A:18 Inconvenient Forum statue. The statute and this Court direct that

before dismissing an action as an inconvenient forum, the court must find that 1) another state is more appropriate and 2) this state is inconvenient.

In the required analysis of the step to determine whether another state is more appropriate, the analysis shall be based on the factors in RSA 458-A:18, II.

RSA 458-A:18, II states in relevant part:

> II. Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:
>
> (a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (b) The length of time the child has resided outside this state;
>
> (c) The distance between the court in this state and the court in the state that would assume jurisdiction;
>
> (d) The relative financial circumstances of the parties;
>
> (e) Any agreement of the parties as to which state should assume jurisdiction;
>
> (f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
>
> (g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (h) The familiarity of the court of each state with the facts and issues in the pending litigation.

Of these first-step analysis factors, at issue in this matter is the agreement the parties made as to which state would have jurisdiction. *Appendix* at 10. The original parenting plan was negotiated, jointly submitted, and approved in January 2014. In this parenting plan the parties already anticipated that 1) the mother would be moving to California with Delilah; 2) when Delilah became closer to school age the parenting schedule would need to be modified; and 3) New Hampshire would retain jurisdiction for that modification. *Transcript* at 7, *Appendix* at 10. Specifically, the parties wrote, "Sachet shall be allowed to remove Delilah from New Hampshire on 1/31/2014 to California. Further relocations must be approved by the Court. New Hampshire

shall retain jurisdiction over the child for future modifications." (Parenting Plan, January 13, 2014, Paragraph F). *Appendix* at 10. This was a known and anticipated issue in the parenting plan and the parties agreed upon keeping jurisdiction in New Hampshire. Mr. McAndrews relied in good faith on the negotiated terms of the parenting plan when he agreed for Delilah to relocate to California with Ms. Woodson. *Appendix* at 36.

Also of the above factors, at issue in this matter is the length of time Delilah has resided out of the state. Though Delilah moved with Ms. Woodson in 2014, Delilah has been living with her father in New Hampshire for what amounts to nearly fifty percent of the time. *Transcript* at 8, *Appendix* at 33.

Also at issue in this matter is the nature and location of evidence required to resolve the modification of the parenting plan. Delilah has a pediatrician, a dentist, an eye doctor, teachers, coaches, day care providers, and fully-engaged members of her extended family in New Hampshire to provide the evidence needed to understand Delilah's best interests and determine the modifications needed in the parenting plan to support Delilah as she enters school age. *Transcript* at 8.

Also of the above factors, at issue in this matter is the familiarity of the court of each state with the facts and issues in the pending litigation. New Hampshire has been the only state in which matters have been heard to completion in the parenting of Delilah. *Appendix* at 37. The New Hampshire court was the court to approve and adopt the original parenting plan. *Appendix* at 4. The New Hampshire court was also the court that heard and ordered a modification to the Uniform Support Order on April 7, 2015. *Appendix* at 127.

While the evaluation of the required "more appropriate" factors was noted, not only do the weight of the factors swing in favor of determining that New Hampshire is the more

appropriate forum, but only step one of the two-step analysis was discussed. The two-step analysis directed by RSA 458-A:18 requires, specifically, that a court must find that its own state is an inconvenient forum and it also must find that the other state is a "more appropriate forum." RSA 458-A:18,I. The requisite two-steps are again reiterated in RSA 458-A:18,III by stating that a court has authority to dismiss "[i]f a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum…." [emphasis added] *Appendix* at 73.

In this matter, the lower court did not complete the two-step analysis as required by the statute. The lower court identified that it needed to "determine whether [New Hampshire] is the better venue or an inconvenient forum" [emphasis added] whereas the statutory test in actuality should have been whether New Hampshire is an inconvenient forum and whether Indiana is more appropriate. Further, no analysis is given that contemplates any inconvenient forum analysis outside of the "more appropriate" factors. *Appendix* at 36.

The inconvenient forum statute requires a two-step analysis. The lower court failed to find that New Hampshire is inconvenient when it only analyzed whether Indiana was a more appropriate forum.

III. THE PARTIES AGREED AND THE COURT SUBSEQUENTLY ORDERED A FORUM AGREEMENT CLAUSE IN WHICH THE PARTIES DETERMINED THAT NEW HAMPSHIRE IS TO "RETAIN JURISDICTION OVER THE CHILD FOR FUTURE MODIFICATIONS."

Paragraph F of the Parenting Plan specifically provides for the State of New Hampshire to retain jurisdiction for future custody modifications. *Transcript* at 7, *Appendix* at 10.

The New Hampshire Supreme Court specifically found in *In the Matter of Glenda J. Ball and Frank A. Ball*, 123 A.3d 719 (N.H. 2015) that the parties agreed that "New Hampshire law would apply" for their support modification under UIFSA and that agreement between the parties was enough to overcome the initial state's UIFSA "continuing, exclusive jurisdiction over" the matter. (Id. 723) *Appendix* at 113-114.

New Hampshire, and many other states, "have treated [forum selection] clauses as presumptively enforceable absent some countervailing reason making enforcement unreasonable." *Hansa Consult of North America, LLC v. Hansaconsult Ingenieurgesellschaft mbH*, 163 N.H. 46, 52 (N.H. 2011). *Appendix* at 109. In *Hansa*, the Court states, "The starting point in analyzing the scope and application of a forum selection clause is the language of the clause itself." *Id. Appendix* at 109.

New Hampshire's treatment of forum selection clauses as presumptively enforceable has been codified in RSA 508-A:2, which states in its entirety:

> I. If the parties have agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state will entertain the action if:
>
> (a) the court has power under the law of this state to entertain the action;
>
> (b) this state is a reasonably convenient place for the trial of the action;
>
> (c) the agreement as to the place of the action was not obtained by

misrepresentation, duress, the abuse of economic power, or other unconscionable means; and

(d) the defendant, if within the state, was served as required by law of this state in the case of persons within the state or, if without the state, was served either personally or by registered mail directed to his last known address.

II. This section does not apply to the appointment of an agent for the service of process pursuant to statute or court orders. *Appendix* at 81.

In the January 14, 2014 Parenting Plan, the parties willingly, with representation by counsel, and with full awareness of Delilah's anticipated move to another state, submitted to the court a Parenting Plan stating that New Hampshire law shall apply to future modifications for Delilah. *Transcript* at 7, *Appendix* at 10. Specifically, the parties wrote, "Sachet shall be allowed to remove Delilah from New Hampshire on 1/31/2014 to California. Further relocations must be approved by the Court. New Hampshire shall retain jurisdiction over the child for future modifications." (Parenting Plan, January 13, 2014, Paragraph F). *Appendix* at 10 and 56. This was a known and anticipated issue in the Parenting Plan and the parties agreed upon keeping jurisdiction in New Hampshire. Mr. McAndrews relied in good faith on the negotiated terms of the parenting plan in agreeing for Delilah and Ms. Woodson to relocate.

In New Hampshire, forum selection clauses are presumptively enforceable. The specific language of the forum selection clause in this matter is clear that the parties had agreed for jurisdiction to remain in New Hampshire for all custody modifications for Delilah.

IV. THE GOALS OF UCCJEA ARE SUPPORTED BY KEEPING UCCJEA JURISDICTION IN THE SAME STATE THAT HAS UIFSA JURISDICTION, SO LONG AS SUBJECT MATTER JURISDICTION IS ALSO IN THAT STATE

Parenting matters before the court often involve both custody orders and support orders. As long as it has subject matter jurisdiction, a state should keep jurisdiction over custody orders under UCCJEA if it also has jurisdiction over support orders under UIFSA in the same matter. *Appendix* at 55.

"When interpreting a uniform law, such as UIFSA, 'the intention of the drafters of a uniform act becomes the legislative intent upon enactment.'" *In re Ball, 723,* citing *Hennepin County v. Hill,* 777 N.W.2d 252, 256 (Minn. Ct.App. 2010). *Appendix* at 114. "We also rely upon the official comments to UIFSA." *Id. Appendix* at 114.

In the official comments to UCCJEA Section 207, the comments provide preferential guidance that support the overall goals for UCCJEA. The comment states, "If one State has jurisdiction to decide both the custody and support issues, it would be desirable to determine that State to be the most convenient forum." (UCCJEA § 207, comment) *Appendix* at 55 and 90.

Pursuant to RSA 458-A:18, II(g), an appropriate forum for custody modifications will be a court that can "decide the issue expeditiously." In deciding issues expeditiously, and in following the goals noted in the UCCJEA official comment above, it is preferred for the state with continuing, exclusive authority to modify a support order under the Uniform Interstate Family Support Act (UIFSA) to also maintain jurisdiction to modify a custody plan. *Appendix* at 55.

Therefore, in a given custody modification matter, if UCCJEA subject matter jurisdiction is in a particular state, and if that same state also has UIFSA jurisdiction in that matter, then

UCCJEA goals for expeditious modifications will be better met for that state to keep the UCCJEA modification.

On April 7, 2015 a New Hampshire court did in fact find jurisdiction over the parties to modify the Uniform Support Order on Mr. McAndrews, the obligor. *Appendix* at 128. The New Hampshire court accepted jurisdiction over the support order in this matter and held a review hearing on March 24, 2015, in which Ms. Woodson participated telephonically from California. *Appendix* at 127. The New Hampshire court then issued a Uniform Support Order on April 7, 2015, over which the New Hampshire court continues to have jurisdiction.

Since there is subject matter jurisdiction under UCCJEA in this matter, jurisdiction for parenting and jurisdiction for support orders should be in the same state. If Indiana has jurisdiction over the parenting plan and New Hampshire has jurisdiction over the support order, there is a probability that should Indiana modify the parenting plan, the support order in this matter will also need modification. Such an outcome keeps Mr. McAndrews litigating in Indiana for the custody modifications and litigating in New Hampshire for the support order. Litigating in two states lacks judicial economy, is not efficient for both parents, and is a severe financial burden on this family, which, as noted by the lower court, is not wealthy. *Addendum* at 33.

Since New Hampshire maintains continuing, exclusive jurisdiction for Mr. McAndrews' Uniform Support Order under UIFSA, and since the lower court found that New Hampshire does still maintain subject matter jurisdiction under RSA 458-A:13, New Hampshire should therefore also maintain jurisdiction for Mr. McAndrews' Parenting Plan modification.

V. THE "HOME STATE" TEST FOR *INITIAL* CUSTODY DETERMINATIONS WAS MISTAKENLY USED FOR DETERMING JURISDICTION IN A CUSTODY MODIFICATION.

Under UCCJEA, there is no "home state" test for parenting plan modifications. The "home state" test is only for initial custody determinations. This matter involves a parenting plan modification and as such the lower court erred when it incorporated the "home state" test, which is reserved solely for determining jurisdiction for an initial parenting plan, in its Order. The Final Order from the lower court held that Indiana is Delilah's home state. *Addendum* at 32.

In re Sheys and Blackburn, 168 N.H. 35, 38 (2015) provides in part, that "even if the child has acquired a new home State, the original decree State retains exclusive, continuing jurisdiction, so long as the general requisites of the 'substantial connection' jurisdiction provisions of Section 201 [of the UCCJEA] are met.'" *Appendix* at 37 and 93.

Supporting this principle in *Sheys*, the Court in *Clarke*, speaking of UCCJA, stated that "initial jurisdiction and modification jurisdiction are governed by different standards. 'Initial jurisdiction is primarily in the home state of the child' while '[j]urisdiction to modify an existing custody decree is reserved for the state that rendered the decree.'" *Clarke*, 755. *Appendix* at 37 and 96.

Similarly, RSA 458-A:1 defines "home state" for the purposes of UCCJEA. *Appendix* at 68. However, the term "home state" is only used in RSA 458-A:12 *Initial* Child-Custody Jurisdiction. *Appendix* at 69. "Home state" is not a factor in RSA 458-A:13, which controls modifications. *Appendix* at 70. As noted in *Sheys* and *Clarke* above, the home state of the child is vital for *initial* child-custody determinations but a different standard is used for *modifications* of child custody. *Appendix* at 37.

In this matter, the trial court order stated that, "This court finds that, statutorily, each court has jurisdiction. [Indiana] is the child's home state as defined by UCCJEA." *Addendum* at 32. This conclusion contained in the trial court order runs counter to RSA 458-A:12 Initial Child-Custody Jurisdiction and RSA 458-A:13, which gives exclusive, continuing jurisdiction for custody modifications. Statutorily, the "home state" test only applies to initial custody determinations and is not a test for modifications. *Appendix* at 37-38.

Pursuant to RSA 458-A:13, exclusive, ongoing jurisdiction should continue in New Hampshire and it is not relevant for a modification that the child has a different home state. The "home state" evaluation would have only applied in this matter when in 2014 the initial custody determination was made for these parties. Pursuant to RSA 458-A:13 and pursuant to *Sheys,* the current home state of the child is not relevant for the custody modification.

VI. THE TEST FOR EXCLUSIVE, ONGOING JURISDICTION WAS CONFLATED WITH THE TEST FOR MORE APPROPRIATE FORUM WHEN THE LOWER COURT RELIED ON "SIGNIFICANT CONNECTIONS" BETWEEN THE CHILD AND THE STATE IN ANALYZING THE INCONVENIENT FORUM FACTORS.

In issuing its June 26, 2017 Order, the lower court conflated two separate and distinct tests from two separate statutes when it discussed "more appropriate forum" factors but based its conclusion on the terminology, "significant connection," which is only found in the "exclusive, continuing jurisdiction" test. The trial court concluded that "although the child has significant connection with [New Hampshire] as a result of parenting time, she has more significant connection with [Indiana]." (Order on Petition to Modify and Motion to Dismiss, June 26, 2017) *Addendum* at 32.

The term "significant connection" with regards parenting plan modifications under UCCJEA originates in RSA 458-A:13, I(a) in stating that the child and parent must "have a significant connection with this state" in order for a state to keep exclusive jurisdiction for purposes of a parenting modification. *Appendix* at 53-54.

As described by the New Hampshire Supreme Court, in discussing jurisdiction to modify a parenting plan under RSA 458-A:13,

> "significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside. Only when the child and all parties have moved away is deference to another state's continuing jurisdiction no longer required." *Clarke*, 757. *Appendix* at 97.

Using the test of significant connection, the State of New Hampshire has concluded that a child has a "significant connection" with a state when one parent resides and "exercises at least some parenting time" there. *Sheys*, 38. *Transcript* at 8, *Appendix* at 33 and 93.

In New Hampshire, "[i]n construing a court order, we look to the plain meaning of the words used in the document." *Appeal of Langenfeld*, 160 N.H. 85, 89 (2010). *Appendix* at 54.

In this matter, the terms in the trial court's order lead the analysis to the specific and distinct test for exclusive and continuing jurisdiction under RSA 458-A:13. The trial court language in this matter concluded that "although the child has significant connection with [New Hampshire] as a result of parenting time, she has more significant connection with [Indiana]." (Order on Petition to Modify and Motion to Dismiss, June 26, 2017) *Addendum* at 32. The plain meaning of the language used in the Order in this matter is that the decision was based on significant connections under RSA 458-A:13, I(a). *Appendix* 53-54.

Since the language used by the lower court to form its conclusion in the Order was language from RSA 458-A:13 and since the lower court had already determined that this state had subject matter jurisdiction, pursuant to RSA 458-A:13, and yet the lower court stayed the proceeding, it is unclear on which statute and under which test this matter was stayed. In this matter, exclusive, continuing jurisdiction in this state should continue because this state made the initial custody determination, the father, Mr. McAndrews, still lives in New Hampshire, Delilah lives here for significant parenting time, and continues to have significant connections to this state.

CONCLUSION

Under all other factors of law and specific facts of this matter, New Hampshire should have exclusive, continuing jurisdiction for this custody modification for these parties. Jurisdiction to modify remains with New Hampshire because this state made the initial custody determination and because Mr. McAndrews' continued presence in New Hampshire, his exercising significant parenting time which creates a significant connection to New Hampshire for Delilah, and because of the availability of substantial evidence concerning Delilah's well-being in New Hampshire provides the State of New Hampshire exclusive, continuing jurisdiction over child-custody modifications for Delilah. This jurisdiction to modify custody a determination is exclusive and not shared.

The inconvenient forum statute requires a two-step analysis. The lower court failed to find that New Hampshire is inconvenient when it only analyzed whether Indiana was a more appropriate forum.

In New Hampshire, forum selection clauses are presumptively enforceable. The specific language of the forum selection clause in this matter is clear that the parties had agreed for jurisdiction to remain in New Hampshire for all custody modifications for Delilah.

Since New Hampshire maintains continuing, exclusive jurisdiction for Mr. McAndrews' Uniform Support Order under UIFSA, and since the lower court found that New Hampshire does still maintain subject matter jurisdiction under RSA 458-A:13, New Hampshire should therefore also maintain jurisdiction for Mr. McAndrews' Parenting Plan modification.

Pursuant to RSA 458-A:13, exclusive, ongoing jurisdiction should continue in New Hampshire and it is not relevant for a modification that the child has a different home state. The "home state" evaluation would have only applied in this matter when in 2014 the initial custody

determination was made for these parties. Pursuant to RSA 458-A:13 and pursuant to *Sheys,* the current "home state" of the child is not relevant for the custody modification.

Since the language used by the lower court to form its conclusion was language from RSA 458-A:13 and since the lower court had already determined that this state had subject matter jurisdiction, pursuant to RSA 458-A:13, and yet the lower court stayed the proceeding, it is unclear on which statute and under which test this matter was stayed. In this matter, exclusive, continuing jurisdiction in this state should continue because this state made the initial custody determination, the father, Mr. McAndrews, still lives in New Hampshire, Delilah lives here for significant parenting time, and has significant connections to this state. The parties were represented by counsel when they negotiated and agreed that New Hampshire shall retain jurisdiction for all future modifications for these parents and Delilah. The lower court erred or abused its discretion when it denied jurisdiction for these parents.

REQUEST FOR ORAL ARGUMENT

Eric McAndrews requests that his attorney, Jennifer E. Warburton, be allowed oral argument because the UCCJEA RSA 458-A:13 Exclusive, Continuing Jurisdiction authority to modify a child custody order has been conflated with the UCCJEA RSA 458-A:12 Initial Child-Custody Jurisdiction "Home State" test. The resulting conflation, along with the lack of application of the forum agreement clause signed by the parties, has had significant family and financial implications.

Respectfully submitted,

Eric McAndrews
By His Attorneys,

Shanelaris & Schirch PLLC

Dated: February ___, 2018

_____
Jennifer E. Warburton, Esq. Bar 265800
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(603) 594-8300
35 East Pearl Street
Nashua, NH 03060

CERTIFICATIONS

I hereby certify that the decisions being appealed are addended to this brief. I further certify that on February ___, 2018, copies of the foregoing will be forwarded to the Respondent, Ms. Sachet Woodson, self-represented.

Dated: February ___, 2018

_____
Jennifer E. Warburton, Esq.

ADDENDUM

1. Order on Petition to Modify and Motion to Dismiss (June 26, 2017)
2. Order on Motion to Reconsider (August 24, 2017)

THE STATE OF NEW HAMPSHIRE

JUDICIAL BRANCH

Ninth Circuit-Family Division-Nashua

Docket No. 659-2014-DM-00016

In the Matter of: Eric McAndrews and Sachet Woodson

ORDER

The parties are the parents of a four year old daughter. In January 2014 they executed a final Parenting Plan that the court approved. Pursuant to its relevant terms the parties agreed that they would exercise joint decision-making responsibility for the child. Primary residential responsibility was awarded to the Petitioner "in California" (more on this later in the narrative). Respondent was awarded parenting time for the months of June, July and August each year. Beginning in 2015, he would have additional parenting time in February (odd numbered years) and December (even numbered years). Other relevant portions of the Plan read as follows: "Sachet shall be allowed to remove Delilah from New Hampshire on 1/31/2014 to California. Further relocations must be approved by the court. New Hampshire shall retain jurisdiction over the child for future modifications." (Parenting Plan, Paragraph F).

Later in 2014 Respondent attempted to modify the terms of the Plan. Petitioner participated at the hearing by telephone. The court denied Respondent's petition.

In March 2017 Respondent filed a petition seeking to modify the terms of the Plan so that he would have primary residential responsibility. He also requested a finding of contempt against Petitioner for allegedly not complying with the terms of the Plan. Petitioner filed a Motion to Dismiss alleging that NH does not have jurisdiction. Each party had counsel at the hearing.

The reliable evidence disclosed that Petitioner and child no longer reside in CA. They relocated to IN either in late 2015. She relocated without court approval as described in the Parenting Plan and apparently without Respondent's prior knowledge. It is evident, however, that even if Respondent had no prior knowledge of the relocation to IN, he certainly was aware almost contemporaneously with it. He objected to the Petitioner's request to dismiss the proceedings in NH, citing the terms of the Plan as well as NH case law.

In April 2017, after she was served was completed upon Petitioner she filed a parenting case in IN. Pursuant to the terms of the UCCJEA (RSA 458-A), this court attempted to contact the IN court in order to ascertain the status of the IN proceeding. The information received was that there was an open parenting case, but that no hearings had been scheduled and no pleadings filed since the original petition.

This court finds that, statutorily, each court has jurisdiction. IN is the child's home state as defined by the UCCJEA. NH has jurisdiction under RSA 458-A: 13. NH also has jurisdiction pursuant to the Supreme Court decision in IMO Sheys and Blackburn, 168 NH 35 (2015). Respondent has regularly exercised his parenting time. This court must now determine whether NH is the better venue or an inconvenient forum.

RSA 45-A: 18 describes the factors a court must consider prior to determining whether its jurisdiction is an inconvenient forum. Those include: whether domestic violence occurred; length of time the child has lived outside the jurisdiction; financial circumstances of the parties; any agreement between the parties as to which state shall exercise jurisdiction; the ability of each state to expeditiously decide the issues; nature and location of evidence required in the matter.

There are no complaints of domestic violence. The parties are not wealthy. The child has resided outside NH since January 2015 and in IN since December 2015. Respondent's allegations include that Petitioner and members of her family have inappropriately disciplined the child; that the Petitioner's residential circumstances are unstable; the child is undernourished and underweight.

The court finds that the child's parenting time with the Respondent in NH is significant as described in Sheys. The court also finds that virtually all the evidence that may support Respondent's allegations is located in IN: any police or social service records; the child's health care providers; school and day care personnel. The court finds that, although the child has significant connection with NH as a result of parenting time, she has more significant connection with IN.

RECOMMENDED:

1. Motion to Dismiss the NH action is conditionally granted.

2. Petitioner shall, within 45 days, present evidence or documentation that IN has accepted jurisdiction.

3. If IN declines jurisdiction, this action shall be reinstated upon certification that IN has so declined.

6/23/17
Date

Bruce F. DalPra, Master

I hereby certify that I have read the recommendation and agree that, to the extent that the marital master has made factual findings, he has applied the correct legal standard to the facts determined by the marital master.

So ordered:

6/26/17
Date

Judge JULIE A. INTROCASO

Order on Motion to Reconsider, Dated August 24, 2017

AUG 28 2017

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

9th Circuit - Family Division - Nashua
30 Spring Street, Suite 102
Nashua NH 03060

Telephone: 1-855-212-1234
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NOTICE OF DECISION

CATHERINE E. SHANELARIS, ESQ
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35 EAST PEARL STREET
NASHUA NH 03060

Case Name: **In the Matter of Eric McAndrews and Sachet Woodson**
Case Number: **659-2014-DM-00016**

Please be advised that on August 21, 2017 the Court made the following Order relative to:

Motion to Reconsider;
" The Court has reviewed the motion to reconsider, Respondent's objection and Petitioner's response to the objection. The Order issued on June 26, 2017 is reaffirmed. Motion to reconsider is denied."

(DalPra, MM)

August 24, 2017

Sherry L. Bisson
Clerk of Court

(567)

C: Division Of Child Support Services; Melissa S Penson-Mesa, ESQ; Paul S. Mistovich, ESQ

NHJB-2208-DF (07/01/2011)