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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2018 Term

August Session

Case No. 2018-0013

HALEY ST. PIERRE v. ADAM THATCHER

RULE 7 APPEAL OF FINAL DECISION OF THE
2nd CIRCUIT - FAMILY DIVISION - LEBANON

BRIEF FOR RESPONDENT - APPELLANT

ADAM THATCHER

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QUESTIONS PRESENTED

1. Did the trial court err when it ruled that Colby Santaw had standing?
2. Did the trial court err in allowing the Affidavit of Paternity to be attacked given the lack of pleading attacking the affidavit?
3. Was the Court's decision finding fraud and/or material mistake of fact contrary to the weight of the evidence?
4. Did the trial court err when it allowed relocation after denying it at least two times previous?
5. Did the trial court err when it denied Adam Thatcher primary physical responsibility of Marlena?
6. Did the trial court err when it failed to allocate decision making responsibilities at all amongst Haley St. Pierre/Colby Santaw and Adam Thatcher.

STATEMENT OF THE CASE

On February 4, 2015, Haley St. Pierre (Ms. St. Pierre)[1] filed a Petition for Divorce.[2] *Appendix* at page 1. In this Petition, Ms. St. Pierre indicated that one minor child (Marlena Rose Thatcher, hereafter "Marley") was born to the parties before or during the marriage. Id. Amongst other relief, Ms. St. Pierre requested that the Court issue a temporary and permanent parenting plan.

By July 6, 2015, the parties had agreed to a Parenting Plan and the Court approved it on that date. *Appendix* at page 5. The Parenting Plan called for joint decision-making and provided for shared residential time (equal or approximately equal residential responsibility). *Appendix* at page

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[1]. Haley St. Pierre is now Haley Santaw. To prevent confusion, she will be called Haley St. Pierre throughout this brief.

[2]. Ms. St. Pierre and Adam will be referred to collectively as "the parties."

6. The parties were thereafter divorced by decree dated July 23, 2015. The Parenting Plan was approved as part of the final decree.

On October 21, 2015, Ms. St. Pierre filed a Petition to Change Court Order. *Appendix* at page 13. This Petition alleged that Colby Santaw was Marley Thatcher's biological father, not Adam. Ms. St. Pierre asked that Mr. Santaw's name be substituted for Adam's name on Marley's birth certificate; that Marley's last name be changed to Santaw and that Mr. Santaw be awarded parental rights and responsibilities. *Appendix* at page 15. Id.

On November 20, 2015, Colby Santaw (Mr. Santaw) moved to intervene. *Appendix* at page 17. In this motion, Mr. Santaw requested that his paternity rights be recognized and that the Court award him parenting rights. Id. Mr. Santaw also asked that Marley's last name be changed to Santaw.

Adam answered Ms. St. Pierre's Petition on December 28, 2015. In this answer, Adam included a counterclaim asking that Ms. St. Pierre's requests for relief be denied and that Adam be awarded primary physical responsibility of Marley. *Appendix* at page 20. In his answer, Adam stated that since Marley's birth, he had been recognized as Marley's biological father; that his name was put on Marley's birth certificate as her father; and that he has acted in loco parentis by demonstrating a full commitment to raising and caring for Marley.

On December 28, 2015, Adam noted that he had no objection to Mr. Santaw's Motion to Intervene. *Appendix* at page 23. In this pleading Adam stated that he didn't agree that Mr. Santaw was the biological parent. No objection was made to the request to intervene as it initially appeared to Adam proper that Mr. Santaw appear and make whatever case he wanted to make.

On March 29, 2016, Ms. St. Pierre answered Requests to Admit. *Appendix* at page 25. In

her answers, Ms. St. Pierre admitted that a copy of Marley's birth certificate was attached (showing Adam as Marley's father). *Appendix* at page 28. Ms. St. Pierre also authenticated an Affidavit of Paternity dated November 1, 2013 and affirmed that it was signed by her and Adam. *Appendix* at page 29. Ms. St Pierre admitted that she signed the Affidavit of Paternity freely and voluntarily and without threats or promises being made beforehand. Id. Ms. St. Pierre admitted that when she signed the Affidavit of Paternity, she declared, under oath, that Adam was Marley's father. Id. Ms. St. Pierre admitted that after Marley was born, the parties married and subsequently divorced. Id. In addition, in her answers to the Requests to Admit, Ms. St. Pierre admitted that she had never attempted to rescind the Affidavit of Paternity. Id. She admitted that the Affidavit of Paternity had gone unchallenged as of the date she signed the Requests to Admit (on or about April 28, 2016).

On April 25, 2016, Adam filed an Objection to Mr. Santaw's Partially Assented to Motion for Parenting (*Appendix* at page 30) and a Motion to Remove Mr. Santaw as a party to the proceeding. *Appendix* at page 42. In these motions, Adam pointed out that at no time had anyone challenged the Affidavit of Paternity. Id. He argued that given the lack of opposition to the Affidavit, the Affidavit acted as a judgment of paternity. Id. On May 27, 2016, the Court denied Adam's requested relief. *Appendix* at page 49.

On May 9, 2016, Adam moved to dismiss Mr. Santaw as a party. In doing so, Adam pointed out the provisions of federal law. 42 U.S.C. §666(a)(5)(D)(iii) (stating that a signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger.) *Appendix* at page 50. This motion was denied on June 22, 2016 as the Court wanted to hold an evidentiary hearing. *Appendix* at page 49.

On November 9, 2016, a final hearing was held. *See, Case Summary, Appendix* at page 76. A Court Order was issued on February 7, 2017. *See*, Addendum at Bates No. 34. In its Order, the Court acknowledged that "When the status of paternity is contested after the 60-day period, paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger." 42 U.S.C. §666(a)(5)(D)(iii). The Court concluded that Mr. Santaw had standing to challenge the Affidavit of Paternity, given the fact that Mr. Santaw was the putative father. The Court concluded:

> **Based on the weight of the credible evidence, Ms. St. Pierre and Mr. Thatcher <u>either</u> misrepresented or were mistaken concerning the baby's paternity. <u>Mr. Santaw has a valid claim</u> for fraud or material mistake of fact concerning the signing of the Affidavit of Paternity. Duress does not apply. (My emphasis)**

In the body of its Order, the Court said that both Mr. Thatcher and Ms. St. Pierre were at least aware of the possibility that Mr. Thatcher may not be the child's biological father when they signed Marley's Affidavit of Paternity. The Court further said that there was information in the prenatal records which could have lead either to question his or her belief about the child's conception date, which was calculated using self-reported information from Ms. St. Pierre, and the assumption of birth exactly 40 weeks later. The Court said that either Ms. St. Pierre or Adam could have requested a paternity test to eliminate any doubt about Mr. Thatcher being the child's biological father. The Court said that neither party chose to do that or to contact Mr. Santaw (this finding of fact was incorrect as noted below) and that both Ms. St. Pierre and Adam wanted Marley to be Adam's child, and to continue their relationship. According to the Court, it was entitled to view Ms. St. Pierre and Adam's conduct as supporting a material mistake of fact, or a deliberate disregard of facts which did not support their belief that Mr. Thatcher was Marley's father (which the Court said would

support a finding of fraud). In addition to the foregoing, the Court denied Ms. St. Pierre's proposed relocation to Florida.

On March 17, 2017, the lower court denied Mr. Santaw and Ms. St. Pierre's motion to relocate. In doing so, the lower court noted that it was exercising its discretion ***not*** to permit relocation. The Court determined that "Considering all of these factors, the balance weighs against Marley to relocate out of the Upper Valley at this time. The lower court stated, "A lot will depend on how Mr. Thatcher handles the changes. If he decides in the future that he does not want to continue to be involved with Marley, then that would weigh for the move. As long as he exercises his parenting time with Marley consistently, the Court expects that they will continue the strong bond they have." *See*, Addendum at Bates No. 45.

On July 6, 2017, Ms. St. Pierre filed a Motion for Ex Parte Relief. *Appendix* at page 82. On that date, Ms. St. Pierre falsely accused Adam of "allowing" Marley to fall into a bonfire. She also falsely accused Adam of not attending to Marley's wounds properly and of not taking Marley to a doctor or anyone to treat Marley's wounds. Lastly, Ms. St. Pierre falsely stated that there were three open investigations including NH DCYF, VT DCF and the Vermont State Police.

On July 27, 2017, after a short hearing on July 20, 2017 (with evidence, for the most part, taken by offers of proof), the trial court allowed relocation to take place. According to the trial court, "Based on the weight of the credible evidence, the Court finds that the *ex parte* was justified, even if all the facts set forth did not prove to be 100% accurate." *Appendix* at page 89. On August 31, 2017, the trial court issued an additional order. *Appendix* at page 93. In this order, the court noted that on August 14, 2017, NH DCYF finished its investigation and made an internal finding of neglect against Adam. Id.

On April 13, 2018, NH DCYF ruled that DCYF failed to prove, even by a preponderance of the evidence that the findings of neglect should be upheld. The full story of what happened on July 3, 2017 is contained in the April 13, 2018 Order and in the Findings of Fact. *Appendix* at page 95. The Order and the findings support Adam's position that Ms. St. Pierre falsely accused Adam of "allowing" Marley to fall into a bonfire; that Ms. St. Pierre falsely accused Adam of not attending to Marley's wounds properly and of not taking Marley to a doctor or anyone to treat Marley's wounds. Adam thereafter brought the NH DCYF decision to the trial court's attention but no remedial action has been taken. It appears that Adam has been victimized by false testimony and by the trial court's precipitous action, taken before it knew all of the facts.

STATEMENT OF THE FACTS

Haley St. Pierre (Ms. St. Pierre) met Colby Santaw (Mr. Santaw) in 2008. TII at page 11. This began an on again off again relationship that lasted for several years. Id. After Ms. St. Pierre went off to college, the relationship ended. Id. In August, 2012, Ms. St. Pierre met Adam Thatcher (Adam). TII at page 11. By November, 2012, Ms. St. Pierre and Adam were residing together. Id.

On February 15, 2013, Ms. St. Pierre found out that she was pregnant. TII at page 11. Trial testimony revealed that Ms. St. Pierre's last menstrual period began on January 16, 2013. TII at page 48. Ms. St. Pierre was the source of that information. At trial, Ms. St. Pierre agreed that due dates are calculated by adding 280 days to the date of the last menstrual period. TII at page 48. When adding 280 days to Ms. St. Pierre's last menstrual period, Ms. St. Pierre agreed that her due date for giving birth was October 23, 2013. Id. Ms. St. Pierre agreed that the hospital had used this date, October 23, 2013, as Ms. St. Pierre's due date. Id. That was based on information Ms. St. Pierre herself gave to the hospital.

Ms. St. Pierre agreed that she likely ovulated around January 30, 2013. TII at page 50. After ovulating, there was a five to seven day window when conception could occur. TII at page 49. This meant that Ms. St. Pierre could likely become pregnant between February 1, 2013 and February 7, 2013. Id.

The trial testimony was in dispute as to when Ms. St. Pierre took a trip to New York. Ms. St. Pierre testified that she went to New York on February 9, 2013 and stayed there until February 11, 2013. While there, she testified that she stayed at Mr. Santaw's home. It was at Mr. Santaw's home that Ms. St. Pierre and Mr. Santaw had intercourse. TII at page 51. Mr. Santaw's trial testimony was the same as Ms. St. Pierre on this topic (the couple had intercourse on February 9, 2013). TII at page 107. Both Ms. St. Pierre and Mr. Santaw said they were certain that they had intercourse on February 9, 2013 because the date coincided with a fishing derby that was held that weekend. Compare, TII at page 14 with TII at page 84.

For his part, Adam was certain that Ms. St. Pierre was in New York the first weekend in February, 2013 and that Ms. St. Pierre returned on February 3, 2013. TII at page 138. Adam says he was on the couch, watching the Super Bowl, when Ms. St. Pierre returned from New York. Id. Adam testified that he and Ms. St. Pierre had intercourse on February 1, 2013 (the day Ms. St. Pierre left for New York) and on February 4, 2013, the day after Ms. St. Pierre returned from New York. TII at page 139.

Now back in New Hampshire, Adam found out that Ms. St. Pierre and Mr. Santaw had met at a bar in New York. TII at page 139. Adam had seen a text message from an unknown number. The message asked if Ms. St. Pierre "missed him yet?" TII at page 140. Ms. St. Pierre told Adam that Mr. Santaw had attempted to kiss her; however, she didn't immediately indicate that they had

intercourse. Id. Later, Adam went through Ms. St. Pierre's telephone. Doing this yielded information that Ms. St. Pierre and Mr. Santaw, in fact, had intercourse together. Id. Feeling that Ms. St. Pierre was "incredibly remorseful," Adam forgave Ms. St. Pierre for her indiscretion and the couple moved forward. TII at page 141. At no time, did Ms. St. Pierre or Adam suggest that they take a blood test or a genetic test. Then, again, neither did Mr. Santaw make such a suggestion.

Once Ms. St. Pierre told Adam she was pregnant, Adam asked if it was possible that Mr. Santaw was the father. Ms. St. Pierre assured him it was not possible. TII at page 124. Now assured he was going to be a father, Adam attended Ms. St. Pierre's doctor's appointments. Adam was ecstatic about becoming a Dad. TII at page 143. Adam testified that once he knew they were going to have a little girl, he was in love immediately. TII at page 144. Once Marley was born, Adam couldn't take his eyes off her. Id.

When Ms. St. Pierre knew she was pregnant, she also contacted Mr. Santaw (the court made a contrary finding.). Ms. St. Pierre told Mr. Santaw she was pregnant and that she thought Adam was the father. TII at page 16. Mr. Santaw reacted by stating that they should no longer speak to one another. TII at page 86. Mr. Santaw also said that Ms. St. Pierre should think about the child's best interest and that would be "to be with her father."

On October 31, 2013, at a time when Ms. St. Pierre and Adam remained unmarried to each other, Ms. St. Pierre gave birth to Marlena Rose Thatcher (Marley). TII at page 80. The day after Marley was born, Ms. St. Pierre and Adam signed an Affidavit of Paternity. *Appendix* at page 29. This affidavit indicated that Adam was signing the document voluntarily and of his own free will. It indicated that no threats or force or promises were made to get Adam to sign the affidavit. Importantly, the affidavit stated that by signing this affidavit Adam was declaring that he was

Marley's father and that Adam accepted the financial obligations that go with being a father.

The Affidavit of Paternity contained a Certificate signed by Eleanor E. Gibbs on behalf of Dartmouth Hitchcock Medical Center. Ms. Gibbs certified that the parents had been provided all the information about the purpose of the Affidavit and information about rights and responsibilities. *Appendix* at page 29. Once the Affidavit of Paternity was signed, a Birth Certificate was issued listing Adam as Marley's father and Ms. St. Pierre as Marley's mother. *Appendix* at page 28.

More than 60 days then went by without either Adam or Ms. St. Pierre requesting that the Affidavit of Paternity be rescinded. TII at page 80. Instead, the couple married on January 28, 2013. TII at page 57.

Approximately twelve months later, on February 4, 2015, Ms. St. Pierre filed a Petition for Divorce. *Appendix* at page 1. In that petition, Ms. St. Pierre stated that Marlena Rose Thatcher was a child born to the parties either before or during the marriage. *Appendix* at page 1. The parties then agreed to a Parenting Plan. *Appendix* at page 5. The Parenting Plan was presented to the Court on July 6, 2015 and was approved by the Court on July 23, 2015. The Parenting Plan called for joint decision-making and shared residential responsibility. *Appendix* at page 6.

By October, 2015, Ms. St. Pierre was again seeing Mr. Santaw. On a drive home following a trip to Philadelphia, Ms. St. Pierre testified that she and Mr. Santaw began to "do the math." TII at page 24. This "math" was done using Ms. St. Pierre's actual delivery date (October 31, 2013), not the estimated delivery date used by the hospital. Id. According to Ms. St. Pierre, two ultrasounds had been done, both of which gave an estimated date of conception as being January 13, 2013. Id. On cross examination, however, Ms. St. Pierre admitted that the date of her last menstrual cycle began on January 16, 2013. TII at page 56. Ms. St. Pierre also admitted that the due date of

October 23, 2013 came from adding 280 days to the date of her last menstrual period. TII at page 61. Ms. St. Pierre could not explain how she could conceive a baby on January 13, 2015 and then have a period three days later. Neither did she explain how Mr. Santaw could be the father if he didn't have "access" to Ms. St. Pierre until February 9,2015.

Nevertheless, Ms. St. Pierre and Mr. Santaw found it necessary to undergo genetic testing to determine if Mr. Santaw was Marley's natural father. On their own, without prior notice to Adam, Ms. St. Pierre, Mr. Santaw and Marley underwent genetic testing and it was determined that in all probability Mr. Santaw not Adam, was Marley's natural father. The genetic test, according to Ms. St. Pierre, was done "just for peace of mind." TII at page 25.

Now knowing who Marley's natural father is, Ms. St. Pierre decided to tell Adam. TII at page 26. When Adam heard what Ms. St. Pierre was telling him, he hung up the phone. On October 21, 2015, Ms. St. Pierre filed a Petition to Change Court Order. *Appendix* at page 13.

Right after Marley was born, Adam recalls hospital officials speaking to Ms. St. Pierre about an Affidavit of Paternity. Adam recalls hospital officials telling Ms. St. Pierre not to sign the affidavit if she had any reason to doubt that Adam was the father. TII at page 147. Once Marley was born, Adam was a very involved father. TII at page 149. Adam would get home from his restaurant work at around 11 at night and he would take over for Ms. St. Pierre. Id. Adam prepared meals, changed diapers, and in Adam's words became "the psychological father." Adam bought Marley clothes; took care of her hair; and bathed her. TII at page 152. Adam and Marley would go on hikes. They would go to the beach and to other places. TII at page 152. Adam would take Marley to story time on Tuesdays. While there, Marley would do arts and crafts. TII at page 153. Marley loved to snuggle. She also loved to throw kisses to Adam and to Adam's father and mother (Nina and Papa).

Id. Marley's name for Adam was "daddy." TII at page 150.

Nancy Thatcher (Mrs. Thatcher), Adam's mother, testified. TII at page 215. In her testimony, Mrs. Thatcher testified that she is very proud of her son. She sees him as a good parent. She sees Adam take care of all of Marley's needs. She has seen him fix meals, dress Marley, change her when necessary, brush her teeth, fix her hair, shop for clothes and buy Marley everything that is necessary. Mrs. Thatcher describes the tight bond between Adam and Marley. She observed that Adam and Marley would go hiking together and go to the beach. Adam would take Marley to dance classes and to the Montshire Museum. She has seen Adam take Marley to visit family and friends. TII at page 216.

At a pretrial conference held on May 27, 2016, the court took up two motions. T1 at page 4. The first motion concerned Ms. St. Pierre's wish to relocate to Florida. Id Ms. St. Pierre wanted to move to Florida to live with her then fiancé, Colby Santaw (Mr. Santaw). Id. Ms. St. Pierre argued that she should be able to relocate to Florida because she had a job in Florida; her fiance, Mr. Santaw was living and working in Florida; and Ms. St. Pierre had no employment in New Hampshire. Id. The second motion concerned Adam Thatcher's (Adam's) motion to remove Mr. Santaw as an intervener. Id.

At the same pretrial conference, Ms. St. Pierre informed the court that her goal was to remove Mr. Thatcher as the biological father on the birth certificate, to put Mr. Santaw down as the real father and to determine what auxiliary rights should be accorded Adam. T1 at pp. 6-7. According to Ms. St. Pierre, Marley was only 2 years of old, so not much of a bond could have been created between she and Adam during that short time period. T1 at p. 7.

Finally, at the pretrial conference, Judge Tenney asked why "in the midst of this when there's

a shared custody arrangement already ordered, why would they be taking such affirmative steps to plan a move, leave jobs here, accept jobs there, when right now there's a shared custody arrangement?"

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, OR REGULATIONS INVOLVED IN CASE

5-C:28. Rescission of Paternity Procedures.

I. A parent or legal guardian may request to rescind an affidavit of paternity from the clerk of the city or town where the birth occurred within 60 days of the filing of an affidavit of paternity unless an administrative or judicial proceeding related to the child results in an earlier date.

II. Once the completed rescission of paternity form is filed, the clerk of the town or city shall remove the name of the father from the birth record and insert "not stated" in the space provided for the father's name or, if the original birth record was filed prior to the completion of an affidavit of paternity, change the child's name on the birth record back to the name stated on the original record before the affidavit of paternity was filed.

III. After the 60-day rescission period has passed, any challenge to the affidavit shall be decided only by a court of competent jurisdiction.

IV. The fee for changing the birth record due to a rescission of paternity shall be in accordance with N.H. Rev. Stat. Ann. § 5-C:10.

V. The clerk of the city or town where the birth occurred shall distribute the rescission of paternity to the birth mother; the father named on the affidavit of paternity; the parent or legal guardian of minor signatory as stated on the affidavit of paternity; the division; the department of health and human services; the husband, if a 3-party affidavit of paternity was completed; and, the hospital that was the originator of the affidavit of paternity, if applicable.

42 U.S.C.S. § 666. Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement

((iv) Use of paternity acknowledgment affidavit. Such procedures must require the State to develop and use an affidavit for the voluntary acknowledgment of paternity which includes the minimum requirements of the affidavit specified by the Secretary under section 452(a)(7) [42 USCS § 652(a)(7)] for the voluntary acknowledgment of paternity, and to give full faith and credit to such an affidavit signed in any other State according to its procedures.

(D) Status of signed paternity acknowledgment.

(i) Inclusion in birth records. Procedures under which the name of the father shall be included on the record of birth of the child of unmarried parents only if--

(I) the father and mother have signed a voluntary acknowledgment of paternity; or

(II) a court or an administrative agency of competent jurisdiction has issued an adjudication of paternity.

Nothing in this clause shall preclude a State agency from obtaining an admission of paternity from the father for submission in a judicial or administrative proceeding, or prohibit the issuance of an order in a judicial or administrative proceeding which bases a legal finding of paternity on an admission of paternity by the father and any other additional showing required by State law.

(ii) Legal finding of paternity. Procedures under which a signed voluntary acknowledgment of paternity is considered a legal finding of paternity, subject to the right of any signatory to rescind the acknowledgment within the earlier of--

(I) 60 days; or

(II) the date of an administrative or judicial proceeding relating to the child (including a proceeding to establish a support order) in which the signatory is a party.

(iii) Contest. Procedures under which, after the 60-day period referred to in clause (ii), a signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger, and under which the legal responsibilities (including child support obligations) of any signatory arising from the acknowledgment may not be suspended during the challenge, except for good cause shown.

SUMMARY OF ARGUMENT

Unlike the petitioner in *In re Neal & DiGiulio*, 184 A.3d 90 (N.H. 2018)[3], Adam Thatcher has not asked that his paternity be rescinded. Indeed, neither Ms. St. Pierre nor Mr. Santaw ever filed a motion/petition to disestablish paternity. Rather, the procedure used to bring this matter to the attention of the Court was a Petition to Change Court Order. This Petition to Change Court Order essentially stated that a subsequent genetic test revealed Colby Santaw to be Marley Thatcher's biological father; therefore, Adam's name should be removed from Marley Thatcher's birth certificate and Mr. Santaw's name should replace Adam's name. Absent is a pleading alleging that the signatories signed the Affidavit of Paternity as a result of fraud or as a result of a material mistake of fact.

Adam believes that only a signatory to an Affidavit of Paternity can move to rescind it. In this case, the lower court gave Mr. Santaw party status, even though Mr. Santaw hadn't signed the

[3]. This case was decided just a few months ago (late March, 2018).

Affidavit of Paternity. Then the court found that Mr. Santaw was a "victim" of fraud perpetrated by Adam and Ms. St. Pierre who, ironically, is now married to Mr. Santaw.

The trial court, on its own, determined that Adam and Ms. St. Pierre had sufficient information at the time of Marley Thatcher's conception to have inquired further. According to the Court, given the uncertainties as to whom might be Marley's natural father, Adam and Ms. St. Pierre should have requested blood tests. The trial court found that this lack of effort defrauded a non-signatory (Mr. Santaw) and created a material mistake of fact permitting rescission.

The facts show that at the same time Ms. St. Pierre was telling Adam she was pregnant, she was telling Mr. Santaw she was pregnant. Mr. Santaw knew what Adam knew. Like Adam and Ms. St. Pierre, Mr. Santaw chose to do nothing (except stop talking to Ms. St. Pierre and banning her from his social media sites). So, what the trial court says about Ms. St. Pierre and Adam, it can also say about Mr. Santaw. Everyone, to include Mr. Santaw, appears to have been "satisfied" with Adam becoming Marley's father. Where's the fraud?

In *Neal*, the trial court found that the petitioner signed the acknowledgment under a "material misunderstanding of fact" and that he "signed the affidavit ... with the mistaken belief he was the father." Adam is not making this claim. Adam is not saying that he signed the acknowledgment under a material misunderstanding or mistake of fact; rather, Adam says that he signed the Affidavit of his own free will and that he wants to remain Marley's father and doesn't want the Affidavit rescinded.

As already stated, Adam and Ms. St. Pierre signed the Affidavit of Paternity as their free and voluntary act. Adam and Ms. St. Pierre both had all of the information necessary to decide whether they wanted to sign the Affidavit. Neither Adam nor Ms. St. Pierre defrauded the other. Both knew

all of the material facts; therefore they weren't acting under any misapprehension of the facts.

Unlike the Petitioner in *Neal*, Adam didn't sign the Affidavit under a "material mistake of fact" as to his biological parentage. If a mistake is an "error, misconception, or misunderstanding or an erroneous belief", no such error was apparent at the time the parties signed the affidavit because they had spoken to each other candidly about events concerning Mr. Santaw having intercourse with Ms. St. Pierre. Ms. St. Pierre and Adam signed the Affidavit with their eyes "wide open." .

Of note is *In re Gendron*, 157 N.H. 314, 321, 950 A.2d 151, 156 (2008). In that case, the Court said that the trial court had found that genetic marker testing was relevant because it would be in the child's best interests. The Court agreed that a child's best interests generally should be given consideration in determining whether to order genetic marker testing when that issue remains relevant, cf. *Bodwell v. Brooks*, 141 N.H. 508, 512, 686 A.2d 1179 (1996); *Hansen v. Hansen*, 116 N.H. 329, 331, 358 A.2d 409 (1976), however, the Supreme Court then found that the trial court erred in finding that this child's best interests required such testing. In holding such, the Court said that "Certainty and finality are particularly important in paternity determinations because 'stability and continuity of support, both emotional and financial, are essential to a child's welfare.'" *Paternity of Cheryl*, 746 N.E.2d at 495 (citations omitted); see also *Tregoning v. Wiltschek*, 2001 PA Super 243, 782 A.2d 1001, 1004 (Pa. Super. Ct. 2001) ("Public policy demands that children have the right to certainty in their relationships with their parents.... If a certain person has acted as the parent and bonded with the child, the child should not be required to suffer the potentially damaging trauma that may come from being told that the father he has known all his life is not in fact his father.") What's different about this case?

Adam acted as a parent should act and he bonded with his daughter, Marley. Adam now suffers from being told two years after Marley Thatcher's birth that he wasn't in fact, Marley's father. He was told, more or less, to just go away because Marley is so young, she will never remember you or think about you again.

ARGUMENT

I. The Trial Court Committed Reversible Error When It Ruled That Colby Santaw Had Standing to Attack the Affidavit of Paternity in This Case.

In its Amended Final Order (*Addendum* at page 45), the trial court held that "Mr. Santaw has standing to challenge the Affidavit of Paternity, as he is a putative father. As he is challenging the Affidavit, he has the burden of proof to prove fraud, duress, or material mistake of fact under N.H. Rev. Stat. Ann. § 5-C:28."

Adam contends that the trial court's decision granting Mr. Santaw standing to challenge the parties' Affidavit is in error. Resolution of this issue requires this Court to interpret N.H. Rev. Stat. Ann. § 5-C:28 and 42 U.S.C.S. § 666.

"As a first step in statutory construction, we examine the language found in the statute itself, *Town of Wolfeboro v. Smith*, 131 N.H. 449, 452, 556 A.2d 755, 756 (1989); *Appeal of Coastal Materials Corp.*, 130 N.H. 98, 101, 534 A.2d 398, 399 (1987), and where possible, we 'ascribe the plain and ordinary meanings to words used,' *Leach v. O'Neil*, 132 N.H. 665, 668, 568 A.2d 1189, 1191 (1990). However, '[t]o divine the intent of a statute, we will determine its meaning from its construction as a whole, not by examining isolated words and phrases.'" *Petition of Jane Doe*, 132 N.H. 270, 276, 564 A.2d 433, 438 (1989). In matters of statutory interpretation, the Supreme Court is the final arbiter of legislative intent as expressed in the words of the statute considered as a whole.

In the Matter of Conant & Faller, 167 N.H. 577, 580, 116 A.3d 561 (2015).

N.H. Rev. Stat. Ann. § 5-C:28(I) provides that "A parent or legal guardian may request to rescind an affidavit of paternity from the clerk of the city or town where the birth occurred within 60 days of the filing of an affidavit of paternity unless an administrative or judicial proceeding related to the child results in an earlier date." Later on, in N.H. Rev. Stat. Ann. § 5-C:28(III), the statute provides that "After the 60-day rescission period has passed, any challenge to the affidavit shall be decided only by a court of competent jurisdiction."[4]

It is clear that only a parent or legal guardian may request to rescind an affidavit of paternity. That interpretation comes from the plain language in N.H. Rev. Stat. Ann. § 5-C:28(I). The question is whether a "challenge" to the Affidavit of Paternity can come from someone not involved in executing the Affidavit. Certainly, the statute doesn't indicate that an interested third party has the right to challenge. Presumably, if the legislature wanted someone other than a named parent or legal guardian to be able to move to disestablish paternity, it could have said so. Moreover, under the doctrine known as expressio unius, the expression of one thing suggests the exclusion of others; it would seem the correct construction of N.H. Rev. Stat. Ann. § 5-C:28(I) is that to maintain a challenge, you must be a parent or legal guardian. At the time Mr. Santaw began his "challenge," he was not Marley's parent or legal guardian.

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[4]. The trial court equated rescission within 60 days of the signing of the Affidavit of Paternity with a "challenge." Such a construction supports Adam's theory that only a parent or a legal guardian can challenge the Affidavit. If that is true, Mr. Santaw does not have standing, because at the time of the challenge Marley already had two parents; neither of whom was Mr. Santaw. *Appendix* at page 29.

Moreover, the only evidence Mr. Santaw had to offer was a genetic test.[5] This was not a genetic test ordered by the trial court; rather, it was done by Ms. St. Pierre and Mr. Santaw "on their own." See, In *In re Gendron*, 157 N.H. 314, 320, 950 A.2d 151, 155-56 (2008), where the Court held that the unchallenged acknowledgment established the father's paternity, thus dispensing with the need for additional proof of paternity. "Therefore, genetic marker testing was irrelevant to determining the father's request for custody." See id. See, also, *Watts v. Watts*, 115 N.H. 186, 337 A.2d 350 (1975). In *Watts*, the defendant father had acknowledged two children as his own since their birth. *Watts,* 115 N.H. at 187. Over fifteen years later, relying upon an earlier version of N.H. Rev. Stat. Ann. § 522:1, the defendant sought to disprove paternity through blood tests. Id. at 188; see N.H. Rev. Stat. Ann. § 522:1 (1974). This Court held that the presumption of paternity in that case could not be rebutted by blood tests because the "defendant ha[d] acknowledged the children as his own without challenge for over fifteen years." *Watts*, 115 N.H. at 189. The Court reasoned that "[t]o allow [the] defendant to escape liability for support by using blood tests would be to ignore his lengthy, voluntary acceptance of parental responsibilities." Id.; see also *McRae v. McRae*, 115 N.H. 353, 355, 341 A.2d 762 (1975) ("To permit the husband to raise the question of paternity after an eight-year period of uninterrupted acquiescence, with several opportunities to raise the issue, would contravene the policy of this State's law to protect the child and the spouse from the belated resort to scientific proof in an effort to escape parental responsibility." (citation omitted)).[6]

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[5]. The trial court found it significant that Mr. Santaw had undergone genetic testing. The trial court clearly found this evidence *relevant* despite *In re Gendron*, supra. Indeed, the trial court used the existence of genetic testing as a basis for finding that Mr. Santaw had standing. *Addendum* at page 48. It should have been the other way around; since genetic testing was irrelevant, Mr. Santaw had no evidence to offer and therefore, had no standing.

[6]. If eight and fifteen years is too long, what about two years?

The Court is asked to construe N.H. Rev. Stat. Ann. § 5-C:28(III) as permitting a challenge only by a parent or legal guardian. If the Court agrees with this request, it should rule that Mr. Santaw does not have standing to challenge the Affidavit of Paternity signed by Ms. St. Pierre and Adam. If the Court was to rule otherwise, and grant standing, then it is effectively overruling *Watts* and *McRae*.

II. <u>The Parties Executed an Affidavit of Parentage. As a Result, This Constitutes a Legal Finding of Paternity</u>.

In New Hampshire, there are two ways to establish paternity. See, N.H. Rev. Stat. Ann. § 168-A:2. One way to establish paternity is for a mother, putative father (a term that was applied by the trial court to describe Mr. Santaw)[7], child, or public authority chargeable by law with the support of a child to petition the superior court. If the petition is granted, then paternity is established. N.H. Rev. Stat. Ann. § 168-A:2.(I)(a). A second way to establish paternity requires the filing of an affidavit of paternity with the clerk of the town where the birth of the child occurred. N.H. Rev. Stat. Ann. § 168-A:2.(I)(b). See, N.H. Rev. Stat. Ann. § 5-C:24. The affidavit of paternity has the legal effect of establishing paternity without requiring further action pursuant to N.H. Rev. Stat. Ann. § 168-A, unless rescinded pursuant to N.H. Rev. Stat. Ann. § 5-C:28.

On November 1, 2013, Haley St. Pierre[8](Ms. St. Pierre) and Adam Thatcher (Adam) signed an Affidavit of Paternity. *Appendix* at page 29. The Affidavit indicated that on October 31, 2013, Marlena Rose Thatcher (Marley) was born to Adam and Ms. St. Pierre (collectively, the parents).

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[7]. Wouldn't Adam have been a putative father as well? Except, Adam signed an Affidavit of Paternity understanding that his signature on the Affidavit was the equivalent of a finding of paternity (equal to a finding by a court of law).

[8]. Ms. St. Pierre is now married to Colby Santaw, an intervener in this case. Although Ms. St. Pierre is now Ms. Santaw; for clarity, she will be referred to throughout as Ms. St. Pierre.

In the Affidavit, the parents gave permission, pursuant to N.H. Rev. Stat. Ann. § 5-C:24, to having Adam's name entered on the birth certificate as Marley's father. Both Adam and Ms. St. Pierre signed the Affidavit.

For his part, Adam stated that he was signing the Affidavit voluntarily and of his own free will. Adam said that no force had been used against him to get him to sign the Affidavit. By virtue of signing the Affidavit, Adam was declaring to all that he was Marley's natural father and that he accepted financial and legal responsibility for Marley, to include child support. See, N.H. Rev. Stat. Ann. § 168-A:2. Finally, by signing the Affidavit, Adam understood that a signed Affidavit is a finding of paternity equal to a finding by a court of law. Indeed, it is a judgment, created by operation of law.

On October 21, 2016, Ms. St. Pierre filed a Petition to Change Court Order. *Appendix* at page 13. In this petition, Ms. St. Pierre indicated she wanted the parties' Parenting Plan of July 23, 2015 changed. Ms. St. Pierre indicated she wanted the Parenting Plan changed because (1) Adam wasn't Marley's biological father; (2) because Mr. Santaw was filing for his custody rights; (3) because both biological parents live together; and (4) because both biological parents wish to keep the biological nuclear family intact. Ms. St. Pierre asked that Adam be removed from Marley's birth certificate; that her last name be changed to Santaw; and grant Ms. St. Pierre "full custody."

N.H. Rev. Stat. Ann. § 5-C:28 states that only a **parent** or **legal guardian** may request to rescind an affidavit of paternity. They may do so within 60 days of the filing of an affidavit of paternity unless an administrative or judicial proceeding related to the child results in an earlier date. N.H. Rev. Stat. Ann. § 5-C:28(I). After the 60-day rescission period has passed, a parent or legal guardian can present a "challenge"to the affidavit. N.H. Rev. Stat. Ann. § 5-C:28(III). To

successfully challenge the affidavit, a parent or legal guardian must prove that the affidavit was signed on the basis of fraud, duress, or mistake of fact. *In re Neal & DiGiulio*, 184 A.3d 90 (N.H. 2018); *In re Gendron*, 157 N.H. 314, 950 A.2d 151 (2008); and 42 U.S.C.S. § 666.

C.L. v. Y.B. (In re D.L.), 938 N.E.2d 1221 (Ind. Ct. App. 2010) is a case cited in *In re Neal & DiGiulio*. In *In re D.L.*, the Indiana Court of Appeals noted that "C.L.'s argument that the trial court erred in failing to disestablish his paternity of D.L. fails for an additional reason. Although the Indiana Code does not address the disestablishment of paternity where paternity was established by an action commenced pursuant to Article 31-14, that objective may be properly pursued via a motion to disestablish paternity, a motion to vacate paternity order, or a Trial Rule 60(B) motion for relief from judgment, but C.L. did not file any such motions, present an oral request, or offer any argument before the trial court on this matter. The failure to raise an issue before the trial court will result in waiver of that issue. *Van Winkle v. Nash*, 761 N.E.2d 856, 859 (Ind. Ct. App. 2002). Accordingly, C.L. has waived his argument that the trial court erred in failing to disestablish paternity."

Ms. St. Pierre never filed a motion to disestablish paternity, a motion to vacate paternity order, nor did she move for relief from a judgment. All Ms. St. Pierre filed was a Petition to Change Court Order. Ms. St. Pierre never alleged that when she or Adam filed the Affidavit of Paternity, it was the product of duress, a material mistake of fact or fraud. Following the reasoning in *In re D.L.*, the issue of disestablishing the Affidavit of Paternity should be deemed waived.

In *In re D.L.*, paternity was established by court order, not by the filing of an Affidavit of Paternity. See, N.H. Rev. Stat. Ann. § 168-A:2.(I)(a). That is a major distinction between *In re D.L.* and the case at bar. While the Indiana court stated that if paternity has been established in someone other than a parent listed on the birth certificate, it follows that it must be disestablished in the parent

in question, the court was addressing a situation where paternity was established by court order. This proposition, however, only holds true in an instance where paternity is established by court order and doesn't hold true where parenting is established by the filing of an Affidavit of Paternity. *C.L. v. Y.B. (In re D.L.)*, 938 N.E.2d 1221, 1225-26 (Ind. Ct. App. 2010).

In *In re Neal & DiGiulio*, 184 A.3d 90 (N.H. 2018), the petitioner moved to rescind a voluntary acknowledgment of paternity. This is the proper way to request rescission.[9] In this case, the trial court decided the case, not on New Hampshire law; rather, it decided it upon the language set forth in the Maine voluntary acknowledgment of paternity form. In *Neal*, the trial court found, "immediately before finding that the petitioner signed the acknowledgment under a "material misunderstanding of fact," that he "signed the affidavit ... with the mistaken belief he was the father." Adam does not make such a claim. Adam does not take the position that before he signed the Affidavit of Paternity, he was laboring under a material mistake of act. Neither does he take the position that when he signed the Affidavit of Paternity, that he signed with the mistaken belief he

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[9]. In *In re Gendron*, 157 N.H. 314, 950 A.2d 151 (2008), after the legal father had filed a parenting petition seeking custody of his child, the mother defended by claiming that Mr. Gendron was not the biological father. As a consequence, the mother requested genetic marker testing. The court determined that because of the Affidavit of Paternity in *Gendron*, genetic marker testing ***was irrelevant***. The Court held that by signing the acknowledgment, the mother, by her own volition, accepted that the father was the child's biological father. "A valid acknowledgment of paternity filed with the proper agency is equivalent to an adjudication of paternity of a child and confers upon the acknowledged father all of the rights and duties of a parent.). *In re Gendron*, 157 N.H. 314, 318-19, 950 A.2d 151, 154 (2008)

was the father. When Adam and Ms. St. Pierre signed the Acknowledgment of Paternity, Adam embraced fatherhood. He is now fighting to retain his status as Marley's father.

More than 60 days then went by without either Adam or Ms. St. Pierre (or Mr. Santaw for that matter) requesting that the Affidavit of Paternity be rescinded. Instead of filing a motion to rescind the Affidavit of Paternity, the couple married on January 28, 2014. TII at page 57. Approximately one year later, on February 4, 2015, Ms. St. Pierre filed a Petition for Divorce. In that petition, the parties stated that Marlena Rose Thatcher was a child born to the parties either before or during the marriage. The parties then agreed to a Parenting Plan. The Parenting Plan was presented to the Court on July 6, 2015 and was approved by the Court July 23, 2015. The Parenting Plan called for joint decision-making and shared residential responsibility.

Adam notes the following language from the *Neal* case: "The opening of a paternity case sought by a party who has previously acknowledged himself to be the father, should only be allowed in extreme and rare instances." *Matter of Paternity of R.C.*, 587 N.E.2d 153, 157 (Ind. Ct. App. 1992). In addition, the following language appears in the *Gendron* case:

> The trial court apparently found that genetic marker testing was relevant because it would be in the child's best interests. While we agree that a child's best interests generally should be given consideration in determining whether to order genetic marker testing when that issue remains relevant, cf. *Bodwell v. Brooks*, 141 N.H. 508, 512, 686 A.2d 1179 (1996); *Hansen v. Hansen*, 116 N.H. 329, 331, 358 A.2d 409 (1976), we find that the trial court erred in finding that this child's best interests required such testing. Certainty and finality are particularly important in paternity determinations because "stability and continuity of support, both emotional and financial, are essential to a child's welfare." *Paternity of Cheryl*, 746 N.E.2d at 495 (citations omitted); see also *Tregoning v. Wiltschek*, 2001 PA Super 243, 782 A.2d 1001, 1004 (Pa. Super. Ct. 2001) ("Public policy demands that children have the right to certainty in their relationships with their parents.... If a certain person has acted as the parent and bonded with the child, the child should not be required to suffer the potentially damaging trauma that may come from being told that the father he has known all his life is not in fact his father." (citations omitted)). *In re Neal & DiGiulio*, 184 A.3d 90 (N.H. 2018).

So, how did we get here? Trial testimony tells us by October, 2015, a few months after the Thatcher divorce became final (and about two years after Adam and Ms. St. Pierre signed the Affidavit of Paternity), Ms. St. Pierre decided to once again see Mr. Santaw. On a drive home following a trip to Philadelphia, Ms. St. Pierre testified that she and Mr. Santaw began to "do the math." This "math" was done using Ms. St. Pierre's actual delivery date (October 31, 2013), not the estimated delivery date used by the hospital. According to Ms. St. Pierre, two ultrasounds had been done, both of which gave an estimated date of conception as being January 13, 2013. But, on cross examination, Ms. St. Pierre admitted that the date of her last menstrual cycle began on January 16, 2013. Ms. St. Pierre also admitted that the due date of October 23, 2013 came from adding 280 days to the date of her last menstrual period. Ms. St. Pierre could not explain how she could conceive a baby and then have a period.

Apparently, neither Ms. St. Pierre nor Mr. Santaw believe in the language that appears in *Neal* and in *Gagnon*. This is evident because Ms. St. Pierre and Mr. Santaw found it necessary to undergo genetic testing to determine if Mr. Santaw was Marley's natural father, even though such testing was arguably not in Marley's best interest (by case law). On their own, without prior notice to Adam, Ms. St. Pierre, Mr. Santaw and Marley underwent genetic testing and it was determined that in all probability, Mr. Santaw not Adam, was Marley's biological father. The genetic test, according to Ms. St. Pierre, was done "just for peace of mind."[10]

Here is what Ms. St.. Pierre stated at the time of trial. "I understand that it's very difficult, I can't imagine, but at the same time if we're thinking of about Marley and her best interests,

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[10]. But not for Adam's peace of mind, or Marley's for that matter.

wouldn't you think that's (sic) being with her biological family when she has two parents who love each other and are planning on being together forever?" As for Mr. Santaw, he said the following in court: "I'm really sorry, and I feel terrible for your family. I would never wish this upon anyone nor my worst enemy..." Apparently, neither Ms. St. Pierre nor Mr. Santaw share the Court's attitude about what is in Marley's best interest.

III. **Ms. St. Pierre, a Signatory to the Affidavit of Parentage Failed to Prove Fraud or a Material Mistake of Fact**.

When addressing the fraud and material mistake of fact issues, the trial court focused on Mr. Santaw, who was not a signatory to the affidavit of paternity. According the trial court, both Mr. Thatcher and Ms. St. Pierre were at least aware of the possibility that Mr. Thatcher may not be the child's biological father when they signed Marlena's Affidavit of Paternity. But, Mr. Santaw had the same information as Ms. St. Pierre and Adam. Ms. St. Pierre told Mr. Santaw what she had previously told Adam.

Without being specific, the Court went on to state that there was information in the prenatal records which could have led either to question his or her belief about the child's conception date, which was calculated using self-reported information from Ms. St. Pierre, and the assumption of birth exactly 40 weeks later. What prenatal records? What information?

Because either Ms. St. Pierre or Adam could have requested a paternity test to eliminate any doubt about Mr. Thatcher being the child's biological father, the Court found evidence of fraud and a material mistake of fact.[11] But Mr. Santaw could have asked Ms. St. Pierre to undergo

[11]. The trial court effectively imposed a duty on anyone in Adam and Ms. St. Pierre's position to take genetic tests if there was a possibility that someone other than themselves were parents. *Addendum* at page 51.

paternity testing as well and he chose not to do so.

The Court noted that at the time Ms. St. Pierre and Adam signed the affidavit of paternity, they both wanted Marley to be Adam's child, and to continue their relationship. Because of this, it is clear that neither Ms. St. Pierre not Adam defrauded each other as both had a unity of interest. Neither did they induce a signature on the affidavit of paternity by providing the other with false information. The reality to them was that Adam was, indeed, Marley's biological father.

According to the Court, it was entitled to view Ms. St. Pierre and Adam's conduct as supporting a mutual mistake, or deliberate disregard of facts which did not support their belief that Mr. Thatcher was Marley's father (which the Court said would support a finding of fraud). Why didn't the trial court look at Mr. Santaw's inaction as well?

The record reflects that Adam never dealt with Mr. Santaw (except to tell him to stay away from his wife). If extrinsic fraud is fraud that induces one not to present a case in court or deprives one of the opportunity to be heard, then Adam certainly didn't perpetrate such a fraud on Mr. Santaw because he never really spoke to him. Only Ms. St. Pierre spoke to Mr. Santaw, who was a non-signatory to the affidavit of paternity.

There was no evidence produced that at the time of the signing of the affidavit of paternity, either Ms. St. Pierre or Adam was induced to sign the affidavit because of a material mistake of fact. Indeed, when they signed the affidavit of paternity each was convinced that Adam was Marley's natural father. This was a conviction held in good faith.

IV. Any Fraud or Mistake of Material Fact was Perpetrated on Adam Thatcher and Mr. Thatcher has Waived any Right He May Have to Nullify the Affidavit of Parentage.

If anyone was defrauded in this case or if anyone was induced to sign an affidavit under a

material mistake of fact, it was Adam. Adam was told he was the father by the person in the best position to know (Ms. St. Pierre). He reasonably relied on what Ms. St. Pierre told him. But, Adam embraced parenthood; came to love Marley; and was "all in" as a parent. Then, Adam had the proverbial rug pulled out from under him. When that rug was pulled, Adam was essentially told to "go away." He was told that given Marley's age, Marley would soon forget him. This was the unkindest cut of all. Nevertheless, Adam waived any claim of fraud and/or material mistake of fact. He wants to continue to be Marley's father.

V. **While a Case has Been Made of Biological Non-Paternity; No Case has Been Made of Legal Non-Paternity**.

While it may be true that Colby Santaw is Marley's biological parent, at the same time, Adam asserts that he is Marley's legal parent in the same sense that an adopting parent is a child's legal parent. While Adam acted in loco parentis, his status is that of "parent." He is not Marley's uncle. Adam is Marley's father. The affidavit of paternity, still unchallenged, settled that issue.

VI. **Whatever Mistake May Have Been Made in This Case was not Material and Did Not Give the Court Jurisdiction to Overturn the Affidavit of Parentage**.

One would presume that a material mistake of fact is a mistake of fact that goes to the very nature of the affidavit of paternity. The record fails to reflect what mistake was made that induced the signing of the affidavit. What did Adam or Ms. St. Pierre say or do that was material to their signing the affidavit of paternity? All they did, is love each other at that moment and bask in the glory of parenthood.

VII. **Adam Thatcher did not Perpetrate a Fraud on Anyone When He Signed the Affidavit of Paternity as He Signed the Affidavit in Good Faith, Believing He and He Alone was Marley's Father**.

Adam Thatcher signed the affidavit of paternity in good faith, assured that he was Marley's

father by the person most likely to know the truth, Ms. St. Pierre. There is no evidence that Adam considered Mr. Santaw to be the father.

The factual evidence suggests that Ms. St. Pierre's last menstrual period began on January 16, 2013. Under general guidelines, Ms. St. Pierre would have ovulated 14 days later (January 30). Science tells us that Ms. St. Pierre would have been able to conceive over the next 5-7 days. Adding that period of time onto January 30, the period of conception would have been February 1, 2013 through February 7, 2013. During that period of time, Adam had intercourse with Ms. St. Pierre at least twice. According to the testimony, Mr. Santaw did not have intercourse during this time period.

The trial court was apparently not impressed with this math; opting, instead to rely on information allegedly in Ms. St. Pierre's medical records dealing with prenatal visits. Ms. St. Pierre never testified specifically about these records. No reference was made to any specific medical records. We are left to take Ms. St. Pierre's word for it. As the Court considers whether Ms. St. Pierre is credible, they can consider the fact that Ms. St. Pierre said she was told she had conceived just days before starting her menstrual period. That obviously didn't happen and Ms. St. Pierre is relying on evidence of that nature, then she certainly can be said to have reasonably relied on anything the hospital said.

VIII **Neither Ms. St. Pierre Nor Mr. Santaw Petitioned to Disestablish Paternity, So the Court Should Not Have Ruled on Such a Petition Since it Didn't Exist**.

There is not a single pleading where either Ms. St. Pierre or Mr. Santaw petitioned to disestablish paternity. The record will reflect that Adam brought this issue to the Court's attention on a number of occasions. Despite this, no such petition was ever filed. In the absence of a Petition to Disestablish Paternity, the trial court erred when it allowed Mr. Santaw standing and when it ruled

that Mr. Santaw had either been defrauded or was the victim of a material mistake of fact.

IX. **Under the Circumstances of This Case, the Court Erred When It Allowed Relocation After Denying Two Previous Requests.**

Early on in this proceeding, Judge Tenney asked the question of why Ms. St. Pierre and Mr. Santaw were choosing to move to Florida when this proceeding was just starting. Judge Luneau prohibited relocation on several occasions. When the parties married, that fact alone changed everything. Relocation has been devastating to Adam. His daughter is in Florida while Adam is in Vermont.

On May 27, 2016, the trial court denied Mr. Santaw and Ms. St. Pierre's request for an expedited hearing on their motion to relocate. *Appendix* at page 49. This ruling was consistent with the earlier ruling by Judge Tenney at the parties' pretrial conference.

On March 17, 2017, the lower court denied Mr. Santaw and Ms. St. Pierre's motion to relocate. In doing so, the lower court noted that it was exercising its discretion ***not*** to permit relocation. The Court determined that "Considering all of these factors, the balance weighs against Marlena to relocate out of the Upper Valley at this time. The lower court stated, "A lot will depend on how Mr. Thatcher handles the changes. If he decides in the future that he does not want to continue to be involved with Marlena, then that would weigh for the move. As long as he exercises his parenting time with Marlena consistently, the Court expects that they will continue the strong bond they have."

Everything changed on July 6, 2017 when Ms. St. Pierre filed a Motion for Ex Parte Relief. *Appendix* at page 82. On that date, Ms. St. Pierre falsely accused Adam of "allowing" Marley to fall into a bonfire. She also falsely accused Adam of not attending to Marley's wounds properly and of

not taking Marley to a doctor or anyone to treat Marley's wounds. Lastly, Ms. St. Pierre falsely stated that there were three open investigations including NH DCYF, VT DCF and the Vermont State Police.

On July 27, 2017, after a short hearing on July 20, 2017 (with evidence, for the most part, taken by offers of proof), the trial court allowed relocation to take place. According to the trial court, "Based on the weight of the credible evidence, the Court finds that the *ex parte* was justified, even if all the facts set forth did not prove to be 100% accurate." *Appendix* at page 83. On August 31, 2017, the trial court issued an additional order. *Appendix* at page 93. In this order, the court noted that on August 14, 2017, NH DCYF finished its investigation and made an internal finding of neglect against Adam. Id. But, this internal finding was appealed.

On April 13, 2018, NH DCYF ruled that DCYF failed to prove, even by a preponderance of the evidence that the findings of neglect should be upheld. The full story of what happened on July 3, 2017 is contained in the April 13, 2018 Order and in the Findings of Fact. The Order and the findings support Adam's position that Ms. St. Pierre falsely accused Adam of "allowing" Marley to fall into a bonfire; that Ms. St. Pierre falsely accused Adam of not attending to Marley's wounds properly and of not taking Marley to a doctor or anyone to treat Marley's wounds. Adam has brought the NH DCYF decision to the trial court's attention but no remedial action has been taken. It appears that Adam has been victimized by false testimony and by the trial court's precipitous action, taken before it knew all of the facts.

X. The Trial Court Erred When It Failed/Refused to Consider Adam's Counterclaim Wherein Adam Asked for an Award of Primary Physical Responsibility.

Adam filed an answer to Ms. St. Pierre's Petition to Change Court Order. The answer

contained a counterclaim wherein Adam requested that he be awarded primary physical responsibility over Marley. *Appendix* at page 21. When issuing its final orders, the trial court said, "Although the Court is ***changing paternity***, Mr. Thatcher does not lose his ability to ask for parenting rights and responsibilities over Marlena. As he was married to Ms. St. Pierre, he retains the status of a stepparent. Mr. Thatcher has a very strong bond with the child which is in the nature of a parental bond. He has raised Marlena as his own child since birth. As her ***stepfather***, the law allows him to assert parenting rights as a step parent. See: *Bodwell v. Brooks*, 141 N.H. 508 (1996) and N.H. Rev. Stat. Ann. § 461-A:6(V). It would be in Marlena's best interests for Mr. Thatcher to have parenting time."

Nowhere in its final order does the trial court discuss Adam's request for primary physical responsibility. Indeed the trial court doesn't even order a parenting plan setting out Adam's parenting time. Instead, without any stated reasoning, Adam is awarded ***visitation***.

It was error for the trial court not to take up Adam's request to be awarded primary physical responsibility. It was incumbent on the trial court to analyze Adam's request using the factors described in N.H. Rev. Stat. Ann. § 461-A:6.

CONCLUSION

The Court's decision in this case will not only impact four lives (Adam, Marley, Ms. St. Pierre and Mr. Santaw), it will also have a potential impact on numerous other New Hampshire families where children have been born out of wedlock. For example, the Court's decision will likely influence how, when and by whom challenges are made to Affidavits of Paternity.

While it is arguably true that the New Hampshire Legislature may need to look at our paternity statute, for now, based on the current state of our law, we ask the Court to reverse the trial

court's decision in this matter. We ask that the trial court be reversed on the issue of whether Mr. Santaw had standing. We ask the Court to find and rule that only signatories to an Affidavit of Paternity can challenge the Affidavit. We ask that the trial court's ruling that Mr. Santaw and/or Ms. St. Pierre met their burden of proving fraud and/or a material mistake of fact be reversed. In doing so, we ask the Court to find and rule that Mr. Santaw and Ms. St. Pierre's blood test results are irrelevant and should not have been given any weight in the hearing below.

No one involved in this case set out to deceive another. Everyone involved in this case made informed decisions knowing all of the information they needed to know. Everyone knew who had intercourse with whom and when. Everyone knew when menstrual cycles began and when conception was likely to occur. They only thing that is likely fiction is that Ms. St. Pierre conceived on January 13 and had her period three days later. Given the discrepancy in the evidence as to when Ms. St. Pierre had intercourse with Mr. Santaw (was it February 2 or February 9) and when Ms. St. Pierre actually conceived (was it January 13 or some other date), we ask that the Court reverse the trial court's finding that Mr. Santaw met his burden of proving fraud and or a material mistake of fact by a preponderance of the evidence.

A person once said that "you don't need to be related by blood to be a good parent." Here is an opportunity to affirm that principle.

REQUEST FOR ORAL ARGUMENT

The Appellant requests the opportunity to be heard at oral argument. The Appellant sees this matter as a case of first impression. The issues raised in this brief are of sufficient magnitude that the full court should consider its merits.

Respectfully submitted,

By: R. Peter Decato

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief.

I further certify that on August 13, 2018, copies of the foregoing brief will be forwarded, by first class mail, to opposing counsel, Attorney Jay Markell, Airport Road, Concord, New Hampshire 03301.

Dated: 8/13/18

R. Peter Decato
R. Peter Decato, Esq.

ADDENDUM:

1. Final Order (Feb. 07, 2017)
2. Orders/Amended Final Order (Mar 17, 2017)
3. Orders on *Ex Parte Petition* and Reconsideration (Jul 27, 2017)
4. Orders on Status of Case (Dec 22, 2017)

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

2nd Circuit - Family Division - Lebanon
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Lebanon NH 03766-1407

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NOTICE OF DECISION

R. PETER DECATO, ESQ
DECATO LAW OFFICE
84 HANOVER STREET
LEBANON NH 03766

Case Name: **In the Matter of Haley St. Pierre and Adam Thatcher**
Case Number: **652-2015-DM-00015**

Enclosed please find a copy of the Court's Order dated February 06, 2017 relative to:

Final Orders

This matter will become final on 03/10/2017 known as the Judgment Day, if no objections or appeals are filed. Objections must be filed with this court within 10 days of the date of the Notice of Decision, appeals to the Supreme Court within 30 days.

February 07, 2017

Pamela G. Kozlowski
Clerk of Court

(871)
C: Sharon M. Ryan, ESQ; Barbara L. Parker, ESQ; Patrick Timothy Hayes, ESQ

NHJB-2207-DF (07/01/2011)

THE STATE OF NEW HAMPSHIRE

JUDICIAL BRANCH

NH CIRCUIT COURT

GRAFTON COUNTY

2ND CIRCUIT - FAMILY DIVISION - LEBANON

In the Matter of:
Haley St. Pierre, Petitioner, and Adam Thatcher, Respondent
Colby Santaw, Intervenor

Case No. 652-2015-DM-00015

FINAL ORDERS

Petitioner, Haley St. Pierre, Respondent, Adam Thatcher, and Colby Santaw, the Intervenor, appeared with counsel before the Court on November 9, 2016, for a Final Hearing on the Merits. The Court heard testimony from all three parties. The Court held the record open for the parties to submit additional Requests for Findings of Fact and Rulings of Law.

I. Background

The issue is parenting rights and responsibilities for Marlena Thatcher, (birthdate 10/31/2013.) This case involves Ms. St. Pierre's request to relocate Marlena, and Mr. Santaw's request for parenting rights and responsibilities.

Ms. St. Pierre and Mr. Thatcher met in 2012, when they were both working in the restaurant industry. They lived together as a couple during the pregnancy. Marlena was born in October 2013, and approximately three months later, in January of 2014, the parties decided to marry. They both acknowledged that the relationship developed differences, and eventually they separated in 2014. The divorce was filed in early 2015 and finalized in July of 2015.

Pursuant to their Divorce Decree dated 7/23/2015, they agreed that they would share decision-making responsibility for Marlena, Ms. St. Pierre would have primary residential responsibility, and that Mr. Thatcher would have Mondays and Tuesdays and alternating weekends from Friday until Sunday. This Parenting Plan largely adopted the schedule the parties had been using during their period of separation.

At the time of the child's conception in 2013, Ms. St. Pierre travelled to New York and had an intimate relationship with Colby Santaw, the Intervenor. Ms. St. Pierre and Mr. Santaw had been high school sweethearts. They broke up their relationship when Mr. Santaw graduated and went to college in upstate New York. Ms. St. Pierre testified that the trip was at a time when she and Mr. Thatcher were having issues in their relationship. Mr. Thatcher testified he was not aware the relationship had issues, and thought Ms. St. Pierre was making the trip to New York to see friends. When Ms. St. Pierre returned to New Hampshire, she either informed Mr. Thatcher, or he discovered from looking at her cell phone, that she had had an intimate relationship with Mr. Santaw.

Shortly thereafter, Ms. St. Pierre discovered she was pregnant. She told Mr. Santaw about the pregnancy and also told him that he was not the father. She told Mr. Thatcher that he was the father, and he believed her, although Mr. Thatcher told the Court he had his doubts, based upon the timing of the visit to New York and his knowledge of the intimate relationship with Colby Santaw.

The parties disputed the exact weekend of the visit, but the visit happened during the time that the child was conceived.

After Ms. St. Pierre disclosed her pregnancy to Mr. Santaw and to Mr. Thatcher, she and Mr. Thatcher reconciled any issues they had with their relationship, and they remained co-habitating.

After Mr. Santaw heard from Ms. St. Pierre that she was pregnant, he made the decision to cut off all contact and told her that he thought it was appropriate that she focus on her relationship with the child's father, which then was believed to be Mr. Thatcher. He decided to cut off contact with her, including social media contact, and essentially lost contact with her until well after the child's birth and the parties' subsequent divorce.

Marlena was born in October 31, 2013. Both St. Pierre and Thatcher families were overjoyed with her arrival. Both parents and their extended families were involved. The parties married several months later.

The relationship between Mr. Thatcher and Ms. St. Pierre irretrievably broke down, and they separated.

Mr. Thatcher and Ms. St. Pierre co-parented Marlena during the separation and divorce period.

After the divorce was final, Ms. St. Pierre rekindled her relationship with Mr. Santaw, and they began dating in the fall of 2015. In October 2015, Mr. Santaw and Ms. St. Pierre were on a trip together without Marlena, when they began to discuss Marlena's birth. At that point, Mr. Santaw was dating Ms. St. Pierre, but had not met Marlena. Mr. Santaw said he wanted to take things slowly with being introduced to the child and do it at a point when the parties' relationship was serious. Ms. St. Pierre had just ended a serious relationship she had with a boyfriend, whom she had been dating for several months and with whom Marlena had formed a relationship.

Mr. Santaw testified credibly that when he contemplated the timing of his intimate relationship with Ms. St.Pierre in early 2013 and the child's birth that October, he came to the conclusion that there was a possibility that he could be Marlena's father. This was confirmed in his mind when he looked at Marlena's baby picture and compared it with one of his own baby pictures, and noticed a resemblance.

Mr. Santaw asked Ms. St. Pierre, and she agreed, that they conduct their own genetic test to see if he could be Marlena' s biological father. The parties did testing in early October 2015. The results that came back were conclusive- Mr. Santaw was Marlena's biological father.

After she reviewed the test results, Ms. St. Pierre tried to set up an in-person meeting with Mr. Thatcher to discuss them. Mr. Thatcher was reluctant to do so. He felt she was up to something. Finally, Ms. St. Pierre told Mr. Thatcher over the phone about the results. Mr. Thatcher was upset.

Following this conversation, the parties' co-parenting relationship deteriorated. Ms. St. Pierre feels that she did not get enough information from Mr. Thatcher. Mr. Thatcher felt that he had no obligation to Ms. St. Pierre to provide information, and the parties had basically exercised a shared parenting schedule, with slightly more overnight time to Ms. St. Pierre.

Mr. Santaw and Ms. St. Pierre have continued their relationship and are now engaged, with a wedding date expected in the summer of 2017. Mr. Santaw is an engineer, and has been offered employment in Florida. Ms. St. Pierre has been working part time. She would like to relocate to Florida to be with Mr. Santaw, and take Marlena with her. Mr. Thatcher objects as that would interfere with his parenting relationship with Marlena.

The child's safety is not an issue in this case. At issue is whether the Court has the ability to modify or enter a new Affidavit of Paternity, based upon the genetic testing, which indicates that Mr. Santaw is the biological father. The issue is also whether Ms. St. Pierre should be able to relocate to Florida with Marlena.

Ms. St. Pierre resides temporarily in Claremont, with her family, and with Mr. Santaw part time.

Mr. Santaw resides with Ms. St. Pierre in Claremont, but also in Florida part time. He has rented a home down there and is co-owner of a business which is based down there, but has flexible hours. He flys up freuquenty, and she and Marlena will fly down.

Mr. Thatcher recently broke up with a long-term girlfriend, whom he was living with, and has now moved back into his parents' home in Vermont, where he is staying with his parents and the child. He has extended family members who provide childcare for him, as to Ms. St. Pierre.

All three sets of grandparents are actively involved and see the child during their respective parenting time.

Mr. Santaw asked for temporary parenting time, which the Court denied, based upon the fact that he was residing with Ms. St. Pierre and his access to the child would be during her time.

The Court was told that Marlena calls both Mr. Santaw and Mr. Thatcher daddy. Mr. Thatcher gets called Uncle Adam when she is with her mother and Mr. Santaw, and Mr. Santaw is called "Mommy's Daddy" when Marlena is with Mr. Thatcher.

There is considerable hostility and tension between the parties. The Court was told that the child has exhibited such symptomatic complaints as constipation, stomach aches, and generally feeling torn between the parents.

The following requests for findings and rulings are granted and incorporated into this order. :

Petitioner's: 2-9, 11, 13, 15-16, 18-19, 21, 22-23, 26, 28-29.

Respondent's: 1-2, 5-13, 17, 19. A-M, R-Z, AA-PP.

Intervenor's (supplemental): 1, 10

Others are either denied, and or addressed in this narrative order. If there are any conflicts between the requests and the narrative orders, the narrative orders govern.

I. Paternity and rights of Colby Santaw

RSA 168-A:2, I controls the guidelines for the establishment of paternity, which may be established upon an affidavit of paternity for unmarried parents. N.H. Rev. Stat. § 168-A:2, I(b) (Supp. 2012).

Singing the Affidavit has the legal effect of establishing paternity for the child. *In Re Gendron and Plaisek*, 157 N.H. 314 (2008.)

It is noted that at the time of Marlena's birth, Mr. Thatcher and Ms. St. Pierre were not married, and the Affidavit was needed. Had they been a married couple, Mr. Thatcher would have been placed on the birth certificate as there is a presumption of legal paternity when the mother is married.

Once paternity is established, RSA 5-C:28 provides for rescission of paternity. N.H. Rev. Stat. § 5-C:28 (Supp. 2012). A parent or legal guardian may request to have paternity rescinded within a 60-day period from filing of an affidavit of paternity. N.H. Rev. Stat. § 5-C:28, I (Supp. 2012). This challenge is done on an administrative level. Although the opportunity to rescind of paternity passes after a 60-day period, it is possible to challenge paternity; however, any challenge to the affidavit shall be decided only by a court of competent jurisdiction. See N.H. Rev. Stat. § 5-C:28, III (Supp. 2012).

Under Federal law, states must have in effect laws requiring the use of these procedures to improve the effectiveness of child support enforcement. In cases such as this, concerning paternity establishment, where there is a signed voluntary acknowledgement of paternity, procedures requiring a legal finding of paternity must be in place, subject to the right of any signatory to rescind the acknowledgement within (I) 60 days; or (II) the date of an administrative or judicial procedure relating the child in which the signatory is a party, which includes enforcement of a support order. 42 U.S.C.A. § 666(5)(D)(ii) (2007).

When the status of paternity is contested after the 60-day period, paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger. 42 U.S.C.A. § 666(5)(D)(iii) (2007).

States must also have procedures concerning the admissibility of genetic testing and their admissibility of evidence for purposes of establishing paternity. 42 U.S.C.A. § 666(5)(F)(2007).

In New Hampshire, under RSA 522:1, in civil actions in which paternity is a relevant and contested issue, the court or the department of health and human services has the authority to order genetic testing to determine paternity. N.H. Rev. Stat. § 522:1 (Supp. 2012). If any party refuses to submit to such tests, the court may resolve the question of paternity against such party. N.H. Rev. Stat. § 522:1, I(a) (Supp. 2012).

Although RSA 522:1 lays out the authority and administrative procedures, under section (e), nothing in this section precludes a party from filing a petition to determine paternity directly with the court, seeking a judicial determination. N.H. Rev. Stat. Ann. § 522:1, II(e) (Supp. 2012).

Mr. Santaw has standing to challenge the Affidavit of Paternity, as he is a putative father. As he is challenging the Affidavit, he has the burden of proof to prove fraud, duress, or material mistake of fact under RSA 5-C:28.

Based on the weight of credible evidence, Ms. St. Pierre and Mr. Thatcher either misrepresented or were mistaken concerning the baby's paternity. Mr. Santaw has a valid claim for fraud or material mistake of fact concerning the signing of the Affidavit of Paternity. Duress does not apply.

Both Mr. Thatcher and Ms. St. Pierre were at least aware of the possibility that Mr. Thatcher may not be the child's biological father when they signed Marlena's Affidavit of Paternity. They were aware of Ms. St. Pierre's intimacy with Mr. Santaw around the time of the child's conception. Mr. Thatcher was involved as Ms. St. Pierre was in the prenatal visits and after care for the child. There was information in the prenatal records which could have lead either to question his or her belief about the child's conception date, which was calculated using self-reported information from Ms. St. Pierre, and the assumption of a birth exactly 40 weeks later. The ultrasounds revealed development which was a little off of the due date the doctor had calculated. Either Ms. St. Pierre or Mr. Thatcher could have requested a paternity test to eliminate any doubt about Mr. Thatcher being the child's biological father. Neither chose to do that, or to contact Mr. Santaw. Both Ms. St. Pierre and Mr. Thatcher wanted Marlena to be his child, and to continue their relationship.

The Court can either view Ms. St. Pierre and Mr. Thatcher's behavior as ignorance of the facts, which supports a mutual mistake, or deliberate disregard of facts which did not support their belief that Mr. Thatcher was the child's father, which would support a fraud.

Either way, Mr. Santaw would not have been aware of Marlena's existence until he started dating Ms. St. Pierre in October 2015. He would not have had a reason to contact Ms. St. Pierre or

Mr. Thatcher prior to that time. He was relying on incorrect information Ms. St. Pierre gave him about the child's paternity. The Court found his testimony to be credible.

Mr. Santaw met his burden to show that the paternity Affidavit should be rescinded, and Marlena's birth certificate should be amended.

Therefore, the Court makes a finding that Colby Santaw is the biological and legal father of Marlena Thatcher and the child's birth certificate shall be amended to reflect Colby Santaw as the father.

Although the Court is changing paternity, Mr. Thatcher does not lose his ability to ask for parenting rights and responsibilities over Marlena. As he was married to Ms. St. Pierre, he retains the status of a stepparent. Mr. Thatcher has a very strong bond with the child which is in the nature of a parental bond. He has raised Marlena as his own child since birth. As her stepfather, the law allows him to assert parenting rights as a step parent. *See*: Bodwell v. Brooks, 141 N.H 508 (1996.) and RSA 461-A:6 V. It would be in Marlena's best interests for Mr. Thatcher to have parenting time.

Relative to decision making and residential responsibility and other parenting responsibilities, where Ms. St. Pierre and Mr. Santaw are an intact couple, the Court declines to issue a specific parenting plan on those.

The Court is carving out a schedule of parenting time for Mr. Thatcher.

The parties should be able to understand how difficult it would be for Marlena to suddenly lose time with Mr. Thatcher, which is what is proposed by Ms. St. Pierre. Marlena's distress over the conflict is already manifesting itself in her physical symptoms. Changing the schedule to alternating weekends when she starts to enroll in kindergarten makes sense, as most of Marlena's weekday time will be at school.

A great part of the success or failure of this arrangement will depend on how the parties react to it.

The parties (St. Pierre, Thatcher and Santaw) shall attend family counseling. Sessions need not be together, but they need to get the same information from an experienced provider. Marlena can accept and embrace a blended family situation more easily than adults can. The parties should select a therapist who is experienced with blended families and can help them address Marlena's needs. Ms. St. Pierre shall be responsible for the costs of the counseling.

The Court declines to change Marlena's last name at this time . This issue was not sufficiently addressed or developed at the hearing. Legally, Mr. Santaw and Ms. St. Pierre will share decision making and can make that decision together. Marlena is young, and is not yet school aged.

II. Relocation

The other issue before the Court was whether Ms. St. Pierre could relocate with Marlena to Florida. She and Mr. Santaw are a couple. They are planning to marry. He resides in Florida in a rented home. His job is in Florida. He has a flexible schedule. Ms. St. Pierre has left her job and is not currently working. She is being supported by Mr. Santaw. The couple travels back and forth. Marlena travels to Florida when Ms. St. Pierre has the longer, alternate week, and otherwise, Mr. Santaw will come to New Hampshire to see Marlena and Ms. St. Pierre.

All three parties have extended family in the Upper Valley/New Hampshire area, including the three sets of grandparents, who are now very extensively involved.

The standard the Court must use in regards to the relocation request is set forth in RSA 461-A:12. Pursuant to that statute, the parent seeking to relocate must give more than 60 days notice to the other parent unless the Parenting Plan specifically governs relocation. RSA 461:A:12 III.

In this case, notice is not an issue. Ms. St. Pierre has given reasonable notice. The 2015 Parenting Plan does not expressly govern the relocation.

Although Mr. Thatcher is legally a stepparent, the Court would use the same standard as a parent here, because of his uniquely close bond to Marlena.

Under RSA 461-A:12, the relocation statute, the parent seeking to relocate bears the burden under a preponderance of the evidence standard that: (a) the relocation is for a legitimate purpose and, (b) the proposed relocation is reasonable in light of that purpose. Once the moving parent meets his or her burden the burden shifts to the non-moving parent to show, by a preponderance of the evidence that the proposed relocation is not in the best interest of the child (*see* RSA 461-A-12, v, vi).

Based on the weight of the credible evidence, the Court finds that Ms. St. Pierre has not met her burden by a preponderance of the evidence to show that the relocation is for a legitimate purpose at this time. She is engaged. She is not married yet. She does not appear to have any job prospects in Florida. Mr. Santaw is able to commute to New Hampshire to be with her. This is not a necessary move for Marlena.

Likewise, the Court finds that Ms. St. Pierre's proposed relocation to Florida is not reasonable in light of that fact. Mr. Santaw has had a home and a business in that location, but this has not been a long term situation.

Even if the Petitioner met her burden, Respondent meets his to show that the relocation is not in the child's best interest. See *Tomasco v. Dubuc*, 145 N.H. 169 (2000), *In Re Lockaby*, 148 N.H. 462 (1990), and *In the Matter of Heinrich and Curotto*, 160 N.H. 650 (2010.)

In terms of analyzing the best interests standard, pursuant to *Tomasco and Heinrich*, the Court must consider:

1. Each parent's reasons for seeking or opposing the move;

2. The quality of the relationships between the child and the custodial and non-custodial parent;

3. The impact of the move on the quantity and the quality of the child's future contact with the non-custodial parent;

4. The degree to which the custodial parent in the child's life may be enriched economically, emotionally, and educationally by the move;

5. The feasibility of preserving the relationship between the non-custodial parent and the child through suitable visitation arrangements;

6. Any negative impact from continued or exacerbated hostility between the custodial and the non-custodial parents, and;

7. The effect the move may have on the extended family relations.

Both parents have legitimate reasons for seeking or opposing the move. Ms. St. Pierre's desire to move is motivated by the relationship with Mr. Santaw, and does not appear to be motivated by a desire to get away from Mr. Thatcher. Mr. Thatcher's desire to oppose the move is also legitimate, and compelling. He is actively involved in Marlena's life, and sees her regularly under the current schedule. That regular contact would change if Marlena relocated.

The quality of the relationships between the child and the custodial and non-custodial parents, in this Court's assessment are equal. Marlena has a strong bond with both Ms. St. Pierre and Mr. Thatcher.

Mr. Thatcher's contact with Marlena would be greatly affected by the move. Under the current schedule he is able to participate in Marlena's activities such as dance class and to see her regularly. If Marlena moved to Florida, the distance would be prohibitive. Such a distance would effectively preclude the parent who lives away from participating in weekly events given the travel time. There is a strong policy in RSA 461-A that both parents need to be involved in the children's lives and have regular contact with the child, unless it can be shown that it is harmful for the child.

Marlena has historically had a schedule where she sees her parents fairly regularly. Although the parties do not always agree, and they tend to parallel-parent more than cooperatively co-parent, it has been to Marlena's benefit to have both parents have ongoing regular and frequent contact.

Marlena's ties to date have been in in the Upper Valley area. She has a close relationship with her grandparents. All three sets of grandparents live in the Upper Valley area.

Ms. St. Pierre's life would be enhanced significantly economically and emotionally by the move. Her life will be enhanced economically and emotionally by living with Mr. Santaw, who is an emotional and financial support to her.

As far as enhancing Marlena's life, there was not enough information to make a determination. Marlena is preschool aged. Marlena does not have any special education issues which might be better addressed in one system over another. The Court cannot say that Marlena's life would be enhanced educationally by either school in Florida or school in New Hampshire.

Marlena would benefit by having Ms. St. Pierre as an at-home parent. She has that now.

It is feasible to preserve Mr. Thatcher's relationship through parenting time arrangements. Mr. Thatcher's time would have to shift to longer periods of time during vacations and holidays. He would not have the ability to see Marlena during the week with the distance. This would change Marlena's schedule significantly. At Marlena's young age, it would be difficult for her developmentally to spend lengthy periods of time away from Mr. St. Pierre or Mr. Thatcher.

The negative impact on the child from continued or exacerbated hostility between parents is a major factor for this case. The hostility still appears great. The parties do not have good communication, which makes it more difficult for Marlena.

The Court cannot say with any certainty whether the hostility would decrease if Ms. St. Pierre moved away. Some of the day to day issues that the parties have might be moot because they would not have weekly contact with each other. Some of the might be magnified, for instance, conflicts over travel, exchanges and accommodating schedule changes, which would not be easy with parents long distance, particularly if they do not have a strong co-parenting relationship to begin with. On the basis of the testimony provided, the move would not improve relations between the parties.

Marlena would be further away from relatives in the Upper Valley/ New Hampshire, including all three sets of grandparents. These family members have been very involved with her since her birth. Moving her away would mean she would have less access to those family members.

No one factor is dispositive, and the Court cannot not weigh all the factors equally. It has its discretion in applying the *Tomasco* factors. *See Heinrich and Curotto, supra.*

Considering all of these factors, the balance weighs against allowing Marlena to relocate out of the Upper Valley area at this time.

For now, Marlena's schedule between Ms. St. Pierre and Mr. Thatcher shall remain the same. Once Marlena enrolls in kindergarten, this would change so that Marlena would be with Ms. St. Pierre primarily during the week, and with Mr. Thatcher on alternating weekends.

The Court is aware that this may inconvenience Ms. St. Pierre and Mr. Santaw. However, Mr. Thatcher has a strong bond with Marlena, having served in an in loco parentis role since her birth.

A lot will depend on how Mr. Thatcher handles the changes. If he decides in the future that he does not want to continue to be involved with Marlena, then that would weigh for the move. As long as he exercises his parenting time with Marlena consistently, the Court expects that they will continue to share the strong bond they have.

III. Child support

Given the orders above, which create a substantial change in circumstances for the child, the Court is vacating the current USO.

Accordingly,

1. Colby Santaw is the father of Marlena Thatcher, and his name shall be entered on the child's birth certificate.

2. The Parenting Plan and USO issued 7/23/2015 are vacated, and the provisions for tax exemptions in the Decree are also vacated.

3. Mr. Thatcher shall have parenting time with Marlena as follows:

    a. For the remainder of the preschool year, on alternating weekends, Friday to Sunday, and Monday and Tuesdays overnight.

    b. Beginning in the fall of 2017, when Marlena starts kindergarten, he shall have alternating weekends, Friday 5pm to Sunday 5pm, plus two weeks of summer vacation time.

4. The parties shall enroll in family counseling. Ms. St. Pierre and Mr. Santaw shall be responsible for the costs. This shall be a temporary order

So Ordered:

2/16 2017
Date

[signature]
Hon. Henrietta W. Luneau, Presiding Judge

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
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NOTICE OF DECISION

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Case Name: **In the Matter of Haley St. Pierre and Adam Thatcher**
Case Number: **652-2015-DM-00015**

Enclosed please find a copy of the Court's Order dated March 17, 2017 relative to:

Orders
Amended Final Orders

☐ Docket in Book
☑ Copy sent to Client
☐ To be filed

March 17, 2017

Pamela G. Kozlowski
Clerk of Court

(871)

C: NH Division of Human Services; Sharon M. Ryan, ESQ; Barbara L. Parker, ESQ; Patrick Timothy Hayes, ESQ

THE STATE OF NEW HAMPSHIRE

JUDICIAL BRANCH

NH CIRCUIT COURT

GRAFTON COUNTY

2ND CIRCUIT - FAMILY DIVISION - LEBANON

In the Matter of:
Haley St. Pierre, Petitioner and Adam Thatcher, Respondent (and Colby Santaw, Intervenor)

Case No: 652-2015-M-0015

ORDERS

1. Mr. Thatcher's Motion to Reconsider is granted in part. Prayer E is granted. Marlena will start kindergarten in 2019, not 2017. All other requests are respectfully denied.

2. It appears that the pagination of the final order is off, either by scivener's and/or software error. An amended order is issued.

3. Mr.Santaw's Motion to Reconsider contains allegations of changes to material facts which happened after the final hearing, including his and Ms. St. Pierre's marriage. The motion is not signed under oath. This motion shall be scheduled for a hearing. The parties shall notify the Court within 10 days if more than one hour (20 min each) is needed.

So Ordered:

3/17, 2016
Date

Hon. Henrietta W. Luneau

THE STATE OF NEW HAMPSHIRE

JUDICIAL BRANCH

NH CIRCUIT COURT

GRAFTON COUNTY

2ND CIRCUIT - FAMILY DIVISION - LEBANON

In the Matter of:
Haley St. Pierre, Petitioner, and Adam Thatcher, Respondent
Colby Santaw, Intervenor

Case No. 652-2015-DM-00015

AMENDED FINAL ORDERS

Petitioner, Haley St. Pierre, Respondent, Adam Thatcher, and Colby Santaw, the Intervenor, appeared with counsel before the Court on November 9, 2016, for a Final Hearing on the Merits. The Court heard testimony from all three parties. The Court held the record open for the parties to submit additional Requests for Findings of Fact and Rulings of Law.

I. Background

The issue is parenting rights and responsibilities for Marlena Thatcher, (birthdate 10/31/2013.) This case involves Ms. St. Pierre's request to relocate Marlena, and Mr. Santaw's request for parenting rights and responsibilities.

Ms. St. Pierre and Mr. Thatcher met in 2012, when they were both working in the restaurant industry. They lived together as a couple during the pregnancy. Marlena was born in October 2013, and approximately three months later, in January of 2014, the parties decided to marry. They both acknowledged that the relationship developed differences, and eventually they separated in 2014. The divorce was filed in early 2015 and finalized in July of 2015.

Pursuant to their Divorce Decree dated 7/23/2015, they agreed that they would share decision-making responsibility for Marlena, Ms. St. Pierre would have primary residential responsibility, and that Mr. Thatcher would have Mondays and Tuesdays and alternating weekends from Friday until Sunday. This Parenting Plan largely adopted the schedule the parties had been using during their period of separation.

At the time of the child's conception in 2013, Ms. St. Pierre travelled to New York and had an intimate relationship with Colby Santaw, the Intervenor. Ms. St. Pierre and Mr. Santaw had been high school sweethearts. They broke up their relationship when Mr. Santaw graduated and went to college in upstate New York. Ms. St. Pierre testified that the trip was at a time when she and Mr. Thatcher were having issues in their relationship. Mr. Thatcher testified he was not aware the relationship had issues, and thought Ms. St. Pierre was making the trip to New York to see friends. When Ms. St. Pierre returned to New Hampshire, she either informed Mr. Thatcher, or he discovered from looking at her cell phone, that she had had an intimate relationship with Mr. Santaw.

Shortly thereafter, Ms. St. Pierre discovered she was pregnant. She told Mr. Santaw about the pregnancy and also told him that he was not the father. She told Mr. Thatcher that he was the father, and he believed her, although Mr. Thatcher told the Court he had his doubts, based upon the timing of the visit to New York and his knowledge of the intimate relationship with Colby Santaw.

The parties disputed the exact weekend of the visit, but the visit happened during the time that the child was conceived.

After Ms. St. Pierre disclosed her pregnancy to Mr. Santaw and to Mr. Thatcher, she and Mr. Thatcher reconciled any issues they had with their relationship, and they remained co-habitating.

After Mr. Santaw heard from Ms. St. Pierre that she was pregnant, he made the decision to cut off all contact and told her that he thought it was appropriate that she focus on her relationship with the child's father, which then was believed to be Mr. Thatcher. He decided to cut off contact with her, including social media contact, and essentially lost contact with her until well after the child's birth and the parties' subsequent divorce.

Marlena was born in October 31, 2013. Both St. Pierre and Thatcher families were overjoyed with her arrival. Both parents and their extended families were involved. The parties married several months later.

The relationship between Mr. Thatcher and Ms. St. Pierre irretrievably broke down, and they separated.

Mr. Thatcher and Ms. St. Pierre co-parented Marlena during the separation and divorce period.

After the divorce was final, Ms. St. Pierre rekindled her relationship with Mr. Santaw, and they began dating in the fall of 2015. In October 2015, Mr. Santaw and Ms. St. Pierre were on a trip together without Marlena, when they began to discuss Marlena's birth. At that point, Mr. Santaw was dating Ms. St. Pierre, but had not met Marlena. Mr. Santaw said he wanted to take things slowly with being introduced to the child and do it at a point when the parties' relationship was serious. Ms. St. Pierre had just ended a serious relationship she had with a boyfriend, whom she had been dating for several months and with whom Marlena had formed a relationship.

Mr. Santaw testified credibly that when he contemplated the timing of his intimate relationship with Ms. St.Pierre in early 2013 and the child's birth that October, he came to the conclusion that there was a possibility that he could be Marlena's father. This was confirmed in his mind when he looked at Marlena's baby picture and compared it with one of his own baby pictures, and noticed a resemblance.

Mr. Santaw asked Ms. St. Pierre, and she agreed, that they conduct their own genetic test to see if he could be Marlena' s biological father. The parties did testing in early October 2015. The results that came back were conclusive- Mr. Santaw was Marlena's biological father.

After she reviewed the test results, Ms. St. Pierre tried to set up an in-person meeting with Mr. Thatcher to discuss them. Mr. Thatcher was reluctant to do so. He felt she was up to something. Finally, Ms. St. Pierre told Mr. Thatcher over the phone about the results. Mr. Thatcher was upset.

Following this conversation, the parties' co-parenting relationship deteriorated. Ms. St. Pierre feels that she did not get enough information from Mr. Thatcher. Mr. Thatcher felt that he had no obligation to Ms. St. Pierre to provide information, and the parties had basically exercised a shared parenting schedule, with slightly more overnight time to Ms. St. Pierre.

Mr. Santaw and Ms. St. Pierre have continued their relationship and are now engaged, with a wedding date expected in the summer of 2017. Mr. Santaw is an engineer, and has been offered employment in Florida. Ms. St. Pierre has been working part time. She would like to relocate to Florida to be with Mr. Santaw, and take Marlena with her. Mr. Thatcher objects as that would interfere with his parenting relationship with Marlena.

The child's safety is not an issue in this case. At issue is whether the Court has the ability to modify or enter a new Affidavit of Paternity, based upon the genetic testing, which indicates that Mr. Santaw is the biological father. The issue is also whether Ms. St. Pierre should be able to relocate to Florida with Marlena.

Ms. St. Pierre resides temporarily in Claremont, with her family, and with Mr. Santaw part time.

Mr. Santaw resides with Ms. St. Pierre in Claremont, but also in Florida part time. He has rented a home down there and is co-owner of a business which is based down there, but has flexible hours. He flys up freuquenty, and she and Marlena will fly down.

Mr. Thatcher recently broke up with a long-term girlfriend, whom he was living with, and has now moved back into his parents' home in Vermont, where he is staying with his parents and the child. He has extended family members who provide childcare for him, as to Ms. St. Pierre.

All three sets of grandparents are actively involved and see the child during their respective parenting time.

Mr. Santaw asked for temporary parenting time, which the Court denied, based upon the fact that he was residing with Ms. St. Pierre and his access to the child would be during her time.

The Court was told that Marlena calls both Mr. Santaw and Mr. Thatcher daddy. Mr. Thatcher gets called Uncle Adam when she is with her mother and Mr. Santaw, and Mr. Santaw is called "Mommy's Daddy" when Marlena is with Mr. Thatcher.

There is considerable hostility and tension between the parties. The Court was told that the child has exhibited such symptomatic complaints as constipation, stomach aches, and generally feeling torn between the parents.

The following requests for findings and rulings are granted and incorporated into this order. :

Petitioner's: 2-9, 11, 13, 15-16, 18-19, 21, 22-23, 26, 28-29.

Respondent's: 1-2, 5-13, 17, 19. A-M, R-Z, AA-PP.

Intervenor's (supplemental): 1, 10

Others are either denied, and or addressed in this narrative order. If there are any conflicts between the requests and the narrative orders, the narrative orders govern.

I. Paternity and rights of Colby Santaw

RSA 168-A:2, I controls the guidelines for the establishment of paternity, which may be established upon an affidavit of paternity for unmarried parents. N.H. Rev. Stat. § 168-A:2, I(b) (Supp. 2012).

Singing the Affidavit has the legal effect of establishing paternity for the child. *In Re Gendron and Plaisek*, 157 N.H. 314 (2008.)

It is noted that at the time of Marlena's birth, Mr. Thatcher and Ms. St. Pierre were not married, and the Affidavit was needed. Had they been a married couple, Mr. Thatcher would have been placed on the birth certificate as there is a presumption of legal paternity when the mother is married.

Once paternity is established, RSA 5-C:28 provides for rescission of paternity. N.H. Rev. Stat. § 5-C:28 (Supp. 2012). A parent or legal guardian may request to have paternity rescinded within a 60-day period from filing of an affidavit of paternity. N.H. Rev. Stat. § 5-C:28, I (Supp. 2012). This challenge is done on an administrative level. Although the opportunity to rescind of paternity passes after a 60-day period, it is possible to challenge paternity; however, any challenge to the affidavit shall be decided only by a court of competent jurisdiction. See N.H. Rev. Stat. § 5-C:28, III (Supp. 2012).

Under Federal law, states must have in effect laws requiring the use of these procedures to improve the effectiveness of child support enforcement. In cases such as this, concerning paternity establishment, where there is a signed voluntary acknowledgement of paternity, procedures requiring a legal finding of paternity must be in place, subject to the right of any signatory to rescind the acknowledgement within (I) 60 days; or (II) the date of an administrative or judicial procedure relating the child in which the signatory is a party, which includes enforcement of a support order. 42 U.S.C.A. § 666(5)(D)(ii) (2007).

When the status of paternity is contested after the 60-day period, paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger. 42 U.S.C.A. § 666(5)(D)(iii) (2007).

States must also have procedures concerning the admissibility of genetic testing and their admissibility of evidence for purposes of establishing paternity. 42 U.S.C.A. § 666(5)(F)(2007).

In New Hampshire, under RSA 522:1, in civil actions in which paternity is a relevant and contested issue, the court or the department of health and human services has the authority to order genetic testing to determine paternity. N.H. Rev. Stat. § 522:1 (Supp. 2012). If any party refuses to submit to such tests, the court may resolve the question of paternity against such party. N.H. Rev. Stat. § 522:1, I(a) (Supp. 2012).

Although RSA 522:1 lays out the authority and administrative procedures, under section (e), nothing in this section precludes a party from filing a petition to determine paternity directly with the court, seeking a judicial determination. N.H. Rev. Stat. Ann. § 522:1, II(e) (Supp. 2012).

Mr. Santaw has standing to challenge the Affidavit of Paternity, as he is a putative father. As he is challenging the Affidavit, he has the burden of proof to prove fraud, duress, or material mistake of fact under RSA 5-C:28.

Based on the weight of credible evidence, Ms. St. Pierre and Mr. Thatcher either misrepresented or were mistaken concerning the baby's paternity. Mr. Santaw has a valid claim for fraud or material mistake of fact concerning the signing of the Affidavit of Paternity. Duress does not apply.

Both Mr. Thatcher and Ms. St. Pierre were at least aware of the possibility that Mr. Thatcher may not be the child's biological father when they signed Marlena's Affidavit of Paternity. They were aware of Ms. St. Pierre's intimacy with Mr. Santaw around the time of the child's conception. Mr. Thatcher was involved as Ms. St. Pierre was in the prenatal visits and after care for the child. There was information in the prenatal records which could have lead either to question his or her belief about the child's conception date, which was calculated using self-reported information from Ms. St. Pierre, and the assumption of a birth exactly 40 weeks later. The ultrasounds revealed development which was a little off of the due date the doctor had calculated. Either Ms. St. Pierre or Mr. Thatcher could have requested a paternity test to eliminate any doubt about Mr. Thatcher being the child's biological father. Neither chose to do that, or to contact Mr. Santaw. Both Ms. St. Pierre and Mr. Thatcher wanted Marlena to be his child, and to continue their relationship.

The Court can either view Ms. St. Pierre and Mr. Thatcher's behavior as ignorance of the facts, which supports a mutual mistake, or deliberate disregard of facts which did not support their belief that Mr. Thatcher was the child's father, which would support a fraud.

Either way, Mr. Santaw would not have been aware of Marlena's existence until he started dating Ms. St. Pierre in October 2015. He would not have had a reason to contact Ms. St. Pierre or Mr. Thatcher prior to that time. He was relying on incorrect information Ms. St. Pierre gave him about the child's paternity. The Court found his testimony to be credible.

Mr. Santaw met his burden to show that the paternity Affidavit should be rescinded, and Marlena's birth certificate should be amended.

Therefore, the Court makes a finding that Colby Santaw is the biological and legal father of Marlena Thatcher and the child's birth certificate shall be amended to reflect Colby Santaw as the father.

Although the Court is changing paternity, Mr. Thatcher does not lose his ability to ask for parenting rights and responsibilities over Marlena. As he was married to Ms. St. Pierre, he retains the status of a stepparent. Mr. Thatcher has a very strong bond with the child which is in the nature of a parental bond. He has raised Marlena as his own child since birth. As her stepfather, the law allows him to assert parenting rights as a step parent. *See:* Bodwell v. Brooks, 141 N.H 508 (1996.) and RSA 461-A:6 V. It would be in Marlena's best interests for Mr. Thatcher to have parenting time.

Relative to decision making and residential responsibility and other parenting responsibilities, where Ms. St. Pierre and Mr. Santaw are an intact couple, the Court declines to issue a specific parenting plan on those.

The Court is carving out a schedule of parenting time for Mr. Thatcher.

The parties should be able to understand how difficult it would be for Marlena to suddenly lose time with Mr. Thatcher, which is what is proposed by Ms. St. Pierre. Marlena's distress over the conflict is already manifesting itself in her physical symptoms. Changing the schedule to alternating weekends when she starts to enroll in kindergarten makes sense, as most of Marlena's weekday time will be at school.

A great part of the success or failure of this arrangement will depend on how the parties react to it.

The parties (St. Pierre, Thatcher and Santaw) shall attend family counseling. Sessions need not be together, but they need to get the same information from an experienced provider. Marlena can accept and embrace a blended family situation more easily than adults can. The parties should select a therapist who is experienced with blended families and can help them address Marlena's needs. Ms. St. Pierre shall be responsible for the costs of the counseling.

The Court declines to change Marlena's last name at this time . This issue was not sufficiently addressed or developed at the hearing. Legally, Mr. Santaw and Ms. St. Pierre will share decision making and can make that decision together. Marlena is young, and is not yet school aged.

II. Relocation

The other issue before the Court was whether Ms. St. Pierre could relocate with Marlena to Florida. She and Mr. Santaw are a couple. They are planning to marry. He resides in Florida in a rented home. His job is in Florida. He has a flexible schedule. Ms. St. Pierre has left her job and is not currently working. She is being supported by Mr. Santaw. The couple travels back and forth. Marlena travels to Florida when Ms. St. Pierre has the longer, alternate week, and otherwise, Mr. Santaw will come to New Hampshire to see Marlena and Ms. St. Pierre.

All three parties have extended family in the Upper Valley/New Hampshire area, including the three sets of grandparents, who are now very extensively involved.

The standard the Court must use in regards to the relocation request is set forth in RSA 461-A:12. Pursuant to that statute, the parent seeking to relocate must give more than 60 days notice to the other parent unless the Parenting Plan specifically governs relocation. RSA 461:A:12 III.

In this case, notice is not an issue. Ms. St. Pierre has given reasonable notice. The 2015 Parenting Plan does not expressly govern the relocation.

Although Mr. Thatcher is legally a stepparent, the Court would use the same standard as a parent here, because of his uniquely close bond to Marlena.

Under RSA 461-A:12, the relocation statute, the parent seeking to relocate bears the burden under a preponderance of the evidence standard that: (a) the relocation is for a legitimate purpose and, (b) the proposed relocation is reasonable in light of that purpose. Once the moving parent meets his or her burden the burden shifts to the non-moving parent to show, by a preponderance of the evidence that the proposed relocation is not in the best interest of the child (see RSA 461-A-12, v, vi).

Based on the weight of the credible evidence, the Court finds that Ms. St. Pierre has not met her burden by a preponderance of the evidence to show that the relocation is for a legitimate purpose at this time. She is engaged. She is not married yet. She does not appear to have any job prospects in Florida. Mr. Santaw is able to commute to New Hampshire to be with her. This is not a necessary move for Marlena.

Likewise, the Court finds that Ms. St. Pierre's proposed relocation to Florida is not reasonable in light of that fact. Mr. Santaw has had a home and a business in that location, but this has not been a long term situation.

Even if the Petitioner met her burden, Respondent meets his to show that the relocation is not in the child's best interest. See *Tomasco v. Dubuc*, 145 N.H. 169 (2000), *In Re Lockaby*, 148 N.H. 462 (1990), and *In the Matter of Heinrich and Curotto*, 160 N.H. 650 (2010.)

In terms of analyzing the best interests standard, pursuant to *Tomasco and Heinrich*, the Court must consider:

1. Each parent's reasons for seeking or opposing the move;

2. The quality of the relationships between the child and the custodial and non-custodial parent;

3. The impact of the move on the quantity and the quality of the child's future contact with the non-custodial parent;

4. The degree to which the custodial parent in the child's life may be enriched economically, emotionally, and educationally by the move;

5. The feasibility of preserving the relationship between the non-custodial parent and the child through suitable visitation arrangements;

6. Any negative impact from continued or exacerbated hostility between the custodial and the non-custodial parents, and;

7. The effect the move may have on the extended family relations.

Both parents have legitimate reasons for seeking or opposing the move. Ms. St. Pierre's desire to move is motivated by the relationship with Mr. Santaw, and does not appear to be motivated by a desire to get away from Mr. Thatcher. Mr. Thatcher's desire to oppose the move is also legitimate, and compelling. He is actively involved in Marlena's life, and sees her regularly under the current schedule. That regular contact would change if Marlena relocated.

The quality of the relationships between the child and the custodial and non-custodial parents, in this Court's assessment are equal. Marlena has a strong bond with both Ms. St. Pierre and Mr. Thatcher.

Mr. Thatcher's contact with Marlena would be greatly affected by the move. Under the current schedule he is able to participate in Marlena's activities such as dance class and to see her regularly. If Marlena moved to Florida, the distance would be prohibitive. Such a distance would effectively preclude the parent who lives away from participating in weekly events given the travel time. There is a strong policy in RSA 461-A that both parents need to be involved in the children's lives and have regular contact with the child, unless it can be shown that it is harmful for the child.

Marlena has historically had a schedule where she sees her parents fairly regularly. Although the parties do not always agree, and they tend to parallel-parent more than cooperatively co-parent, it has been to Marlena's benefit to have both parents have ongoing regular and frequent contact.

Marlena's ties to date have been in in the Upper Valley area. She has a close relationship with her grandparents. All three sets of grandparents live in the Upper Valley area.

Ms. St. Pierre's life would be enhanced significantly economically and emotionally by the move. Her life will be enhanced economically and emotionally by living with Mr. Santaw, who is an emotional and financial support to her.

As far as enhancing Marlena's life, there was not enough information to make a determination. Marlena is preschool aged. Marlena does not have any special education issues which might be better addressed in one system over another. The Court cannot say that Marlena's life would be enhanced educationally by either school in Florida or school in New Hampshire.

Marlena would benefit by having Ms. St. Pierre as an at-home parent. She has that now.

It is feasible to preserve Mr. Thatcher's relationship through parenting time arrangements. Mr. Thatcher's time would have to shift to longer periods of time during vacations and holidays. He would not have the ability to see Marlena during the week with the distance. This would change Marlena's schedule significantly. At Marlena's young age, it would be difficult for her developmentally to spend lengthy periods of time away from Mr. St. Pierre or Mr. Thatcher.

The negative impact on the child from continued or exacerbated hostility between parents is a major factor for this case. The hostility still appears great. The parties do not have good communication, which makes it more difficult for Marlena.

The Court cannot say with any certainty whether the hostility would decrease if Ms. St. Pierre moved away. Some of the day to day issues that the parties have might be moot because they would not have weekly contact with each other. Some of the might be magnified, for instance, conflicts over travel, exchanges and accommodating schedule changes, which would not be easy with parents long distance, particularly if they do not have a strong co-parenting relationship to begin with. On the basis of the testimony provided, the move would not improve relations between the parties.

Marlena would be further away from relatives in the Upper Valley/ New Hampshire, including all three sets of grandparents. These family members have been very involved with her since her birth. Moving her away would mean she would have less access to those family members.

No one factor is dispositive, and the Court cannot not weigh all the factors equally. It has its discretion in applying the _Tomasco_ factors. _See_ _Heinrich and Curotto_, supra.

Considering all of these factors, the balance weighs against allowing Marlena to relocate out of the Upper Valley area at this time.

For now, Marlena's schedule between Ms. St. Pierre and Mr. Thatcher shall remain the same. Once Marlena enrolls in kindergarten, this would change so that Marlena would be with Ms. St. Pierre primarily during the week, and with Mr. Thatcher on alternating weekends.

The Court is aware that this may inconvenience Ms. St. Pierre and Mr. Santaw. However, Mr. Thatcher has a strong bond with Marlena, having served in an in loco parentis role since her birth.

A lot will depend on how Mr. Thatcher handles the changes. If he decides in the future that he does not want to continue to be involved with Marlena, then that would weigh for the move. As long as he exercises his parenting time with Marlena consistently, the Court expects that they will continue to share the strong bond they have.

III. Child support

Given the orders above, which create a substantial change in circumstances for the child, the Court is vacating the current USO.

Accordingly,

1. Colby Santaw is the father of Marlena Thatcher, and his name shall be entered on the child's birth certificate.
2. The Parenting Plan and USO issued 7/23/2015 are vacated, and the provisions for tax exemptions in the Decree are also vacated.
3. Mr. Thatcher shall have parenting time with Marlena as follows:
   a. For the remainder of the preschool year, on alternating weekends, Friday to Sunday, and Monday and Tuesdays overnight.
   b. Beginning in the fall of 2019, when Marlena starts kindergarten, he shall have alternating weekends, Friday 5pm to Sunday 5pm, plus two weeks of summer vacation time.
4. The parties shall enroll in family counseling. Ms. St. Pierre and Mr. Santaw shall be responsible for the costs. This shall be a temporary order

So Ordered:

3/17 2017
Date

Hon. Henrietta W. Luneau, Presiding Judge

THE STATE OF NEW HAMPSHIRE

JUDICIAL BRANCH

NH CIRCUIT COURT

GRAFTON COUNTY — 2ND CIRCUIT - FAMILY DIVISION - LEBANON

In the Matter of:
Haley (St. Pierre) Santaw, Petitioner, and Adam Thatcher Respondent and Colby Santaw, Intervenor,

Case No. 652-2015-DM-00015

ORDERS ON *EX PARTE* PETITION AND RECONSIDERATION

The three parties each appeared with counsel before the Court on July 20, 2017, for a Hearing on the Emergency Request brought by Ms. Santaw for a modification of Parenting Orders. The Court heard offers of proof from the three parties and from witnesses Ryan Kelly and Dr. Mark Harris. The Court also considered the records from the Dartmouth Hitchcock Clinic, Shriner's Hospital, and a letter from Lindsey Chambers, Vermont DCF Social Worker.

This Order also encompasses the June 1, 2017 hearing on reconsideration, in which the parties each appeared with counsel.

I. Ex parte issues

The parties acknowledge that 3 year old Marlena had an accident and fell into a campfire during Mr. Thatcher's parenting time on July 3, 2017, sustaining serious burns on her arms, thumb and back as a result, which may require surgery.

Mr. Thatcher had taken Marlena to a friend's home on Lake Winnipesaukee that day. The fall occurred around 10:00pm around a backyard firepit on the ground made of stones. Mr. Thatcher drove Marlena back to Fairlee Vermont, and Marlena went to bed at around 1:30am. Mr. Thatcher did not notify Ms. Santaw until the next morning.

The next day, Marlena attended a 4th of July parade in Fairlee in the morning. Mr. Thatcher called Ms. Santaw and told her about the injury. He saw a nurse, who is a friend of the family, who called a doctor. The doctor did not see Marlena but reviewed pictures of the injury over the phone and spoke with the nurse. The doctor did not recommend an ER visit.

Ms. Santaw was concerned and after she could not reach Mr. Thatcher that day, she drove to Mr. Thatchers' parents' home that afternoon to see Marlena. She took Marlena to the emergency room at Dartmouth Hitchcock Medical Center. The Center admitted Marlena in mid-afternoon, then had her transported to the Shriner's Boston Burn Center for specialized care that evening, given the level of and location of the burns. Vermont DCF was notified, as was NH DCYF.

Ms. Santaw filed the ex parte motion the following day, which was granted.

Based on the weight of credible evidence, the Court finds that the *ex parte* was justified, even if all of the facts set forth did not prove to be 100% accurate .

Mr. Thatcher did delay in getting Marlena to appropriate medical care after the injury. He drove home from Lake Winnipesaukee to Fairlee that night. He could have sought medical treatment at a hospital ER up to the time Ms. Santaw picked her up, but declined to.

Mr. Thatcher did not inform Ms. Santaw of the injuries until later the following day. She was deprived of the opportunity to discuss it with him at the time, and the option to take the child to medical care immediately.

Although there is a lack of trust between the parties because of the particular history of this case, the Court would have expected, at a minimum, Mr. Thatcher would have called Ms. Santaw to notify her promptly of the accident, once he had tended to Marlena, and given Ms. Santaw an opportunity to weigh in on care and see Marlena.

Vermont DCF investigated and has closed the assessment. They noted that although there was a delay in seeking care, Mr. Thatcher consulted with a nurse the following morning who saw Marlena and then consulted with a doctor by phone. DCF did recommend that if Marlena is injured in his care, he seek medical treatment immediately.

NH DCYF has not informed the parties of the outcome of its investigation.

There is a dispute about how the fall happened. Mr. Thatcher told the Court that Marlena tripped on a rock and fell into the firepit. Mr. and Ms. Santaw told the Court that Marlena told them she was on Mr. Thatcher's lap while he was seated at the firepit, and was being tickled, and fell into the firepit. Marlena told the DHMC physicians that she fell into the fire. DHMC found that the injuries were consistent with the report of falling.

Ms. Santaw told the Court that she suspects that Marlena was not supervised properly and/or the adults had been drinking, which was the reason why medical care was not immediately sought. This was denied by Mr. Thatcher.

In any event, the delay in notification to Ms. Santaw was not credible, nor was the delay in seeking medical care.

On a temporary basis, there is reason to modify decision making, and the schedule based on the incident. This does appear to have been an avoidable accident based on its description.

II. <u>Reconsideration of relocation request</u>.

The Court has reconsidered its decision on Ms. Santaw's request to relocate with Marlena based on changed circumstances since the final hearing.

Mr. and Ms. Santaw are now married. Being able to be with her husband is a legitimate reason to relocate. Florida is a reasonable location in light of that, as Mr. Santaw's business is located there. He clarified that he cannot move the business as it is state specific.

Thus, Ms. Santaw meets the burden that her request to relocate to Florida is for a legitimate purpose, and the proposed location is reasonable in light of that purpose.

The analysis then becomes whether Mr. Thatcher can show that it is not in Marlena's best interests to relocate to Florida.

In the initial final order, the Court found the facts that Mr. Thatcher would not be able to see Marlena regularly or participate in her life as regularly if it allowed the move, and the presence of extended family in the Upper Valley area as factors that weighed heavily against the move.

The Court has reconsidered the new information and what has happened since the final order was issued. There are some factors which now weigh more in favor of relocation.

Mr. and Ms. Santaw have established a residence in Florida for Ms. Santaw and Marlena, and regularly fly her back to Florida for Ms. Santaw's parenting time. Marlena is becoming accustomed to Florida. She has a home there.

The tensions between Mr. Thatcher and Mr. and Ms. Santaw have risen considerably since the final hearing, and that is impacting Marlena negatively. For example, the medical records revealed that the three adults handled the situation when Ms. Santaw came to pick up Marlena on July 4th poorly; Ms. Santaw is accused of entering Mr. Thatcher's parents' property without permission to take the child, Mr. Thatcher is accused of holding a rock and trying to prevent her from leaving the driveway, and Mr. Santaw is accused of hitting Mr. Thatcher with the door of the car. Sadly, Marlena witnessed all of this behavior.

Mr. Thatcher's delay in contacting Ms. Santaw about Marlena's injuries in firepit incident also lend credibility to Ms. Santaw's position at the trial that Mr. Thatcher does not communicate with her. This is a legitimate issue as Marlena is very young, and depends on the adults to communicate adequately about her needs to keep her safe. Communication is a parenting responsibility. The failure to communicate impacts whether Marlena could spend extended periods of time with Mr. Thatcher if he cannot make the effort to meaningfully communicate with Ms. Santaw, and she is Marlena's primary caregiver.

The Court has some concerns about Mr. Thatcher's ability to properly supervise Marlena and his decision making based on the reports of the incident. This was an accident, but it also appears to have been avoidable. No satisfactory explanation was made for why the child was allowed to be so close to the firepit. The delay in communication and seeking medical care was also not justified. While not enough to sustain a finding of neglect according to Vermont authorities, the incident is concerning and does meet the standard for modification of a parenting plan under RSA 461-A:11 (c).

All three parties have extended family in the Upper Valley area, and while this weighed in favor of Marlena to stay in the Upper Valley, and still does, it is also reasonable to presume that the Santaws would return to see their family in the area regularly, bringing Marlena back to the Upper Valley during these visits.

All of this, with the tension between the parties and the negative impact for Marlena also leads the Court to conclude that residing with Ms. Santaw primarily, and a more expeditious relocation schedule to Florida is in Marlena's best interests versus extending a shared schedule.

Once the parties are separated, the Court believes that the tension will decrease.

Considering all of the factors in the Heinrich v. Currotto, the facts now weigh in favor of relocation.

For purposes of this reconsideration, the Court has applied the relocation test in RSA 461-A:12. Using a purely best interests test yields the same results.

Accordingly,

1. On a temporary basis, Ms. Santaw shall have sole decision making responsibility and primary residential responsibility for Marlena.

2. Mr. Santaw's time and parenting responsibilities shall take place during Ms. Santaw's.

3. Ms. Santaw can relocate Marlena to Melbourne, Florida.

4. To allow Mr. Thatcher a chance to normalize his relationship with Marlena, the relocation shall not take place until after 9/1/2017.

5. Mr. Thatcher shall have the following parenting time going forward:

   a. Until the move, he shall see Marlena every other weekend, Friday after work/5pm until Sunday at 5pm. He need not be supervised all the time, but he shall have another adult present in the evenings/overnight to help supervise Marlena.

   b. Mr. Thatcher shall promptly seek medical attention for any injuries sustained by Marlena and contact Ms. Santaw immediately.

   c. Mr. Thatcher shall be responsible for transportation for Marlena during his time.

   d. After the move, Mr. Thatcher shall see Marlena for an extended three day weekend in the Upper Valley area around the Thanksgiving and Christmas holidays. This need not occur exactly on the holiday, but shall be meaningfully close. He shall also have

extended weekends for the three months of April, June and August, (Friday 5pm to Monday morning at 9am) or the equivalent; these will be coordinated with the Santaws' travelling with Marlena to the Upper Valley area. For the remaining part of the year, Mr. Thatcher shall travel to Melbourne to exercise a long weekends with Marlena each month, or the equivalent time. Each party shall provide up to 30 days' notice to the other on travel plans.

e. Mr. and Ms. Santaw are responsible for the costs to travel with Marlena back to the Upper Valley for the holiday and April, June and August time. Mr. Thatcher is responsible for his own travel costs to Florida.

6. The requirement for counseling is vacated.

7. These orders shall be considered further temporary orders until they become final.

8. All other requests not inconsistent with the above shall remain in full force and effect.

So Ordered:

7/27 , 2017
Date

Hon. Henrietta W. Luneau, Presiding Judge

THE STATE OF NEW HAMPSHIRE
RECEIVED DEC 2 6 2017
JUDICIAL BRANCH
NH CIRCUIT COURT

2nd Circuit - Family Division - Lebanon
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Lebanon NH 03766-1407

Telephone: 1-855-212-1234
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http://www.courts.state.nh.us

NOTICE OF DECISION

R. PETER DECATO, ESQ
DECATO LAW OFFICE
84 HANOVER STREET
LEBANON NH 03766

Case Name: **In the Matter of Haley St. Pierre and Adam Thatcher**
Case Number: **652-2015-DM-00015**

Enclosed please find a copy of the Court's Order dated December 20, 2017 relative to:

Orders on Status of Case

December 22, 2017

Pamela G. Kozlowski
Clerk of Court

(254)
C: Colby Santaw; Patrick Timothy Hayes, ESQ

NHJB-2207-DF (07/01/2011)

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

GRAFTON COUNTY

2ND CIRCUIT - FAMILY DIVISION - LEBANON

In the Matter of:
Haley (St. Pierre) Santaw, Petitioner, and Adam Thatcher Respondent and Colby Santaw, Intervenor,

Case No. 652-2015-DM-00015

ORDERS ON STATUS OF CASE

1. This Court's intention was that its orders be final orders, but that certain orders also function as further temporary orders while the case was waiting for its judgment date.

2. Mr. Thatcher appealed this Court's orders before the Court issued the last decision on reconsideration and on clarification on August 31, 2017. This decision clarified that the orders would be temporary until they became final.

3. It appears that the Supreme Court did not have the Court's August 31, 2017 order when issuing a decision on Mr. Thatcher's appeal.

4. Mr. Thatcher then decided to withdraw his appeal based on his belief this Court's orders were temporary, without seeking further clarification from this Court on the status of its orders.

5. The Court orders vacate the 2015 Parenting Plan and USO and establish paternity for Mr. Santaw. The Court did not issue a final parenting plan or USO in this case as to rights and allocation of parenting responsibilities for Marlena between Mr. and Ms. Santaw as they are an intact couple. A narrative order was issued on paternity.

6. It was in Marlena's best interests to specify on a temporary basis that between Mr. Thatcher, Mr. Santaw and Ms. Santaw, Ms. Santaw had sole decision making and residential responsibility for Marlena until the Court orders vacating the 2015 Parenting Plan and establishing Mr. Santaw's paternity became final ones.

7. This case has already had a final hearing on the contested issues, and a final order was issued in February 2017 (Amended in March 2017). The Court held a hearing on the reconsideration requests in June 2017. While the reconsideration requests were under advisement, there was an intervening emergency request in July 2017 to modify the orders based on an incident in which Marlena was injured while with Mr. Thatcher. After a hearing on the emergency requests, the Court issued orders on reconsideration and on the exparte on July 27, 2017. The parties filed additional motions. The Court then issued an order on those motions on August 31, 2017, including Mr. Thatcher's motion for clarification.

8. Mr. Thatcher's appeal had been filed prior to the August 31, 2017 decision.

9. To clarify, the orders that the Court issued July 27, 2017 are final orders, and are further temporary orders until they become final. The Court wanted Marlena to be able to relocate to Florida both on a temporary and a final basis.

10. Since the relocation and modification issues were addressed at a final hearing and on reconsideration (once at the final hearing, once again on reconsideration, and once again at the exparte) any additional hearings on the substantive issues are not necessary, and would be a 'second bite at the apple'.

11. The Court would note that after it issued the July 27, 2017 orders, NH DCYF issued an internal finding of neglect against Mr. Thatcher. This new fact did not change the outcome of the July 27, 2017 orders, as the weight of credible evidence still supported the modification and relocation decisions.

12. The August 31, 2017 orders address all pending motions except for the contempt motions. The August 31, 2017 orders were issued from the clerk's office on September 5, 2017. The judgment date on the case would have been 30 days from that date, but for the pending appeal.

13. After the August 31, 2017 order was issued, the only pending issues in the case (except for the appeal) were the two Motions for contempt filed by Mr. Thatcher. These were scheduled for a hearing in September 2017. He withdrew these motions just prior to the hearing.

14. After the Supreme Court order on the withdrawal of the appeal on October 11, 2017, there was a period of more than 30 days without any motions filed, there were no hearings scheduled, no request for a hearing from any of the parties, and no remand order from the Supreme Court, so this Court closed its file.

15. This Court's position is that the final orders went to judgment on October 11, 2017, the date of the Supreme Court order on Mr. Thatcher's withdrawal of the appeal.

16. All pending motions (except the brought forward exparte filed 12/13/2017) have been addressed in the prior orders.

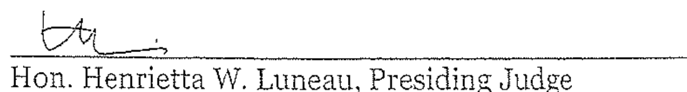
17. The decision has become final.

18. Mr. Thatcher's two motions filed December 5, 2017, are essentially either 1) untimely motions for reconsideration; or 2) a request to re-open the final decision on the case based on a mistaken belief that the Court has not ruled on his motions and issued a final decision. These two motions are respectfully denied. No hearing is needed.

19. Mr. Thatcher has not paid the filing fee for the exparte. Any filing fee for the December 5, 2017 motions is waived.

So Ordered:

12/20, 2017
Date



Hon. Henrietta W. Luneau, Presiding Judge