STATE OF NEW HAMPSHIRE

SUPREME COURT

2018 TERM

AUGUST SESSION

CASE NUMBER 2018-0013

IN THE MATTER OF HALEY ST. PIERRE AND ADAM THATCHER

RULE 7 APPEAL FINAL DECISION

SECOND CIRCUIT

FAMILY DIVISION LEBANON

BRIEF OF PETITIONER-APPELLEE

HALEY ST. PIERRE

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REFERENCE

Black's Law Dictionary, (Abridged 6th ed. (1991).....Passim/Footnotes
American Heritage Dictionary,(2nd college ed.1982).....Passim/Footnotes

TRANCRIPT ABBREVIATIONS

FH TI	Refers to Court Final Hearing
PTC TI	Refers to Court Pre Trial Conference
MTR TI.	Refers to Court Motion to Reconsider

QUESTIONS PRESENTED

1. Whether the trial court correctly decided that Colby Santaw had standing to contest an Affidavit of Paternity.

    a) New Hampshire Statutes permit a putative father to challenge an Affidavit of Paternity through a genetic marker test under RSA 522:1 et. seq. and vacate a finding of paternity based on the historic purpose of equity.

    b) Foreign case law and statute show that statutes must specifically show legislative intent to restrict standing of putative fathers to challenge affidavits.

    c) New Hampshire Affidavits of Paternity have a legal effect of establishing paternity but this legal effect is a rebuttable presumption.

    d) Affidavits of Paternity cannot be judgements of paternity in New Hampshire.

    e) Adam Thatcher did not rebut the genetic marker test and as a result, the court properly rescinded the Affidavit of Paternity.

2. Whether the trial court correctly found material mistake or misrepresentation in setting aside an affidavit of paternity.

    a) The trial court correctly found mistake or misrepresentation as to the Affidavit of Paternity.

    b) Adam Thatcher's claims of "no fraud" perpetrated on him and "waiver" are not relevant to the outcome of the case.

3. Whether New Hampshire recognizes the existence of dual paternity.

    a) New Hampshire is a "single father" jurisdiction and does not recognize dual paternity.

    b) Constitutional concerns with dual paternity and parental rights and responsibilities.

4. Whether a formal "disestablishment of paternity" was necessary to effect a judgment of paternity to allow Colby Santaw to be declared the child's father.

5. Whether the trial court's decision allowing relocation was correctly decided.

    a) The trial court correctly applied the standards in RSA 461-A: 12, and the *Tomasko* factors in allowing relocation as well as residential responsibility and other collateral matters. Residential responsibility became a judgement on October 11, 2017.

STATEMENT OF THE CASE

Haley St. Pierre, while unmarried gave birth to Marlena Rose before the parties married. Prior to marriage, Haley St. Pierre had been involved with both Colby Santaw and Adam Thatcher. Haley St. Pierre and Adam Thatcher signed an Affidavit of Paternity as to Mr. Thatcher being Marlena's father. Haley St. Pierre and Adam Thatcher were married on January 28, 2014 and divorced on or about July 23, 2015. In October, 2015, Ms. St. Pierre filed a Petition to Change a Court Order. In the petition, she alleged that Colby Santaw was someone who could claim custody, physical custody, or parenting rights to the child.

Not long afterwards, Colby Santaw filed a motion to intervene as a challenger to the Affidavit of Paternity. A final hearing was held on November 6, 2016. The court heard from Haley St. Pierre, Adam Thatcher, Colby Santaw, and Nancy Thatcher, Adam Thatcher's mother.

On February 2, 2017, the court made its Orders as to paternity and other parent related issues. In response to events that transpired on July 3, 2017 and from an ex parte motion and a motion for reconsideration on relocation a hearing was held on July 20, 2017.

By Order on July 27, 2017, the court allowed the move and changed responsibilities. The key issues in the case are whether a putative father who can bring a challenge to paternity, whether a court can rescind an Affidavit of Paternity based on successful challenge; whether there was enough evidence to allow a court to find that either a material mistake, fraud, or duress existed such that an Affidavit of Paternity could be set aside, and whether the trial court correctly gave residential responsibility to Haley St. Pierre, and allowed her to relocate with the child to Florida. With the exception of relocation, all Orders became final on October 11, 2017,

STATEMENT OF THE FACTS

The facts and issues are disputed in relevant and important parts. Haley St. Pierre, unmarried, gave birth to Marlena Rose in New Hampshire on 10/31/2013.(Appellant's Appendix page 13). She had been involved with both Colby Santaw and Adam Thatcher. Adam Thatcher signed an Affidavit of Paternity as to being Marlena's father. Marlena was born in New Hampshire. (Appendant's Appendix page 29). Haley St. Pierre and Adam Thatcher were married on January 28, 2014 and divorced on or about July 23, 2015. (Appellant's Appendix p. 1)

In September, 2015, and after the divorce was final, Ms. St. Pierre rekindled her relationship with Colby Santaw and discovered that he could be the father. He had genetic testing done in October, 2015. He found out he was the father using a reliable and accredited test. (Colby Santaw's Motion to Intervene, Appellant's Appendix page 17).

His tests showed a 99.999 certainty he was the father. (Colby Santaw Memorandum, Appellee's Addendum page 5-6). On October 21, 2015, Ms. St. Pierre filed her Petition to Change a Court Order. (Appellant's Appendix page 13). In the petition, she alleged the following: Colby Santaw was a person who could claim custody, physical custody, or parenting rights to the child. *Id.*,at 14. Adam Thatcher refused to meet with a neutral party to resolve the issue. *Id.*, at 15. Ms. St. Pierre sought to have Adam Thatcher's name removed the child's birth certificate, as he was not the biological father, change Marlena's last name, and grant her full custody. *Id.*,15. She also noted that the biological father (Colby Santaw) would be filing for his custody rights. *Id.*, at15. She also referenced the wish to keep their intact nuclear family together. *Id.*, at 15.

On November 20, 2015, Colby Santaw filed his Motion to Intervene. (Index # 31). (Appellant's Appendix page 17). On or about May 23, 2016, Colby Santaw filed a

Memorandum of Law. (Index #57). (Appellee's Addendum page 1). In his Memorandum, Colby Santaw stated that he and Ms. Pierre were in a sexual relationship, and that Mr. Thatcher was aware of the Mr. Santaw's and Ms. St. Pierre's relationship. *Id.*,at 1. When she became pregnant, she was told by her physician that she had become pregnant prior to her sexual relationship with Mr. Santaw. *Id.* at 1. When Marlena was born, Mr. Thatcher signed an affidavit that he was Marlena's father, relying on a physician informing Ms. St. Pierre that she conceived at a time when she had a sexual relationship only with Mr. Thatcher; that she and Mr. Thatcher were unmarried at the time of Marlena's birth. *Id.* at 1. Mr. Thatcher falsely induced Ms. St. Pierre to marry him saying he would join the armed forces. *Id.* at 1. He claimed she could only get support from him if they were married. *Id.*,at 2. Mr. Thatcher did not enlist, and the marriage ended relatively quickly. *Id.*, at 2. Colby Santaw and Ms. St. Pierre reconnected in September, 2015 after having no contact, since the time when Ms. St. Pierre discovered she was pregnant with Marlena. *Id.*at 2. He deduced that he could be the father and immediately submitted to a paternity test that showed a 99.9999% probability he was the father. *Id*, at 2. Ms. St. Pierre and Mr. Santaw attempted to communicate with Mr. Thatcher and he would not communicate about it. *Id.* ,at 2. Mr. Santaw relatively quickly filed his own petition to enforce his rights as a parent. *Id.*at 2. The parties were wrongly led to believe by a third party that Mr. Thatcher, not Mr. Santaw, was Marlena's father, and that a material mistake of fact exists. *Id.* ,at 2-3. Upon discovering material mistake of fact, Mr. Santaw took immediate steps to remedy the error. *Id.*, at 3. There is no dispute that Mr. Santaw is Marlena's father. *Id.* at 3. Santaw's Memorandum also provided a constitutional analysis dealing parental rights, noting among other things that children being raised with intact families, are accorded deference to the parent's wishes under *Troxel v. Granville*, 530 U.S. 57 (2000), and the right of fit parents to raise their

children is possibly the oldest of the fundamental liberty interests recognized by the Supreme Court' *Troxel* 530 U.S. at 65. *Id.*,at 3. Mr. Santaw also pointed out while there may be some qualifiers, that deal with children who are left fatherless, here there is no such problem, as the child's mother and father have both taken the necessary steps to correct the birth certificate as soon as the error was discovered. *Id.*at. 4. Mr. Santaw was providing financial support. *Id.*at 4.

On May 27, 2016, there was a Pre Trial Conference. (Case Summary Index). Adam Thatcher conceded he was not the biological father. "We haven't sought to dispute that." (PTC T1.page 7). This marriage was of short duration, as they were a married couple together for about 5 months. (PTC T1 page 8). Mr. Thatcher alleged the Affidavit of Paternity he signed constituted a judgment if not rescinded within 60 days, and he is the legal father of Marlena, and there was case law on the subject. (PTC T1. page 12). Colby Santaw pointed to the *Gendron* case which referred to Massachusetts law and a granting of full faith and credit to Massachusetts law, did not apply here and that a court of competent jurisdiction could hear this case after 60 days. (PTC T1. page17).

On November 9, 2016, a final hearing was held. At the hearing, Ms. St. Pierre testified that she knew Colby Santaw since 2008 and was dating him. (FH T1.page 11). She broke up with Mr. Santaw in 2011, and met Mr. Thatcher in 2012 (FH T1.page 12). She found out she was pregnant on February 15, 2013. (FH T1. page14). Haley St. Pierre discussed it with Mr. Thatcher, to see if they could work things out, and she reconnected with, and had a sexual relationship with Colby Santaw. (FH T1.page 15). Mr. Thatcher told her that he was going to join the military to support the family, he did not join the military (FH T1.page17). The marriage was an unhappy one. (FH T1. page18).

When trying to pinpoint the date that she might have conceived, Ms. St. Pierre was asked

if she knew about ovulation and how due dates were calculated; she was asked if she was generally consistent with her periods, and she said no; whether she knew that generally, that a woman conceives about 14 days after the date on the onset of their menstrual cycle; she testified that she never really paid any attention to it, and that she never really checked into it. (FH T1, page 49). Ms. St. Pierre testified that she told Mr. Thatcher that she had sexual intercourse with Colby Santaw. (FH T1, page 52). Ms. St. Pierre believed there were mistakes made by the hospital in the medical record. (FH T1,page 61).

Colby Santaw testified that he has a primary residence Claremont, NH, and rents a house in Florida. (FH T page 82). He has a firearms business in Florida. (FH T1 page 83). He had known her since 2008, and that he and Ms. St. Pierre were in a sexual relationship prior to the birth of Marlena. (FH T1 page 83). The dates were February 9, 10, and 12 of 2013. (FH T1 page 84). There were no doubts as to the dates that he was with Ms. St. Pierre. He heard from Mr. Thatcher who called him, very upset, and that he was yelling; that he said he should stay away; that he was swearing, (FH T1 page 84). He was aware that he was involved. (FH T1, page 85). Mr. Santaw was told that it wasn't possible that Marlena was his. (FH T1, page 86). In September 2015, Mr. Santaw and Ms. St. Pierre started dating again. (FH T1, page 86). He looked at Marlena's baby photos, and requested a paternity test; it took about two weeks to get the results back; he did not try to communicate with Mr. Thatcher because there was a lot of hate and resentment towards him, and Colby Santaw didn't blame him. (FH T1 page 88). When he found out that he was Marlena's father, his life entirely changed, and he set up a mutual fund for college and he had to catch up for the last two years. (FH T1 page 89). Colby Santaw testified that Marlena was his daughter; that she knows him as her father; that he and his daughter are very close; that when she sees him she lights up. (FH T1 page 90).Colby Santaw testified that

Marlena likes it in Florida; how tough it was to put her on an airplane to send her back to New Hampshire, and to find out she was enrolled in ballet lessons without his knowledge or consent.(FH T1 page 96). Colby Santaw testified that he and Ms. St. Pierre, planned to get married on July 1, 2017. (FH T1 page 96). Colby Santaw testified that it would be best for Marlena to be in her intact, nuclear family and would be best for her future. (FH T1 page 120).

Adam Thatcher testified Marlena calls him my dad without being provoked at all; (FH T1 page 166) he has never done anything detrimental to her; he never once said anything negative about Ms. St. Pierre; he wanted primary residential responsibility of Marlena. (FH T1 page 167). Adam Thatcher admitted that he got his own DNA test and did not submit it into evidence, and did not turn it over to the other side. (FH T1 page 171.). He acknowledged that Colby is Marlena's biological father. (FH T1 page 172).

When asked if he was her dad in any biological or legal sense, Adam Thatcher said he was the child's psychological father; when asked where he came up with that term, he said that he came up with that in psychology; when asked if there was any kind of a legal precedent which he had seen for that, he said "no." (FH T1 page 173). Adam Thatcher stated it upset him when her father (Colby Santaw) was introduced to Marlena as daddy. (FH T1 page 176).

Adam Thatcher also testified that he was in a relationship with another woman from November ,2014, until March , 2016,(FH T1 page 178). Marlena also called her Mom more than once. (FH T1 page 179). Adam Thatcher testified that he made a mistake thinking he was the biological father. (FH T1 page 180). Adam Thatcher admitted it was not in the child's best interest to have two separate lives. (FH T1 page 183). He restated this. (FH T1 page 184). Adam Thatcher was asked if he was advised not to sign the Affidavit of Paternity if he had a doubt about it. He said yes. (FH T1 page 200). He was asked if he had a doubt about signing the

affidavit of paternity. He said yes. (FH T1 page 201).

Nancy Thatcher, (Adam Thatcher's mother) testified to contentious exchanges after "we found out what the situation was" between Haley and Colby. (FH T1 page 222). Nancy Thatcher stated she called the police to come to an exchange, knowing that Marlena would be there. (FH T1 page 225).

On or February 2, 2017, the Court issued Final Orders, (Appellant's Addendum page 35.) The court vacated the parenting plan and the Uniform Support Order from the parties' divorce. *Id.*at 35. The Order noted that the parties had submitted Proposed Findings of Fact and Rulings of Law. *Id.*at 38

The court found that under Federal law, states must have law requiring legal procedures for paternity determinations. The court cited 42 U.S.C. § 666 (5)(D)(ii). (*Id.*at 38) and 42 U.S.C. § 666 (5)(F) (2007) for admissibility of evidence for genetic testing. *Id*, at 39. RSA 522:1 lays out the authority and procedure and nothing in RA 522:1 precludes a party from filing a petition to determine paternity directly with the court. *Id.*,at 39.

Based on the weight of credible evidence, the court concluded that Mr. Thatcher and Ms. St. Pierre either misrepresented or were mistaken concerning the babies' paternity. *Id.*, at 39. Among other things, this dealt with the circumstances dealing with estimates of conception dates and either Mr. Thatcher or Ms. St. Pierre could have requested paternity tests. *Id.*at 39. The court could view Mr. Thatcher's and Ms. St. Pierre's behavior as ignorance of the facts for mistake, or deliberate disregard that did not support their belief as to Mr. Thatcher being the father which supported fraud. *Id.*, at 39. Colby Santaw was the child's legal and biological father and had met his burden to show the affidavit of paternity should be rescinded, and the birth certificate should be amended. *Id.*, at 40.

As to Mr. Thatcher, the Court went on to say "the law allows him to assert parenting rights as a step parent" citing *Bodwell v. Brooks,* 141 N.H. 508, 686 A.2d 1179 (1996) and referenced RSA 461-A:6 V, indicating that he did not lose his ability to assert parenting rights as a step parent." *Id.*,at 40. The court did not allow a relocation to Florida. *Id.*,at 41.The court revoked the prior parenting plan and uniform support order dealing with the child, the petitioner, and respondent. The child's birth certificate was amended to reflect the child's parentage. *Id*, at 44.

At the June 1, 2017 hearing on a Motion for Reconsideration to move to Florida, Colby Santaw, through counsel, raised the issue of Mr. Thatcher's status as a step parent, noting that he was not married to the mother; that he was not a step parent; that "step parent visitation takes place, and visitation is put in place; and then there's a divorce that maintains. But in this case "he wasn't a step parent at the time this case was file." (Sic). (MTR 1 pages 13 and 14). He also raised the constitutional issue of fit parents being able to act in their child's best interests. (MTR T1 page14).

In its Amended Final Order, the Court noted hostility and tension between the parties; the parties did not have good communications. The hostility still appears great. (Appellant's Addendum, page 55).

On or about July 3, 2017, while the child was in the care and custody of Mr. Thatcher, Marlena was badly burned as a result of being too close to a fire pit. (Appellant'sAppendix, p.82). On or about July 6, 2017, Ms. St. Pierre filed an emergency ex parte motion dealing with Marlena's fall into campfire, as she suffered severe burns while in the care of Adam Thatcher on July 3, 2017. (Appellant's Appendix page 82) this issue which also contained a request to relocate to Florida. (*Id.*, at 83) (Index #107).

On or about July 27, 2017, the Court issued Orders. *Id.*at 88. While on Mr. Thatcher's parenting time, the child sustained serious burns on her arms, thumb and back, as a result of falling into a camp fire, and may require surgery. *Id.* ,at 88. The court found credible evidence that the ex parte was justified even if not 100% accurate. *Id.*at 89. Vermont DCF investigated and had closed the assessment *Id.*, at 89. (Appellee's Confidential Appendix page 1). The court found that Mr. Santaw and Haley are now married and being able to be with her husband is a legitimate reason to relocate and since he has a business in Florida which could not be moved, the relocation was reasonable in light of that purpose. *Id.*,at 90. "This does appear to have been an avoidable accident based on its description." *Id.* at. 90. Mr. Thatcher does not communicate well with Mrs. Santaw and this is a legitimate issue as Marlena is very young. *Id.* at 90. The Court noted that Ms. St. Pierre had married Colby Santaw. *Id,* at 90. 1. On or about December 20, 2017, the court issued its Orders on the Status of Case. (Appellant's Addendum page 63.) The court clarified that it had vacated the parenting plan and Uniform Support Order. *Id.*at 63. It stated that parties had a hearing on relocation requests in June, 2017, *Id.*,at 63. There was a DCYF internal finding of neglect against Mr. Thatcher, but this did not change the relocation orders. *Id.* at 64. The case went to judgement on October 11, 2017. *Id.* at 64.

CONSTITUTIONAL PROVISIONS STATUTES. ORDINANCES, RULES AND REGULATIONS INVOLVED IN CASE

RSA 5-C:24 Appellee Appendix page 1
RSA 5-C:28 Appellee Appendix, page 3
RSA 168-A Appellee's Appendix page 4
RSA 461-A:6 Appellee Appendix page 6
RSA 461-A: 12 Appellee Appendix page 8
RSA 490-D:2 Appellee Appendix page 10
RSA 490-D:3 Appellee Appendix page 11
RSA 490-F:3 Appellee Appendix page 12
RSA 522:1 Appellee Appendix page 13
42 U.S.C. § 666 Appellee Appendix page 17

1 Ms. St. Pierre later married Colby Santaw and will be referred to as Mrs. Santaw later in the brief.

SUMMARY OF THE ARGUMENT

Mr. Thatcher cannot prevail on the issues he appeals because they require unnatural readings of federal and New Hampshire statutes that applicable to this case, and require this Court to add words to New Hampshire statutes the legislature did not include. The burden of challenging paternity was never Haley St. Pierre's burden, because she was not a putative father.

The central issues in this case are interpretation of New Hampshire's paternity statutes and its relocation statute as well as jurisdiction to hear the case. Pursuant to RSA -522 allows challenges to paternity but rebutting a successful challenge requires clear and convincing evidence.

A New Hampshire Affidavit of Paternity is not a judgement of paternity in New Hampshire. RSA 522:1 gives opportunities to putative fathers to challenge paternity. Even if this portion of the federal statute was not referenced in the court's Orders, the Court acted in conformity with law when it said that Mr. Santaw had standing to challenge paternity and incorporated the concept by reference to federal requirements. If the Court were to deny a challenger to paternity any relief, or block the purpose of RSA 522:1, the federal government could plausibly deny grants to states under federal law. Even without the federal reference, the correctly applied state statutes on point as nothing in state law precluded the challenge or denied Colby Santaw standing under RSA 522.

The standards are outlined in RSA 522:1 et. seq. Absent legislative guidance in the form of a new statute that does not unduly restrict standing to challenge paternity, conjunction with RSA 522:1 is controls as to standing, and when balancing equitable considerations the court below got it right. Under RSA 168-A:2 (b), paternity can be established by filing an Affidavit

of Paternity, which has the legal effect of establishing paternity, but is not a judgment of paternity even if registered with the clerk under RSA 5-C:24. Colby Santaw met or exceeded his burden of 97% or higher probability under RSA 522:4 (d) to show he was the father of the child. In conformity with federal law, New Hampshire Affidavits of Paternity can be set aside on the basis of fraud, material mistake, or duress. Trial courts can assess witness credibility. There was ample evidence to support the Court's conclusions.

Colby Santaw had standing to challenge a New Hampshire based on Affidavit of Paternity because other restrictions prevented him from doing so. This is true even after a 60 day period for rescission passed. Adam Thatcher stated that he had doubts about signing the affidavit of paternity and Haley St. Pierre stated she did not know much about ovulation and women's menstrual cycles.

From the foregoing, the trial court correctly applied the paternity, rescission, and relocation statutes.

The court correctly determined that Haley St. Pierre could relocate to Florida with Marlena to be with her husband, the child's father, and that her relocation was for a legitimate purpose, and reasonable in light of that purpose under RSA 461-A:12.

In New Hampshire, Family Division courts are courts of equity under RSA 490-D. The historical purpose of equity is to do justice. Equity based matters such as establishing correct identification of fathers coupled with a statutory scheme that deals with these issues must be as flexible as possible to create just resolutions in paternity matters. This is particularly true in one- father jurisdictions like New Hampshire.

Colby Santaw at all times had standing to bring a challenge to the Affidavit of Paternity, and did so in a reasonable time frame. The changes in the law that Mr. Thatcher wants to see,

such as limitations on who has standing to challenge an affidavit of paternity, and claims to be a "legal father" are radical changes to existing statutes that would have to be made by the legislature. Rewriting statutes is not a judicial function. Hence the relief he seeks cannot be granted by this Court. Haley Santaw and Colby Santaw are married, and Marlena is their daughter. They are child's biological parents and are living in their intact, nuclear family.

As a matter of law, fit parents are presumed to be acting in the best interests of their children, and the rights of fit parents who live as intact nuclear families are constitutionally protected. *Troxel v. Granville*, 530 U.S. 57 (2000).

Questions dealing with residential responsibility for an alleged former stepfather, sufficiency of the evidence claims as to materiality of mistake, alleged waiver by Mr. Thatcher, and allegations of failure to file a motion to disestablish paternity are easily resolved, as they are not material to the outcome of the case. This case went to judgment on October 11, 2017, as the appellee's rights to full residential responsibility and Mr. Thatcher's claim that he should be awarded residential responsibility have no factual basis whatsoever. From the foregoing, the appeal should be dismissed.

STANDARDS OF REVIEW

Haley St. Pierre asks the Court to sustain the trial court's discretion as to the issues Mr. Thatcher appeals. *In the Matter of Kosek & Kosek,* 151 N.H. 722, 725, 871 A.2d 1 (2005). This Court does not over turn a trial court's decision absent an unsustainable exercise of discretion. *Id.* at 724, 871 A.2d 1. Records are reviewed "only to determine whether it contains an objective basis to sustain the trial court's discretionary judgment. *In the Matter of Lockaby & Smith,* 148 N.H. 462, 465, 808 A.2d 832 (2002). Interpretation of a trial court's Order is a question of law, and get de novo review. *In the Matter of Salesky and Salesky,* 157 N.H. 698; 958 A.2d 948

(2008); A trial court's findings are upheld unless they lack evidentiary support, or are tainted by error of law. *In the Matter of Canaway and Canaway*, 161 N.H. 286, 13 A.3d 320 (2010). "The trial court's determination in any custody case depends to a large extent upon a firsthand assessment of the credibility of witnesses, as well as the character and temperament of the parents, and the findings of the trial court are binding upon this court if supported by the evidence." *Webb v. Knudson,* 133 N.H. 665, 671, 582 A.2d 282 (1990).

ARGUMENT

1. **Whether the trial court correctly decided that Colby Santaw had standing to challenge an affidavit of paternity.**

a) **New Hampshire Statutes permit a putative father to challenge an Affidavit of Paternity through a genetic marker test under RSA 522:1 et. seq., and vacate a finding of paternity based on the historic purpose of equity.**

The trial court correctly decided that Colby Santaw had standing to contest paternity because he claimed to be a putative father. Haley St. Pierre was the child's mother, not a putative father. Challenges to paternity using genetic marker tests under RSA 522:1 are allowed as a matter of law, The trial court stated that there are federal requirements states must follow for child support and contested paternity procedures. (Appellant's Addendum page 39). When the court cited to federal law, it effectively incorporated this part of the statute by reference to the standard, which exists in the ability to initiate a paternity challenge under RSA 522:1.

This ensures that putative fathers can challenge paternity. Colby Santaw acted with reasonable promptness when he found out he might be the child's father and this gets the same result under RSA 522:1. By acting while the child was about two years old, and within a relatively short time frame relative to the child's birth in 2013, and the parties divorce in July, 2015, the October 2015 Petition to Change a Court Order in October 2015, along with Colby Santaw's November, 2015 Motion to Intervene shows that reasonableness and timeliness are

easily seen. Furthermore, when looking at the time frames involved, his challenge to paternity was not done 8 or 15 years after the fact, as may have happened in other cases. RSA 522:1, and 168-A:2 apply to this case.

While he cites a part of 42 U.S.C. § 666 in his brief, Mr. Thatcher does not point to the policies and procedures under 42 U.S.C. § 666 such that require states to implement in order to maintain and to secure federal funding for their child support enforcement, such as 42 U.S.C. § 666 (iii) (L) (Appellee's Appendix page 20). Under circumstances such as those, there is no federal bar to a challenge of paternity and no statutory limitation on their use in New Hampshire law if they meet the test of accuracy. This would have to be developed in legislation. The underlying theme is reflected in RSA 522:1.This determination is a legislative function, not a judicial one. As Mr. Thatcher admits in his Conclusions in his brief at page 31, any changes to statute would require the legislature to revisit paternity statutes. Courts do not rewrite statutes.

So the procedural right i.e., the reasonable opportunity to initiate a paternity challenge by one who has standing to do so is an important part of an underlying right. Given the governmental interest in accurate genetic testing and establishing accurate identification of fathers, and the established right to challenge, the condition of having the ability to challenge an affidavit of paternity, if read wrongly, or too narrowly, might create an unconstitutional condition. This doctrine may be validly invoked by a putative father redress under the law. This is "an important substantive right" "and is accorded solicitous protection" (Internal Citations omitted). *Gonya v. Commissioner, New Hampshire Insurance Department*, 153 N.H. 521,524-525, 899 A.2d 278,281 (2006). This is true as there is no problem granting this remedy under Part 1, Article 14 of the State Constitution; the law clearly makes challenges an available remedy.

This Court impliedly recognized that a parenting petition could be brought under N.H. RSA 461-A by someone who was not a child's step parent, biological parent, or grandparent; that after a 60 day rescission window had passed, "*any* (emphasis added) challenge to the affidavit shall be decided only by a court of competent jurisdiction." RSA 5-C:28 (III) (Supp. 2007). *In the Matter of J.B. and J.G.,* 157 N.H. 577, 953 A.2d 1186 (2008).

Therefore, even under RSA 522:1, which Mr. Thatcher does not provide argument against in his brief, fails to note that any artificial barriers that totally deny a putative father a reasonable opportunity to challenge Affidavit of Paternity might affect grants to states with needy families in the Statute he cites, such as 42 U.S.C. § 666, which has required procedures to improve effectiveness of child support enforcement, as he says at page 12. But what happens if this violates a putative father standing. These are important policy goals. Public policy concerns can also militate in favor of the parent child blood relationship.*In the Matter of the Paternity of S.C.*, 966 N.E. 2d. 143, 153, (Ind.App.2012) the court stated as follows:

> Moreover, we believe public policy considerations actually counsel *in favor* of our decision. In a case similar in some relevant respects to the instant case, our Supreme Court stated: We appreciate the Court of Appeals' concern for a man who may be deprived of parental rights that he assumed for many years and wishes to retain even though he is not the child's biological father. *However, a countering important policy concern is identifying* correctly *parents and their offspring. "Proper* identification *of parents and child should prove to be in the best interests of the child for medical or psychological reasons. It also plays a role in the just determination of child support; we have already declared that public policy disfavors a support order against a man who is not the child's father." In re S.R.I.,* 602 N.E.2d 1014, 1016 (Ind.1992). In the end, such policy choices are the province of the legislature.

Therefore, Mr. Thatcher's arguments are better made to the legislature and not this Court.

Colby Santaw had standing to challenge the affidavit of paternity because, as the court found, he was the putative father. "Standing presents a question of subject matter jurisdiction

which may be addressed at any time." *In Re Guardianship of Paul T. Williams,* 139 N.H. 318, 986 A.2d 559 (2009).

This Court previously reversed a denial of standing to challenge a genetic test to establish legal rights of a father under New Hampshire's Uniform Act on Blood Tests to Determine Paternity, 522:5. See *Bodwell v. Brooks*, 114 N.H. 508, 686 A.2d 1179 (1996). The New Hampshire Supreme Court has already stated in no uncertain terms that "while there are legitimate public policy concerns involving the needs of children... that consistent with our jurisprudence, we will not undertake the extraordinary step of creating legislation where none exists." *In the Matter of Linda Plaisted and Grahame Plaisted,* 149 N.H. 522, 526 (2003). "Rather, matters of public policy are reserved for the legislature. *See Minuteman, LLC v. Microsoft Corp.* 147, N.H. 634, 641-42, (2002)." *Id,* 526.

This Court has clearly stated: "It is the historic purpose of equity to secure complete justice..." *Chase v. Ameriquest Mortgage Co.*, 155 N.H. 19, 24, 921 A.2d 369 (2007), quoting *N.H. Donuts, Inc., v. Skipitaris,* 129 N.H. 774, 783,533 A.2d 351 (1987). "A court of equity will order to be done that which fairness and good conscience ought to be or should have been done." It is the practice of courts of equity having jurisdiction to administer relief which the nature of the case and facts demand." *Chase,* at 24 citing *Claremont School Dist. v. Governor (Costs and Attorney Fees)* 144. N.H. 590, 594, (1999).

As mentioned above, RSA 5-C:28 (III) states that after the 60 day period to challenge an affidavit of paternity has expired, "any challenge to the affidavit shall be decided only by a court of competent jurisdiction." The word "**any**" is important, because it does not limit who may bring a challenge after the 60 day period runs. Thus, RSA 5-C: 28 (III), when read with the other statutes, and taken as a whole, shows there is no limitation expressly stating that a putative

father lacked standing to challenge the affidavit.

Moreover, RSA 5- C:28:I says "that a parent or legal guardian may request rescission for an affidavit of paternity." To rescind is "to make void, repeal, or annul."[2] To challenge is "a call to engage in a contest or fight" or "to take exception to or dispute."[3] "It also means to object to or to except to. [4] This does not exclude putative fathers from bringing a challenge after the 60 day period has run. Such an unnatural reading would have the effect of negating RSA 522:1 et, seq. and could undercut federal law.

So while states may be free to place certain limitations on standing, they cannot completely deny a putative father the reasonable opportunity to initiate a challenge. One that basis, one can infer that if the claim is timely, or one in which a challenger can reasonably be expected to show he is the putative father should be allowed to proceed. Mr. Thatcher may be asking this Court to scrap federally protected rights to challenge paternity by limiting standing. **If so, this probably violates federal law and jeopardizes state funding.** Therefore, Mr. Thatcher's position in his brief at page 17, "expressio unius" (presumably "expressio unius est exclusio alterius") i.e., one set of words would work to the exclusion of others, does not apply.

Thus, the trial court got it right when it established paternity and the rights of Colby Santaw, because it correctly applied the statutes and standards contained in RSA 168-A:2 I(b) (Supp. 2012), especially in light of 42 U.S.C. § 666 (iii) (L) which confers standing.

b)Foreign case law and statute show that statutes must specifically show legislative intent to restrict standing of putative fathers to challenge affidavits.

New Hampshire statutes do not expressly limit to challenges to paternity affidavits by putative fathers who present genetic testing evidence which meets or exceed the accuracy

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2 American Heritage Dictionary, 1050 2nd College ed. 1982.
3 Id., at 256
4 Black's Law Dictionary,157 Abridged 6th ed. 1991.

standards of RSA 522 (d). The New Hampshire Supreme Court should not rely on foreign law that restricts standing, as contained in Mr. Thatcher's Appendix, at page 59 or his memorandum to dismiss Colby Santaw as a party or his Appendix at page 52, as they are very different. In *Columbia v. Lawton* , 153 Vt. 165 (2013), the Vermont Supreme Court applied Vermont Title 15, §302 which limits standing as to where cases in which parentage had been previously established. If the Vermont statute limited reasonable opportunities to challenge paternity, it might go too far. But this is not the law in the State of New Hampshire. There never was an agreement to apply Vermont law, and the child was not born in Vermont. To interpret applicable New Hampshire statutes to limit standing adds words to statutes and would create a statute out of thin air. As this Court has said:

> Statutory interpretation is a question of law which we review *de novo*." *Petition of Lundquist*, 168 N.H. 629, 631 (2016) (quotation omitted). "In matters of statutory interpretation, we are the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole." *Id.* "We first look to the language of the statute itself, and, if possible, construe that language accords to its plain and ordinary meaning." *Id.* "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id.* " Moreover, we do not consider words and phrases in isolation, but rather within the context of the statute as a whole." *In re Estate of McCarty*, 166 N.H. 548, 550 (2014).

Similarly, decisional law Mr. Thatcher offers does not help his cause. In citing to *In re Gendron,* 157 N.H. 314 (2008) in his brief at pages 22-23, this Court gave full faith and credit to a Massachusetts paternity matter involving a child born in Massachusetts, and application of Massachusetts General Law c. 209 (C) § 11 (a), which affords a voluntary acknowledgement of paternity judgment status. That is not the case with RSA 168-A:2. The father in *Gendron* sought full faith and credit of a Massachusetts judgment under RSA 168-A:2 (III).

c)New Hampshire Affidavits of Paternity have a legal effect of establishing paternity but this legal effect is a rebuttable presumption.

In New Hampshire, an Affidavit of Paternity under RSA 168-A:4, is a "shall have the legal effect of establishing issue of paternity without requiring further action pursuant to this chapter unless rescinded pursuant to RSA C- 5:28." Mr. Thatcher states at Issue # 2, at pages 19-24) that affidavits of parentage can be legal findings of paternity. 42 U.S.C. § Part D, 666 (D) deals with the status of a signed paternity acknowledgments. But again, Affidavits of Paternity in New Hampshire are not judgements, and they can be challenged under RSA 522:1 and RSA 5-C: 28 (III). The only requirement is that they be challenged in a court of competent jurisdiction. In New Hampshire, they are not judgments. They do not constitute judgements and are subject to challenge and contest. So his position is inconsistent with RSA 522:1 which allows genetic testing. **Rescission is allowed after 60 days under 5-C 28:III in a court of competent jurisdiction, and the fee for changing the birth record shall be in accord with RSA 5-C-10.**

There can be no doubt that RSA 490-D:2 (I) gives the family division subject matter jurisdiction over "Petitions for divorce, nullity of marriage, alimony, custody of children, support, and to establish paternity." Family Division courts have the powers of a court of equity when subject matter jurisdiction as it does here, lies within the family division as it does here. See RSA 490-D:3 (Appellee Appendix, page 11). See also RSA 490-F:3 (Appellee Appendix page 12). *See also, In the Matter of Gregory Neal, and Lauren Digiglio,* 184 A.3d 90 (N.H. 2018).

d)Affidavits of Paternity cannot be judgments of paternity in New Hampshire.

As mentioned above, in New Hampshire, Affidavits of Paternity in and of themselves are not judgments. In applying common and ordinary word usage, the word "legal" means "conforming to law, according to law; required or permitted by law."[5] The term "effect" is

5 Black's Law Dictionary, 618 abridged 6th ed. (1991).

defined as "that which is produced by an agent, or cause outcome, consequence."[6]

Alternatively, the word "legal" means "relating to or concerned with law."[7]. The word "effect" can also mean "something brought about by a cause or agent; result."[8]

The term "judgment" means "a determination of a court of law" "a judicial decision" a court act creating or affirming an obligation, such as a debt." [9] In a like manner, a "judgment" is also defined as "[t]he official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination."[10]. Thus, under RSA 168-A:2, the legal effect of paternity operates only as long as there is no challenge to it. No reasonable reading of the statute can make it a judgment.

RSA C-5:28 uses the word register. The word "register; is defined as a formal or official recording of items, names or actions."[11] Alternately to "register" means "to record formally and exactly; to enroll; to enter in a list or the like."[12] Thus, when taken together, there are no reasonable readings according them judgment status or making them immune to challenge.

e) Adam Thatcher did not rebut the genetic marker test and as a result, the court properly rescinded the Affidavit of Paternity.

The trial court correctly found that Colby Santaw was deemed to be the child's father because the plain readings of RSA 168-A, RSA C-5:28, and RSA 522:1 A plain reading of the New Hampshire statutes show that New Hampshire is a rebuttable presumption jurisdiction as to genetic testing. This is true, given the statute of limitations that allows an action up to the time a child reaches the age of 18. (RSA 168--A:12). He offered no evidence to rebut the presumption of paternity and admitted he took the tests and did not turn the results over to the other parties.

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6 Id., at 355.
7 American Heritage Dictionary, 722, 2[n] college ed.1982.
8 Id., at 439.
9 American Heritage Dictionary, 692 (2[nd]college ed.1982).
10 Black's Law Dictionary,586 (Abridged 6[th] ed. 1991).
11 American Heritage Dictionary, 1041, 2[nd] college ed. 1982.
12 Black's Law Dictionary,887 (Abridged 6[th] ed. 1991).

So no matter how it is viewed, Colby Santaw had as a matter of law, the right to be deemed the father and the court properly rescinded the Affidavit of Paternity under RSA 5-C:28 III because the challenge to the Affidavit of Paternity was successful.

2. Whether the trial court correctly found material mistake or misrepresentation in setting aside an affidavit of paternity.

a) The trial court correctly found material mistake or misrepresentation as to the Affidavit of Paternity.

Based on the evidence before it, the Court correctly found, that either Mr. Thatcher or Ms. St. Pierre were at least aware of facts that would lead them to believe that Mr. Thatcher was not the child's father, and formed the basis of mutual mistake or fraud. This, along with evidence adduced at the hearing, formed a legally sufficient basis from which the Court could set aside the affidavit of paternity. Mr. Thatcher cannot prevail with his arguments at Issue # 3 at pages 25-26 in his brief. The record shows that Mr. Thatcher had his doubts about signing the Affidavit of Paternity. Ms. St. Pierre testified that she was not really familiar with menstruation and ovulation. The Court below could have easily found as it did there was material mistake or misrepresentation. A misrepresentation "is any manifestation by words or conduct...that is understood to mean a statement made to deceive or mislead."[13]. This is the functional equivalent of fraud.

Colby Santaw testified as to his involvement and what he knew. The record above and in the orders, recites ample evidentiary basis that supports the court's findings. Here, the court allowed rescission as it found it met the tests for fraud, or material mistake.

Courts acting as fact finders can evaluate a number of factors, including witness credibility. *State v. Matton*, 165 N.H. 35, 69 A.3d 90 (2013).

When the Court made its determination as to what the witnesses said, and judged their

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13 Blacks Law Dictionary 692, Abridged 6th ed. 1991.

credibility, the Court "sustainably exercised its discretion" *In the Matter of Valentina Conant and William Faller*, 167 N.H. 577, 582 ,55 (2015); 116 A.3d 561 (2015) *In the Matter of Bordalo & Carter*, 164 N.H. 310, 313, A.3d 982, (2012). Thus, the record establishes an objective basis to sustain the court's discretionary decision." *In the Matter of Kurowski & Kurowski*, 161 N.H. 578,585, 20 A3d 306 (2011).

This Court does not reweigh evidence, or substitute its judgment, provided that the Trial Court's decision could have reasonably been made. *See id.*

Similarly, the line of New Hampshire cases Mr. Thatcher presents arguing against genetic tests vary by each case. Some deal with lengthy representations of paternity and requests for custody which are not relevant to this case. Genetic marker tests may not be relevant to deciding custody (*Watts v. Watts,* 115 N.H. 186, 337 A.2d 350 (1975), but are relevant in deciding paternity.

This shows equitable doctrines vary in their application so courts can do justice, crafting individual solutions to problems, as long as they stay within statutory guidelines dealing with support, paternity, residential responsibility, relocation, and the like.

As a result, there is no substantial argument for a sufficiency of the evidence claim as to what the Court had in front of it, or whether it formed a basis for a decision. Looking at the evidence as a whole, the question is when objectively viewed, whether *any* rational trier of fact could have found the essential elements..." *State v. Guilbert P. Germain*, 165 N.H. 350, 354. 79 A.3d 1025,1029 (2013).

Mr. Thatcher's claim in his brief at pages 25-26 that Ms. St. Pierre failed to prove fraud or material mistake of fact lacks merit. First, the court was entitled to credit and weigh the testimony of the witnesses. The Court concluded that it could, based on the factors recited in its

Order, as well as what has been recited above. The record below was sufficient to establish material mistake of fact and or misrepresentation and supports the court decision. Adam Thatcher stated he made a mistake thinking he was the biological father. (FH T1 page 180); and he admitted that he was advised not to if he had a doubt about signing the affidavit of paternity. (FH T1 page 200). Based on the weight of credible evidence the Court found: "Ms. St. Pierre and Mr. Thatcher either misrepresented or were mistaken concerning the baby's paternity."

The interpretation of a trial court order is a question of law, and gets de novo review. *In the Matter of Salesky and Salesky,* 157 N.H. 698, 958 A.2d 948 (2008). A trial court's findings are upheld unless they lack evidentiary support or are tainted by error of law. *In the Matter of Canaway and Canaway*, 161 N.H.286, 13 A.3d, 320 (2010). As a matter of law, the court could find the way it did because it was entitled to assess the credibility of the parties' testimony. The record shows the trial court's Order has evidentiary support showing that is well founded as to the issues for which Mr. Thatcher appeals.

Mr. Thatcher contends the court below should be considering arguments such as the trial court imputing a duty to take genetic tests. (Br.25, FN 11). Mr. Thatcher admitted that he got his own DNA test, he did not submit it into evidence; he did not turn it over to the other side; he admitted that Colby Santaw is the natural father. (FH T1 page 171).

Moreover, the questions Mr. Thatcher raises below pages 25-26 of his brief, such as "unity of interest", whether or not Adam Thatcher dealt with Colby Santaw, dealt in good faith, an alleged lack of evidence to show that either Mr. Thatcher or Ms. Santaw were induced to sign an affidavit because of a material mistake of fact of signing of the affidavit have no bearing on the ultimate result. At page 26 of his brief, Mr. Thatcher asks "Why didn't the trial court look at Mr. Santaw's inaction as well?" At page 27, Issue V is hard to follow. New Hampshire is a

single father jurisdiction. The court found biological and legal fatherhood in Colby Santaw. Mr. Thatcher filed a number of proposed findings of fact and rulings of law. He does not say what they contained, which were granted, which were not, or why.

The court's Orders provided Mr. Thatcher with its basis for its ruling. Mr. Thatcher conceded that he had doubts about signing the Affidavit of Paternity. Mr. Thatcher's assertion that the parties "loved each other and basked in the glory of parenthood" has no relevance to the determination of a mistake. His questions at page 27, Issue VI, about what mistake was made are issues for a trial court, not a reviewing court.

Opinions from other cases do not affect the outcome here. There is no lack of evidentiary support, and no tainted error of law. As this Court has repeatedly pointed out, in matters such as this, trial courts have wide discretion. *In the Matter of Kosek & Kosek,* 151 N.H. 722, 725, 871 A.2d 1 (2005). This court does not over turn a trial court's decision absent an unsustainable exercise of discretion. *Id.* at 724, 871 A.2d 1. The record is reviewed "only to determine whether it contains an objective basis to sustain the trial court's [911 A.2d 22] discretionary judgment. *In the Matter of Lockaby & Smith,* 148 N.H. 462, 465, 808 A.2d 832 (2002). "The trial court's determination in any custody case depends to a large extent upon a firsthand assessment of the credibility of witnesses, as well as the character and temperament of the parents, and the findings of the trial court are binding upon this court if supported by the evidence." *Webb v. Knudson,* 133 N.H. 665, 671, 582 A.2d 282 (1990).

b) Adam Thatcher's claim of waiver and no fraud are not relevant to the outcome of the case.

Mr. Thatcher's claim that no fraud was perpetrated on him does not gain traction.(Issue VII, Br. 27). His argument is undeveloped. Undeveloped arguments are not worthy of judicial review. *Kurowski v. Kurowski,* 161 N.H. 578, 601 20 A.3d 306 (2011); *Douglas v. Douglas,* 143

N.H. 419,429, 727 A.2d 215 (1999). But even if the Court decides to review the argument, Mr. Thatcher's claim in his brief at page 27, that he waived any right to have the Affidavit of Paternity determined as to material mistake or fraud is undercut by his own testimony as he said he had doubts about signing the affidavit of paternity. This does not affect the outcome of this case, or cast doubt on the very basis for the Court's ruling. *Farris v. Daigle,* 139 N.H. 453; 656 A.2d 825, (1995).

Again, at the hearing held in this matter, Mr. Thatcher testified that he had a doubt about signing the Affidavit of Paternity. Individual waiver of a right to challenge paternity affidavits is not listed in either statute as a factor for consideration under RSA 168-A:2, and RSA 522, and does not preclude the statutes being enforced by those who have standing to do so, despite any claim of waiver. The record shows Mr. Thatcher did not waive his right to challenge paternity. Waiver is defined as the "intentional or voluntary relinquishment of a known right." [14] One may wonder if this was waived as he claims, why it does not appear in the transcript of final hearing.

3. Whether New Hampshire recognizes the existence of dual paternity.

a) New Hampshire is a single father jurisdiction.

The trial court correctly found that Adam Thatcher's was not the father of the child. Despite his representations in Issue V. and his Brief at page 27, he is not this child's father and whether or not a case has been made for "multiple fathers" is irrelevant as a matter of law. As Mr. Thatcher admits in his brief at page 31, the legislature would need to be involved with changing statutes. In *Bodwell v. Brooks*, 114 N.H. 508; 686 A.2d 1179 (1996), this Court rejected dual paternity, noting the United States Supreme Court has stated "the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country." *Michael H. v. Gerald D.*, 491 U.S. 110, 131, 109 S.Ct. 2333, 2346, 105 L.Ed. 2d 91

14 Black's Law Dictionary, 1092, Abridged 6th ed. 1991.

(1989).

Second, if this court were to do what Mr. Thatcher wants done by judicial fiat, it would wreak havoc on New Hampshire families; and create a number of novel legal issues to be resolved. Among them would be inheritance problems, including pretermitted child claims in laws of descent and distribution; there may be needed amendments to the Uniform Probate Code; problems may arise with same sex couples, and the like. The problems would be so complex the legislature would have to amend present legislation, not the least of which would be RSA-461-A, which is the Parenting Rights and Responsibilities Act.

Third, this is a floodgate proposal, that would lead to chaos as thousands of families would be disrupted by litigation. Fourth, it would have a catastrophic and disruptive effect on intact, nuclear families, such as is the case here.

b) Constitutional concerns with dual paternity and parental rights and responsibilities.

Marlena is a child who is living with her mother and her father, who are married to each other. As was pointed out in her Petition to change the Court Order, this is an intact nuclear family. In the court's July 27, 2017 Order, the court noted that Colby Santaw and Haley Santaw are married. Previously, the court found that Colby Santaw is the child's biological and legal father. Any other finding other than what the court found, such as some kind of an alternative legal parent, however defined, would violate their well settled constitutional rights to parent their children. *Troxel v. Granville*, 530 U.S. 57 (2000).

Haley Santaw and Colby Santaw are married and raising their biological child. Their fitness as parents is beyond question. These parents have well settled constitutional rights to parent under Federal and New Hampshire law. The right of parents to raise their children is a fundamental liberty interest protected by Part I, Article 2 of the New Hampshire Constitution. *In*

the Matter of R.A. and J.M. (New Hampshire Supreme Court, 2004-721 (2005); *In the Matter of Nelson and & Horsley*, 149 N.H. 545, 547 (2003). In *Nelson,* the New Hampshire Supreme Court stated "that natural or adoptive parent's rights over their children are not easily set aside and that "[p]arental rights "have been found to operate against the State, against third parties, and against the child."

The fundamental right of parents to the care and custody their children has a long and recognized history. *Meyer v. Nebraska*, 262 U.S. 390, 399, (1923); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). *See, e.g. Santosky v. Kramer*, 455 U.S. 745, 753, 102S.Ct. 1388, 71 L.Ed.2d 599 (1982) (acknowledging the "[Supreme] Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest"); *Stanley v. Illinois*, 405 U.S. 645, 651-52,92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). This would be true even if the parents were not "model parents" *IN RE T.A.L., IN RE A.L.,* 149 A.3d 1060, (D.C. 2016).

4.Whether a formal "disestablishment of paternity" was necessary to effect a judgment of paternity to allow Colby Santaw to be declared the child's father.

In his brief at pages 28 and 29, (Issue V(III), Mr. Thatcher asserts there was a failure to disestablish paternity. Mr. Thatcher does not explain how or why a judgment of paternity is legally insufficient in New Hampshire. He does not say why a successful challenge to a judgment of paternity required "a motion to disestablish paternity" a "motion to vacate paternity." He does not explain why Haley Santaw or Colby Santaw needed to move the court for relief from judgment is needed, in this case, if an Affidavit of Paternity is not a judgment, was voided out, had no legal effect, and the child's birth certificate was amended to show Colby

Santaw was the child's father, and a judgment of paternity entered in New Hampshire,

This is all the more true when equitable doctrines apply. Courts are not supposed to consider matters of procedure over substance. Thus it is irrelevant to a final determination in the case. Mr. Thatcher's status was effectively disestablished by an Amended Judgment finding that Mr. Santaw, not Adam Thatcher was the child's father. In *GT Crystal Systems, LLC, and GT Solar Hong Kong, Ltd. v. Chandra Khattack, Kedar Gupta, and Advanced Renewable Energy Company, LLC.*, No. 226-2011-CV-332 (2012), the court below summed up the well settled New Hampshire principle that courts are here to do justice:

> The Court will not elevate form over substance. See *Karch v. Baybank*, FSB 147 N.H. 525, 528 (2002). Since the days of Chief Justice Doe in the late 19th century, New Hampshire procedure has focused on what justice requires, " not on strict precision in form," In re: Proposed Rules of civil Procedure, 139 N.H. 512, 515-516 (1995). For this reason, New Hampshire courts "make every effort to reach a judgment on the merits, to achieve the ends of justice unobstructed by imaginary barriers of form. " Roberts, 140 N.H. at 729, quoting In re: Proposed Riles of Civil Procedure, 139 N.H. at 516; *Walker v. Walker*, 63 N.H. 321, 328, (1885).

Finally, in his brief at page 22, Mr. Thatcher cites *In the Matter of Gregory Neal and Lauren Digiulio* 184 A.3d. 90 (NH 2018). In that case, this Court took note of *In re: Paternity of D.L.*, 938 N.E, 2nd 1221, Ind. Ct. App. 2010) an Indiana decision, noting that "establishing paternity in another man effectively operates to disestablish paternity of the man who executed the paternity affidavit." This is on point, and answers the question.

5.Whether the trial court's decision allowing relocation and residential responsibility were correctly decided.

a) The trial court correctly applied the standards in RSA 461-A: 12 and the *Tomasko* factors in allowing relocation as well as residential responsibility and other collateral matters. Residential responsibility became a judgement on October 11, 2017.

The Court correctly applied the relocation statute in RSA 461-A:12. There was no error of any kind. On about July 3, 2017 the child was badly burned as a result of being too close to a

fire pit while in the care of Mr. Thatcher. Mrs. Santaw filed for an Emergency Ex-parte Order, and a motion to reconsider the prior denial of relocation. As a result of a hearing held on July 20, 2017, the court issued its Order on July 27, 2017. So while Mr. Thatcher had issues with relocation as he states at Issue IX,in his brief at pages 29-31, the relocation was appropriate, as was the assignment of residential responsibility to Haley Santaw. She is the child's mother, and Mr. Santaw is the child's father.

The court had trouble with Mr. Thatcher's ability to adequately supervise Marlena. As the court pointed out "This was an accident, but it also appears it was avoidable." No satisfactory explanation was made for why the child was allowed to be so close to the fire pit. This hearing was held at a time when the facts and the matter itself would have been fresh in his mind. Noted in the court's Order is a letter from Vermont Department of Children Youth (Appellee Confidential Appendix page 1) from which it could conclude that Mr. Thatcher failed to properly supervise the child.

The trial court correctly decided that Mrs. Santaw could relocate to Florida with her husband because it correctly applied the standards in the law. Under RSA 461-A:12 (V), Ms. Santaw had the burden to prove by a preponderance of the evidence that her relocation was for a legitimate purpose, and the proposed relocation was reasonable in light of that purpose. After she made her case, the burden shifted to Mr. Thatcher to show it was not in the child's best interest to move. He was not able to meet that burden.

After a hearing, the court correctly determined that Ms. Santaw and Mr. Santaw were now married, and "Being able to be with her husband is a legitimate reason to relocate for Florida. Florida is a reasonable location in light of that, as Mr. Santaw's business is located there." Mr. Santaw had a business that was state specific and that he could not move. (Appellant

Appendix page 90).

The relocation was for a legitimate purpose. This issue was correctly decided under the factors listed in *Tomasko v. Dubuc*, 145 N.H. 169, 761 A.2d 407 (2000). There is no special emphasis on which of the *Tomasko* factors courts must use to decide a relocation case. Even without allegations of failure to supervise the child, there were ample independent and adequate grounds to allow relocation. Mrs. Santaw was now married, and moving to be with her husband. This is a legitimate reason for relocation. Mr. Thatcher's position was defined as a step parent. Under RSA 461-A:6 (V) he was allowed " reasonable visitation privileges." which were granted. [15] As a step parent, he has no real parental rights, (absent a showing of unfitness). Mr. Thatcher made no showing that Haley Santaw and Colby Santaw are unfit parents, and the case went to judgment on October 11, 2017. Parents have a constitutional right to raise their children. (See 3 b, above). From the foregoing, Mr. Thatcher's stepparent status could be disputed. Mrs. Santaw respectfully points out it is a Court's job to look past the advocacy to see what the real issues are in terms of ascertaining motives, interests, and biases. *In the Matter of Erica Tapply and Benjamin Zukatis*, 162 NH 285, 27 A.3d 628 (2011). Thus, the record speaks for itself.

CONCLUSION

Based on the foregoing, it is clear the court below exercised sustainable discretion as to the matters Mr. Thatcher appeals, and correctly applied the law. The notion that only signatories to an Affidavit to Paternity be allowed to contest paternity is likely a violation of federal law. There were no errors of law, and the record shows ample evidentiary support for the decisions it made for which Mr. Thatcher appeals As a result, the trial court's decisions as to all of the issues Mr. Thatcher appeals in his brief should be affirmed; his requests for relief should be denied, and the appeal dismissed.

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15 Whether Mr. Thatcher's status as stepfather survives divorce under RSA 461-A:6(V)is an open question.

REQUEST FOR ORAL ARGUMENT

The Appellee requests oral argument.

RESPECTFULLY SUBMITED

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October 9, 2018 CERTIFICATE OF SERVICE:

I, Jay Markell, Esquire hereby certify that 2 copies of the brief with addendum, and 2 copies of the appendices pertaining thereto have this day been forwarded to via first class postage prepaid to:

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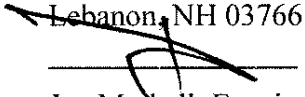

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STATE OF NEW HAMPSHIRE

SUPREME COURT

2018 TERM

AUGUST SESSION

CASE NUMBER 2018-0013
IN THE MATTER OF HALEY ST. PIERRE AND ADAM THATCHER

APPEAL FROM FINAL DECSION

RULE 7 APPEAL

SECOND CIRCUIT

FAMILY DIVISION LEBANON

BRIEF OF PETITIONER-APPELLEE

HALEY ST. PIERRE

ADDENDUM

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STATE OF NEW HAMPSHIRE

2nd CIRCUIT — FAMILY DIVISION - LEBANON

Case #662-2015-DM-00015

In the matter of
Haley St. Pierre and Adam Thatcher
and Colby Santaw, Intervenor

COLBY SANTAW'S MEMORANDUM OF LAW

QUESTIONS OF LAW

What are the rights of an unrelated individual who believed, due to a material mistake of fact, that he was a biological parent, but was not?

SHORT ANSWER

A court may order some contact between an unrelated former step-parent and a child, but paramount to a determination of what contact is appropriate is the biological parents' judgment as to the best interests of their child.

STATEMENT OF THE FACTS

Mr. Thatcher and Ms. St. Pierre were in a relationship that was not going well. Ms. St. Pierre began a sexual relationship with Mr. Santaw. Mr. Thatcher was aware of Ms. St. Pierre and Mr. Santaw's relationship. During that time, Ms. St. Pierre discovered she was pregnant with Marlena. When Ms. St. Pierre went to her physician, she was told that she had become pregnant prior to her sexual relationship with Mr. Santaw. Mr. Santaw and Ms. St. Pierre agreed that Marlena should be raised by her biological parents and they ended their relationship. When Marlena was born, Mr. Thatcher signed an affidavit that he was Marlena's father, once again relying on the physician informing Ms. St. Pierre that Marlena was conceived at a time that she only had a sexual relationship with Mr. Thatcher. Ms. St. Pierre and Mr. Thatcher were unmarried at the time of Marlena's birth. Later, Mr. Thatcher falsely induced Ms. St. Pierre to

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marry him by claiming he was enrolling in the armed forces and she would only be able to get support from him for she and Marlena if they were married. Ms. St. Pierre and Mr. Thatcher married. Mr. Thatcher never enlisted and the marriage ended relatively quickly.

Ms. St. Pierre and Mr. Santaw re-connected in September 2015 after having no contact since Ms. St. Pierre discovered she was pregnant with Marlena. Mr. Santaw, after being informed of the date of Marlena's birth, deduced that he could be Marlena's father. Immediately thereafter, Mr. Santaw submitted to a paternity test which indicated that he was Marlena's father by a probability of 99.9999%. Ms. St. Pierre and Mr. Santaw attempted to discuss the situation with Mr. Thatcher and he would not communicate regarding the situation. This was not unusual as Mr. Thatcher rarely communicated with Ms. St. Pierre despite the fact that good communication would be necessary to co-parent Marlena. Ms. St. Pierre filed to open her case and informed the Court that Mr. Thatcher was not Marlena's father. Mr. Santaw followed relatively quickly with his own Petition seeking to enforce his rights as Marlena's biological father.

DISCUSSION

RSA 461-A:3, II indicates the State has the authority to make orders relative to the rights and responsibilities of unwed parents. The word "parent" is construed to mean biological or adoptive parent. Although an affidavit of paternity can provide evidence of paternity, RSA 5-C, III provides that an affidavit of paternity can be challenged after the 60 day rescission period by a court of competent jurisdiction. Although New Hampshire has established no guidelines relative to the challenge of an affidavit of paternity, Mr. Thatcher correctly points out that federal law indicates that a material mistake of fact is a basis for such a challenge. Since the parties were wrongly led to believe that Mr. Thatcher, not Mr. Santaw, was Marlena's father, by a third

party such a material mistake of fact exists. Mr. Santaw did not discover the material mistake of fact until he discovered Marlena's date of birth in September 2015. Upon discovering the material mistake of fact, Mr. Santaw took immediate steps to remedy the error.

Clearly the facts reveal that the parties all relied on a material mistake of fact made by a third party. Further, there is no dispute that Colby Santaw is Marlena's father. The real question is what contact, if any, should Mr. Thatcher have relative to Marlena.

There is one provision in RSA 461-A for an unrelated individual to have contact with a child and that is RSA 461-A:6, V, which allows visitation for a former step-parent if the court determines such an award is in the child's best interests. Whether it is in a child's best interests to have contact with an unrelated third party is fact driven, but the United States Supreme Court has indicated the court must give significant deference to the child's parents' wishes. Justice O'Connor said in the majority opinion for Troxel v. Granville, 530 U.S. 57 (2000) that "the interests of parents in the care, custody and control of their children is possibly the oldest of the fundamental liberty interests recognized" by the Supreme Court. Troxel, 530 U.S. at 65. Justice Thomas indicated in his concurring opinion in Troxel that a strict scrutiny should be applied to the infringements of fundamental rights. Troxel, 530 U.S. at 80. The Supreme Court has found that there is a presumption that fit parents act in their children's best interests. Troxel, 530 U.S. at 68. See also, Parham v. J.R., 442 U.S. 584 (1979). "Accordingly, so long as a parent adequately cares for his or her children (i.e. is fit) there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. See e.g. Flores, 507 U.S. at 304." Troxel 530 U.S. at 69. There is a presumption that a fit parent's decisions are in the child's best interests.

Although the Supreme Court has qualified unrelated individuals as parents in certain circumstances, this case is distinguishable from those cases. In other cases there was no biological parent available to be the child's father and the parent contesting the paternity had knowledge for a number of years relative to the likelihood that a paternity test would prove that the wrong father was on the birth certificate. The individual who petitioned to correct the affidavit of paternity did not claim that there was mistake of material fact which led to the execution of the affidavit. The distinguishable cases also would have left the child fatherless if the unrelated individual had been removed from the birth certificate. In case at bar, both the biological father and mother filed the necessary paperwork to correct the birth certificate as soon as the error was discovered. The error was not due to fraud or neglect, but due to an error made by a third party.

In the case at bar, Marlena is still at a young enough age that her contact with Mr. Thatcher will be quickly forgotten. Mr. Thatcher has been unable to support Marlena and has relied on others to pay for housing and other necessities. Mr. Thatcher has been unwilling to communicate with Ms. St. Pierre regarding the care of Marlena which has made transitions for Marlena difficult. Mr. Thatcher has been unwilling to co-parent with Ms. St. Pierre, acting as if Ms. St. Pierre does not exist during his parenting time. Mr. Santaw on the other hand has been providing financial support for Marlena since he discovered Marlena was his child. Marlena sees Mr. Santaw as her father and Mr. Santaw and Ms. St. Pierre already have been successfully co-parenting Marlena.

CONCLUSION

A material mistake of fact resulted in an incorrect affidavit of paternity. Further delay in removing Mr. Thatcher from Marlena's birth certificate and adding Mr. Santaw benefits no one,

particularly not Marlena. The question of Mr. Thatcher's on-going contact with Marlena should be first left to Marlena's biological parents and only determined by the Court if Mr. Thatcher can meet his burden that Marlena's parents are not acting in Marlena's best interests.

May 20, 2016

Respectfully submitted,
Colby Santaw
By and through his attorney.

Barbara L. Parker #8806

CERTIFICATION

On this 20th day of May, 2016, I hereby certify that a copy of Colby Santaw's Memorandum of Law was mailed to Patrick Hayes, Esq. and R. Peter Decato, Esq.

Barbara L. Parker

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