THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In the Matter of

Richell Chrestensen (Stiles)

and

Sean Pearson

Case # 2018-0061

MEMORANDUM OF LAW FOR RICHELL CHRESTENSEN (STILES)

APPELLEE

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ORAL ARGUMENT BY:
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ARGUMENT:

I. *In the Matter of JB and JG* 157 NH 577 (2008) was properly distinguished by the trial court.

In that case this Court was presented with, and decided, a very narrow issue: "(1) May petitioner maintain a parenting petition under N.H. RSA [chapter] 461-A, when he is neither a stepparent, biological parent, or grandparent to the child?" *JB* at 579. Answering the question in the affirmative the Court observed "...that the legislature has set forth too many alternative routes to establish parental status that do not require proof of biological ties for us to give the respondent's argument much weight.", *JB* at 580, and noting the "...overarching statutory scheme in this area..." *Id.*

The question in the case at bar is as follows: "May Sean Pearson maintain a parenting petition under N.H. RSA [chapter] 461-A, when he has terminated his parental rights and responsibilities in accordance with the applicable law and procedure?"

II. Sean Pearson lacks standing to establish parental rights and responsibilities.

By operation of law and his knowing, intelligent and voluntary relinquishment, Respondent is now, under statutory and decisional law, a legal stranger to Petitioner's minor child and has no standing to request an award of parenting rights or responsibilities of any kind.

Definitions of "parent" are found in NH RSA Chapters 170 –B and 170-C at 170-B: 2, XII and 170-C: 2, VIII; both definitions specifically exclude Respondent as a "parent" by their terms.

Respondent is among the class of persons excused from any requirement to execute a surrender of parental rights to facilitate an adoption per NH RSA 170-B: 7 V.

Respondent is among the class of persons excluded from consideration as a "parent" under New Hampshire law; he is not a person who may be granted "Residual parental rights and responsibilities" pursuant to RSA 170-C: 2, IX.

Respondent has acknowledged that the parent - child relationship was terminated by judicial decree in 2012 (Case No.: 318-2012-SU-00026); that "...order terminat[ed] the parent –child relationship..." and "...divest[ed] the parent and the child of all legal rights

privileges, duties and obligations." NH RSA 170-C: 12.

"A parent abandons his child when his conduct 'evidences a settled purpose to forego all parental duties and relinquish all parental claims to the child.' *Fortino v. Timko*, 110 N.H. 200, 200, (1970). Abandonment is not ... 'an ambulatory thing, the legal effects of which a delinquent parent may dissipate at will by the expression of a desire for the return of the discarded child.' *Wallace v. Lougee*, 107 N.H. 251, 254, (1966)." *In re Jessica B.*, 121 N.H. 291, 295 (1981)

RSA chapter 461-A, titled Parental Rights and Responsibilities, "... does not explicitly define the term ' parent'." *In re J.B.*, 157 N.H. 577, 580 (2008) Respondent's conduct, under oath and in the presence of the court in 2012, evidenced his "settled purpose" which he now seeks to "dissipate" by his request for relief in this case. Respondent has voluntarily "abandoned" Petitioner's minor child in law and in fact.

"Parental rights may not be preserved by complete indifference to the daily needs of a child or by merely waiting for some more suitable financial circumstance or convenient time for the performance of parental duties and responsibilities (while others adequately provide the child with ... immediate and continuing physical and emotional needs). The parental obligation is a positive duty and requires affirmative performance..." *Matter of Doe*, 118 N.H. 226, 229 (1978), *quoting* In re Smith's Adoption, 412 Pa. 501, 505, (1963)."

The previous determination and definition of Respondent's parental rights and responsibilities was re-affirmed by denial of his pleading seeking to open the surrender case a nd order a new trial in March of 2014, *Weaver, J.* Order dated March 31, 2014 in Case No.: 318-2012-SU-00026. (Attached hereto as Exhibit 1)

III. The relief requested by Sean Pearson at the trial court is barred by relevant statutes.

Judge Weaver's March 31, 2014 Order (Exhibit 1) made clear that the information solicited from Respondent in 2012 was in accordance with the requirements of RSA 170-B: 10 and that Respondent's voluntary surrender was approved by the Court in 2012, meaning that "All parental rights...shall cease and the right of notice of any future hearings shall be waived..." NH RSA 170-B: 11 I (emphasis supplied) and that the surrender may not be withdrawn absent compliance with NH RSA 170-B: 12, I.

NH RSA 170-B: 12, I requires that "A parent wishing to withdraw a surrender shall notify the court in writing where the surrender was taken. Notification shall be prior to the entry of the final decree." (emphasis supplied). Respondent provided no timely writing

indicating that he wished to reconsider his June 27, 2012 decision; a Certificate of Adoption was issued bearing that date.

Respondent was barred from withdrawing his surrender "...for any reason..."after the entry of the final decree of adoption. NH RSA 170-B: 12, V.

Respondent's right of appeal expired on or about July 27, 2012 without Respondent taking any action. NH RSA 170-B: 21, I.

Beginning June 27, 2013, the adoption decree "cannot be challenged by any person including the petitioner, in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice or lack of jurisdiction of the parties or of the subject matter." NH RSA 170-B: 21, II.

"While it is not the purpose to make adoption in all respects equivalent to the birth of a natural child, it was to have that effect in regard to certain rights and duties." *Young v. Bridges*, 86 N.H. 135, 138 (1933), *quoting, Clark v. Clark*, 76 N.H. 551, 552 (1913)

"In the ascertainment of these rights and duties the whole matter is one of statutory construction. Since adoption is wholly statutory, all its incidents must be. As it is unknown to the common law, there is no common law policy for regulation of the status. Any differences between the rights and duties of an adopted child and those of one not adopted are to be marked out only by legislation." Id.

"In 1973, the legislature enacted RSA chapter 170-B the product of a 1972 gubernatorial commission." C. Douglas, 3 New Hampshire Practice: Family Law 396-97 (1982). The Court has described RSA Chapter 170-B as a "...comprehensive statutory scheme..." *In re Adoption of Baby C.*, 125 N.H. 216, 221 (1984)

Such a "comprehensive statutory scheme" must be held to inform the courts of the intent of the Legislature and limit the courts' discretion as regards both adoption (RSA Chapter 170-B) and the termination of parental rights (RSA Chapter 170-C, also enacted in 1973).

Such defined boundaries clearly prohibit the relief requested by Respondent from the Family Division; particularly in the context of his voluntary relinquishment in 2012 and his failed 2014 attempt to avoid the determinative effect of the statutory deadlines he ignored in 2012.

The Probate Division has "exclusive jurisdiction" to grant adoptions, RSA 170-B: 15, I, and "...exclusive original jurisdiction over petitions to terminate the parent-child relationship..." RSA Chapter 170-C: 3.

The Respondent's pleading in this case seeks to restore the legal status that he enjoyed prior to June 27, 2012, restore the procedural right to appeal he enjoyed prior to July 27, 2012 and reinstate his right to challenge the adoption decree, which right permanently expired, by legislative mandate, on June 27, 2013.

Pleadings filed with a different title and in a different Division, that seek the same substantive relief would allow Respondent to receive a third bite of the apple after a period of five (5) years; a third bite that, although formerly allowed on principles of equity, has since been explicitly foreclosed by statute.

"Prior to the enactment of the present statutory scheme, we held that the right to withdraw consent to adoption was not 'absolute but ... governed by equitable considerations.' *Durivage v. Vincent*, 102 N.H. 481, 485, 161 A.2d 175, 178 (1960). In so holding, we recognized that: 'To accede to the contention that such voluntary consent may be withdrawn would be equivalent to saying that parties may come to a court, deliberately give their assent ... and afterwards, at their will and pleasure, return to the court and undo what they did because on a future day they did not like it.' Id. (quoting *Wyness v. Crowley*, 292 Mass. 461, 464, 198 N.E. 758, 759 (1935))" *In re Adoption of Baby C.*, 125 N.H. 216, 480 A.2d 101, (1984)

IV. Respondent's parental rights and responsibilities have already been finally determined and defined by previous orders of the 10th Circuit-Probate Division.

Respondent's status as a parent was terminated by voluntary surrender in the manner required by statute (RSA 170-B: 9 and10) on June 27, 2012. His grounds for seeking to re-open the termination case in 2014, Petitioner's "...failure...to comply with an arrangement or understanding...", were insufficient to revoke or set aside the voluntary surrender as a matter of law. RSA 170-B: 10, II (a)

The order entered March 31, 2014 details the record of the June 27, 2012 hearing and found, *inter alia*, that "...Mr. Pearson was fully advised of his rights at the time of the proceeding. He knowingly and voluntarily waived those rights, and freely and voluntarily acknowledged that he was no longer going to be a parent of the minor. Therefore, the Motion is Denied." *Weaver, J.* Order dated March 31, 2014 in Case No.: 318-2012-SU-00026. (Exhibit 1)

"'Res judicata precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier acti- between the same parties for the same

cause of action.' *Sleeper v. Hoban Family P'ship*, 157 N.H. 530, 533, 955 A.2d 879 (2008) The doctrine applies when three elements are met: '(1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered in the first action.' *Id.*" *Kalil v. Town of Dummer Zoning Bd. of Adjustment*, 159 N.H. 725, 730 (2010)

What Respondent sought in the trial court was a judicial determination of his parenting rights and responsibilities, a determination that has already been made twice, first at Respondent's own request and then by a judgment from the Court; there is no legal issue raised by Respondent that has not already been actually decided or could have been litigated in the earlier actions.

Referring to its decision in *Eastern Marine Construction Corp. v. First Southern Leasing*, 129 N.H. 270, 274, 525 A.2d 709 (1987), the Supreme Court has noted that it has "embraced the modern trend 'to define cause of action collectively to refer to all theories on which relief could be claimed on the basis of the factual transaction in question,' and ' reject[ed] the view that the term is synonymous with the particular legal theory in which a party's claim for relief is framed.' (citations omitted)", *Kalil v. Town of Dummer Zoning Bd. of Adjustment*, 159 N.H. 725, 730 (2010) *citing, Shepherd v. Town of Westmoreland*, 130 N.H. 542, 544, (1988)

The Court also noted that "We have consistently barred such claims when, as here, the subsequent action is so closely related to the earlier action. The fact that the [respondent] attaches a new label to [his] cause of action is insufficient to remove the bar of the earlier adjudication against [him]". *Id.*

Respondent has already had full and fair opportunities to litigate the issue of his parental rights and responsibilities, and; the Probate Court's orders were a final determination of Respondent's parenting rights and responsibilities under the controlling statutory law.

V. Sean Pearson is collaterally stopped from re-litigating the issue of his parental status

Before the Court in this matter (1) are the same parties as appeared in Case No.: 318-2012-SU-00026 five (5) years ago; (2) at issue in the 2012 case were the parties' respective parenting rights and responsibilities; (3) a final judgment on the merits was issued in 2012 and re-affirmed in 2014 through the denial of Respondent's request to re-open the case; (4) during the past five years Respondent has had a two full and fair opportunities to litigate the issue of his parental rights and responsibilities, ; (5) the Court's orders were final

determinations of Respondent's parenting rights and responsibilities under the controlling statutory law.

Based upon those facts, Respondent is collaterally estopped from pursuing the same matter for a third time. *Mahindra & Mahindra v. Holloway Motor Cars of Manchester*, 166 N.H. 740, 750, (2014)

VI. Allowing further litigation in this matter implicates Richell Chrestensen's (Stiles') due process rights

Part I, Art. 15 of the NH Constitution provides, in relevant part, that: "No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land..."

From earliest times this language has been interpreted to guarantee due process and the protections of the law of the land. "'The law of the land' here means process warranted by law."*Hutchins v. Edson*, 1 N.H. 139, (1817); "'Law of the land' in this article means due course and process of law. [citation omitted]" *In re Opinion of the Justices*, 66 N.H. 629, 633 (1891)

The General Court has defined what "due process" requires in termination and adoption proceedings as noted above regarding statutory estoppel. Petitioner would be denied her ability, under the statutory structure, to oppose Respondent's requests to reverse the effects of his actions by shifting forums and shifting focus away from his refusal to responsibly parent Petitioner's son in both the factual and legal senses.

CONCLUSION

The trial court's dismissal of Sean Pearson's pleadings must be affirmed based upon his lack of standing, the entry of orders after he had received proper notice and full and fair opportunities to be heard as well as his failure to avail himself of the opportunities to challenge the resulting decrees. The requirements of procedural due process have been met regarding Respondent's parental rights and responsibilities and final determinations have been made.

DATED: September 4, 2018

Respectfully submitted,
Richell Stiles, (f/k/a Richell Chrestensen)
by her attorneys, Marshall Law PLLC by

Brian D. Kenyon, Esq.
NH Bar # 1355

CERTIFICATION OF NOTICE

I hereby certify that two (2) copies of this Memorandum of Law was this day sent by first class mail and emailed to John Anthony Simmons, Sr., Esq., counsel for Respondent.

September 4, 2017

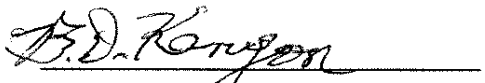

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EXHIBIT 1 TO MEMORANDUM OF LAW FOR RICHELL CHRESTENSEN (STILES)

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BRIAN D. KENYON, ESQ.

EXHIBIT 1

Counsel/Resp.

APR 22 2014

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NOTICE OF DECISION

SHARON J. RONDEAU, ESQ
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EXETER NH 03833

Case Name: **Surrender of Parental Rights Over Lucas Troy Pearson**
Case Number: **318-2012-SU-00026**

On March 31, 2014, Mark F. Weaver issued orders relative to:

Order After Hearing On Motion To Open Termination Of Parental Rights and For New Trial

Any Motion for Reconsideration must be filed with this court by May 01, 2014. Any appeals to the Supreme Court must be filed by May 21, 2014.

April 21, 2014

Cheryll-Ann Andrews
Clerk of Court

C: Sean Pearson

THE STATE OF NEW HAMPSHIRE

JUDICIAL BRANCH

NH CIRCUIT COURT

ROCKINGHAM COUNTY

10th CIRCUIT - PROBATE DIVISION - BRENTWOOD

Surrender of Parental Rights Over Lucas Troy Pearson

Case No. 318-2012-SU-00026

ORDER AFTER HEARING ON MOTION TO OPEN TERMINATION OF PARENTAL RIGHTS AND FOR NEW TRIAL

Before the Court is the motion of Sean Pearson to re-open the surrender of his parental rights over Lucas Troy Pearson in 2012. Mr. Pearson appeared with counsel on March 17, 2014 to argue the Motion. After the hearing, counsel and her client listened to the recording of the termination proceedings. In addition, this Court held open the record for Mr. Pearson's Motion to allow him to file a Memorandum of Law in support of the Motion. After considering the Motion, Memorandum, and the presentation by counsel at the hearing, together with the record of the termination proceedings, the Motion is denied.

The essence of Mr. Pearson's Motion is that he claims he agreed to the surrender of his parental rights based on several promises made by the mother of the child regarding visitation and reduced child support. He claims that the mother has failed to abide by those promises, and that he was fraudulently induced and coerced into surrendering his parental rights. In considering those claims, this Court must first review the record of the hearing where Mr. Pearson agreed to the termination of his rights.

The record of the termination proceeding reflects that after being sworn in by the Court, Judge Hurd took Mr. Pearson's testimony as to the following:

- He confirmed he was 45 years old at the time, and that he went to College.
- He indicated he did not want to speak with an attorney, and stated that he did not want an attorney and knew he had the right to meet with an attorney.
- He confirmed that he was not under the influence of any drugs or alcohol.
- He said he had completely reviewed the surrender form and had no questions for the Court.
- He indicated that he understood he had the right to meet with a counselor and stated that he did not wish to do so.
- He testified that he was aware that the child was going to be adopted, and said that he believed that it was in the best interests of the child for him to terminate his parental rights.
- He acknowledged that upon the acceptance of the surrender he would no longer be the parent of the child.
- He confirmed that he was terminating his parental rights as his own free act and deed, and that he was not being pressured by anyone to terminate his rights.

- He told the Court that he did not want to be notified of the final adoption of the child, but later requested to be notified of the adoption so that he would know when the child support payments would stop being taken out of his paycheck.
- He asked about the effect of the proceeding on his child support payments and was informed that as soon as the child was adopted he would have no obligation to pay any child support other than arrearages, which he confirmed had been paid.

At no time during this colloquy did the Movant ever indicate or ask about parenting time. Indeed, he acknowledged that he was no longer going to be a parent to the child. In addition, his questions about child support show that at the time of the hearing, he was keenly aware of the child support issue, and that he was anxious to know when his child support payments would end. The recording of the hearing shows no hesitation or influence on the part of Mr. Pearson, and Mr. Pearson seemed pleased with the proceedings.

Given this, there is no basis to reopen the case as Mr. Pearson was fully advised of his rights at the time of the proceeding. He knowingly and voluntarily waived those rights, and freely and voluntarily acknowledged that he was no longer going to be a parent to the minor. Therefore, the Motion is Denied.

So Ordered

Dated: 3/31/14

Mark F. Weaver, Judge