THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case Nos. 2018-0086, 2018-0153, 2018-0398

In the Matter of Crystal Ndyaija (n/k/a Perry) and Joshua D. Ndyaija

Rule 7 Appeal From Decision Of The
9th Circuit – Family Division – Nashua

BRIEF OF PETITIONER/APPELLEE, CRYSTAL NDYAIJA (N/K/A PERRY)

On the Brief:

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Oral Argument:

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RSA 458-C:5

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RSA 461-A:11, I (f)

The modification makes either a minimal change or no change in the allocation of parenting time between the parents, and the court determines that such change would be in the best interests of the child.

RSA 461-A:11, I (h)

The parenting schedule was based on the work schedule of the parties.

Statement of the Facts and the Case

The parties to this matter were divorced by a Decree of Divorce dated May 11, 2016. The court approved an Agreed Upon Parenting Plan that was signed by both parties and their attorneys. The court approved a Partial Permanent Stipulation, which was signed by both parties and their attorneys. Respondent's ("Resp.") Appendix ("Appx.") Page ("pg.") 361. The court entered an Order on life insurance and other financial assets. Resp. Appx. pg. 363. At no time, did either party assert that the court did not have jurisdiction to grant the Decree of Divorce, which included a Final Uniform Support Order, a Final Parenting Plan and a Final Order.

On August 26, 2016, approximately three (3) months from the date of the Notice of Decision approving the divorce, the Respondent filed a Petition for Contempt with the 9th Circuit-Family Division-Nashua. Resp. Appx. pg. 335. In the Petition for Contempt, the Respondent raised several issues including, but not limited to, Paragraph H. of the Parenting

Plan, the refusal of the Petitioner to replace one weekend of the Respondent's parenting time, the vacation week rejected and payment for vacation week. The Petitioner filed an Objection to the Motion for Contempt (Resp. Appx. pg. 330) and a hearing was held in this matter on October 12, 2016. The court dismissed the Petition for Contempt. Resp. Appx. pg. 329.

The Respondent appealed this matter to the New Hampshire Supreme Court and the New Hampshire Supreme Court remanded this matter back to the Family Court, for further deliberation. Resp. Appx. pg. 316. By a Notice of Decision dated October 24, 2017, the court issued an Order on the Hearing on the Remand. Petitioner's ("Pet.") Appx. pg. 1. The court ordered that the Petitioner had not violated any provisions of the Parenting Plan and that there was insufficient evidence to prove that she acted unreasonably, willfully or with malice. The court dismissed the Petition for Contempt. The court denied the Motion for Parental Interference filed by the Respondent and the court denied the Respondent's Motion to Restrain. Pet. Appx. pg. 4. The Respondent has now appealed these rulings as well.

The Petitioner filed a Motion to Modify Child Support Order on December 15, 2017. Resp. Appx. pg. 274. The Petitioner alleged that the Respondent revealed that he was making a monthly gross income of $7,200.00 and despite this gross income, the Respondent continued to pay the minimum $50.00 per month in child support.

On February 13, 2018 the Respondent filed a Motion to Modify Parenting Plan and Permanent Stipulation. Resp. Appx. pg. 235. The Petitioner filed an Objection to the Motion filed by the Respondent. Resp. Appx. pg. 237.

On April 26, 2018 the Petitioner filed a Motion to Approve Daycare/Kindergarten Enrollment for Minor Child. Resp. Appx. pg. 231. The Respondent filed a Response to the Motion to Approve Daycare/Kindergarten Enrollment for Minor Child. Resp. Appx. pg.

225.

By a Notice of Decision dated February 13, 2018, the court issued a Uniform Support Order that provided child support to be paid in the child support guideline amount of $274.00 per week and established a child support arrearage of $5,149.38, payable $50.00 per week. Pet. Appx. pg. 15. The court ordered that child support shall be payable to the Division of Child Support Services and the court found that the Order complies with the child support guidelines. A Child Support Guideline Worksheet was attached to the Order. The Respondent has appealed this Order to the Supreme Court.

By a Notice of Decision dated May 14, 2018, the court entered an Order on the Respondent's Motion to Modify Parenting Plan and Permanent Stipulation. Pet. Appx. pg. 22. In its Order, the court denied the Respondent's request to modify Paragraph C. of the Parenting Plan and the court denied the Respondent's request to modify the vacation time provisions in the Parenting Plan. The court found that there was no factual justification or legal basis for the requests made by the Respondent. The court further denied the Respondent's request to compel the Petitioner's compliance with Paragraph G. of the Parenting Plan. The court found Paragraph G. to be not only unnecessary but also unlikely to produce any meaningful agreements between the parties. The court vacated Paragraph G., finding it to be more of a source of conflict than a means by which conflict can be avoided. The court denied the Respondent's request that the life insurance provision of the Final Decree be vacated. The court found that this was a Final Order issued by the court and incorporated into the Final Decree. This issue had not been appealed by the Respondent. The court found that the Respondent's Motion to Modify the Parenting Plan and Permanent Stipulation was a frivolous Motion and without any established legal basis and the court

awarded the Petitioner attorney's fees in the amount of $750.00. The Respondent has appealed this Order of the Family Court.

By a Notice of Decision dated May 14, 2018, the court approved the Petitioner's Motion to Approve Daycare/Kindergarten Enrollment of Minor Child. Pet. Appx. pg. 28. The court further ruled that should there be any expense involved with daycare that expense shall be paid by the party using the service.

Summary of Argument

The Respondent now claims, for the first time, that the Family Court did not have jurisdiction over this matter. The Respondent never raised this issue before the Family Court. By signing the Partial Permanent Stipulation, the Respondent waived his right to raise this jurisdictional issue. In addition, when the Petition for Divorce was filed in this matter, the Petitioner lived, with the parties' minor child, in New Hampshire for thirteen (13) months.

The Family Court found that there was insufficient evidence to prove that the Petitioner acted unreasonably, willfully or with malice. The dismissal of the contempt by the Family Court was reasonable and it was consistent with the facts of the case as reflected in the record.

The Respondent filed Motions for Restraint and Parental Interference. It appears that the Respondent was attempting to get a restraining order by filing these Motions. The denial of these Motions was proper and not an abuse of discretion. The Respondent provided no factual basis or present reason for the court to enter a restraining order against the Petitioner.

The Family Court entered a Uniform Support Order after a hearing in which both parties appeared and both parties presented Financial Affidavits as well as Child Support Guideline Worksheets. Based upon a review of the documentation and the testimony offered, the court properly prepared a Uniform Support Order. By filing a Motion to Modify Child Support, the Respondent opened himself up to a retroactive application of the Uniform Support Order. The arrearage found by the court was proper and consistent with the law.

The Respondent filed a Motion a Modify the Parenting and Permanent Stipulation. The court denied the Motion filed by the Respondent and the court further found that the Respondent's Motion to Modify the Parenting Plan and Permanent Stipulation was a frivolous Motion and without any established legal basis. The Order of the court was proper and consistent with the facts of this case and the law of the state. The court had the discretion to grant attorney's fees to the Petitioner and it granted the attorney's fees to the Petitioner in a reasonable amount. There was no abuse of discretion by the court or error of law in entering these Orders.

The Respondent appealed the Order of the Family Court approving the Petitioner's Motion to Allow for the Daycare/Kindergarten Enrollment of the Minor Child. The Respondent has appealed this ruling even though he agreed with the ruling in his pleadings and on the record. Clearly, the Order of the court was necessary and it was not an abuse of discretion.

Argument

I. The trial court exercise of jurisdiction over this matter has not been obtained in contravention of N.H. RSA 458 and RSA 458-A.

The Respondent has raised the issue of jurisdiction for the first time in this appeal to the Supreme Court. The Respondent never raised this issue before the trial court. The Respondent now raises the issue of jurisdiction even though he freely and voluntarily signed a Partial Permanent Stipulation, and the Respondent was represented by legal counsel.

Paragraph 1 of the Partial Permanent Stipulation states as follows: "1. Divorce. The parties are awarded a divorce based on irreconcilable differences that have caused the irremediable breakdown of the marriage." Pet. Appx. pg. 38.

The Respondent specifically agreed that the parties would be awarded a divorce.

During the divorce case, the Respondent was represented by two (2) separate attorneys who both filed General Appearances in this matter. No Motion to Dismiss based upon jurisdiction was ever filed by the Respondent. The Respondent has clearly waived his right to challenge the trial court's jurisdiction. *Asadorian v. Asadorian*, 127 N.H. 388 (1985).

In his Brief, the Respondent states as follows: "It is unknown if the Family Division examined or contacted the MA courts regarding the information provided, or if it was deemed unimportant at the time." (Page "pg." 21 of Respondent's Brief).

Clearly, the Family Court would not take on this task or responsibility on its own. Without a Motion to Dismiss being filed based upon jurisdiction, the court would have no reason to investigate this jurisdictional issue.

By filing a General Appearance, the Respondent agreed to the court's exercise of jurisdiction over his case. "A General Appearance is a party's submission to the exercise of the court's jurisdiction over him in a pending case" *Chenauski v. Chenauski*, 126 N.H. 116 (1986).

Since this jurisdictional issue was never raised before the trial court, there is no record for the Supreme Court to review on this issue.

The Petition for Divorce in this matter was filed by Crystal on August 26, 2015. Respondent's Appendix ("Appx.") pg. 370. In Paragraph 4 of the Petition, the Petitioner states that she has been a resident of New Hampshire thirteen (13) months. The Respondent never filed any Motion claiming that service of process was improper and not in conformity with New Hampshire law. Clearly, if service of process was not proper, the Respondent waived any objection to any potential deficiency in the service of process by signing the Partial Permanent Stipulation.

In his appeal, the Respondent attempts to raise, for the first time, an issue under RSA Chapter 458-A, The Uniform Child Custody Jurisdiction and Enforcement Act. However, there is no record of this issue ever being raised before the Family Court. In his Brief, the Respondent seems to concede that there is no issue. In the first full paragraph of Page 22 of his Brief, the Respondent states: "Initial child custody jurisdiction, according to RSA 458-A:12, *see Apx 385* would be NH as the home state of Faith and the determination would be valid." If this was in fact an issue, it was resolved when the Respondent signed the Partial Permanent Stipulation as well as the Final Parenting Plan.

The Respondent now appears to be challenging jurisdiction out of a desperation and because he is dissatisfied with the rulings of the Family Court.

II. The trial court did <u>not</u> unsustainably exercise discretion by failing to hold Petitioner in contempt.

The trial court has broad discretion in making findings of fact in Family Law cases. *In the Matter of Sullivan and Sullivan,* 159 N.H. 251 (2009). In this case, after a hearing in which the Respondent was given a full opportunity to present his evidence, the court ruled as follows: "1. Petitioner has not violated a provision of the Parenting Plan. There is insufficient evidence to prove that she acted unreasonably, willfully or with malice. 2. Petition for Contempt is dismissed." Pet. Appx. pg. 4.

The Respondent is clearly dissatisfied with the Order of the trial court. However, the Respondent's dissatisfaction is not a basis for an appeal.

The Respondent filed a Petition for Contempt with the Family Court on August 26, 2016. Resp. Appx. pg. 335. The Petitioner timely filed an Objection to the Petition for Contempt. The Petition for Contempt outlined five (5) concerns that the Respondent had with the Petitioner. The Respondent wanted the Petitioner to be found in contempt because she rejected requests for a meeting to resolve parenting issues under Paragraph H. of the Parenting Plan. At the Hearing on the Remand, the Petitioner testified that all parenting issues between the Respondent and the Petitioner had been resolved and there was no need for a face-to-face meeting. Resp. Appx. pg. 131, Line ("LN") 21, pg. 138, LN 20. The Petitioner admitted that all issues may not have been resolved within the fourteen (14) day timeframe as provided in Paragraph H., but they were resolved shortly thereafter. As the Petitioner testified, there was no need for a face-to-face meeting.

The other issues raised in the Petition for Contempt involved refusal to replace one (1) weekend of the Respondent's parenting, vacation week rejected and payment of vacation week. The court resolved all of these issues and there is no basis for the Respondent's appeal on this matter. The court gave the Respondent ample opportunity to present evidence in this matter. In fact, the vast majority of the time allotted for the Hearing on the Remand was taken up by the Respondent and his testimony. After hearing this testimony, the court concluded that there was insufficient evidence to prove that the Petitioner acted unreasonably, willfully or with malice. The court properly found that no contempt order should be entered in this case.

III. The court's denial of Respondent's requests for Orders on Restraint and Parental Interference are not an abuse of discretion.

The Respondent filed a Motion to Restrain on September 18, 2017. Resp. Appx. pg. 308. The Petitioner filed an Objection to the Motion to Restrain and asserted that the Respondent's Motion was inappropriate and frivolous. Resp. Appx. pg. 309. In the Motion to Restrain, the Respondent was looking to revisit issues that had occurred in the past and that have no relevance on issues between the parties today. The Respondent in essence was requesting a restraining order against the Petitioner, but the Respondent failed to provide any basis for a restraining order to be entered by the court. The Respondent made no allegations that the Petitioner threatened his safety or well-being in any respect. The court properly denied the Respondent's Motion to Restrain.

In conjunction with filing the Motion to Restrain, the Respondent filed a Motion: Parental Interference. Resp. Appx. pg. 304. This Motion was filed on September 18, 2017.

The Petitioner timely filed an Objection to this Motion. Resp. Appx. pg. 305. In the Motion: Parental Interference, the Respondent was raising issues that occurred before the Divorce Decree was approved by the Family Court. The Respondent complained that the Petitioner left the State of Massachusetts in 2014 and crossed state lines, into New Hampshire.

The court correctly denied the Motion: Parental Interference. Pet. Appx. pg. 4. The Respondent provided no evidence that would support the granting of such a Motion. The Order of the court, in denying the Motion: Parental Interference, was consistent with the facts of this case and the law of the state. The court did not abuse its discretion in entering its Order in this matter.

IV. The trial court did <u>not</u> abuse its discretion by issuing a new Uniform Support Order.

The Petitioner filed a Motion to Modify Child Support Order with the Family Court on December 15, 2017. Resp. Appx. pg. 274. In the Motion, the Petitioner alleged that a significant change of financial circumstances has occurred in this case that would warrant a review and modification of the child support order. The Respondent had revealed in a previous Motion to Modify Child Support Order that he had obtained employment and had a monthly gross income of $7,200.00. Resp. Appx. pg. 279. Despite this substantial monthly gross income, the Respondent continued to pay the Petitioner $50.00 per month in child support. The court held a hearing on this matter on February 13, 2018 and the court issued a Uniform Support Order. Pet. Appx. pg. 14. Pursuant to the Uniform Support Order, the court ordered the Respondent to pay the Petitioner child support in the amount of $274.00

per week, which was consistent with the child support guidelines. The court further found that there was a child support arrearage in the amount of $5,149.38, which was to be paid to Petitioner by the Respondent at a rate of $50.00 per week. The court found that child support should be payable to the Division of Child Support Services and the court found no justification for an adjustment of the child support amount.

The Respondent filed a Motion to Modify Child Support Order on September 18, 2017. Resp. Appx. pg. 279. In the Motion, the Respondent alleged that there is a substantial change of circumstances and that he had recently obtained a temporary position. In filing the Motion to Modify Child Support Order, the Respondent was looking for a no child support order, even though he was now employed and making a substantial income. The Respondent alleged that the best interests of the child would allow the parties to identify and meet the needs of the child. The Petitioner interpreted this to mean that each party would pay for the expenses of the child when the child was with that party and that there would be no child support order. The Respondent also sought a deviation in the child support as a result of his student loan debt.

The court held a hearing on this matter on February 13, 2018. Both parties supplied the court with Financial Affidavits and the Petitioner supplied the court with a proposed Uniform Support Order as well as a Child Support Guideline Worksheet. The Respondent also supplied the court with a Child Support Guideline Worksheet. The numbers between the two (2) parties for guidelines child support were very close.

The basic disagreement that the Respondent had with the child support calculation was that the Respondent asserted that he made $7,200.00 gross per month and the Petitioner stated that the Respondent made $7,794.00 per month. As the record reflects, the

Respondent's calculation was based upon being paid four (4) times per month when in reality, he is paid 4.33 times per month. Resp. Appx. pg. 57, LN 6-25. Thus, the court's Child Support Guideline Worksheet, as submitted by the Petitioner, listing the Respondent's monthly income of $7,794.00 per month was correct. The correct guideline child support amount was $274.00 per week.

The Respondent argued that he should not have to pay any child support. The Respondent supplied no law to support his argument and simply stated that each party had their own expenses and each party should pay for the expenses of the child when the child was with that party. As an alternative, the Respondent argued that there should be downward deviation in the child support amount because of his monthly expenses. The court reviewed this argument with the Respondent and found that the Respondent did not have any extraordinary monthly expenses. Resp. Appx. pg. 69, LN 4-15. RSA 458-C:5 is entitled "Adjustments to the Application of Guidelines Under Special Circumstances". In this case, the Respondent was not able to show that there should be any adjustment to the application of the guidelines. The Respondent did not present any special circumstances to the court that would warrant a downward deviation in the child support obligation. The child support order entered by this court was correct.

The Respondent argues that the weekly child support obligation was calculated on incomplete Financial Affidavits. However, the record does not support this assertion. Nowhere in the record is there any indication that the Financial Affidavits were inaccurate or incomplete. Both parties submitted Financial Affidavits and neither party contested the information in the Financial Affidavits at the hearing for this matter.

The Respondent next argues that there should be no child support arrearage and that the

calculation of the arrearage was incorrect. The Respondent filed a Motion to Modify Child Support with the Family Court on September 18, 2017 and he alleged a substantial change in circumstances. The Petitioner agreed that there was a substantial change of circumstances and the Petitioner also filed a Motion to Modify Child Support. Paragraph 5 of the Uniform Support Order provided that payments on all ordered amounts shall begin on the first accrual date after September 18, 2017. This was the date that the Respondent filed his Motion to Modify Child Support and alleged a substantial change of financial circumstances. The court did not abuse its discretion in ordering that the start date for child support would be September 18, 2017 and further ordering that a child support arrearage had accrued going back to September 18, 2017. The Order of the court is consistent with the facts of this case and the law of the state.

The Respondent also complains that the court improperly ordered that child support would be payable through the Division of Child Support Services. This Order is completely within the discretion of the Family Court and the Order of the court in this situation is consistent with the facts of the case and the law of the state. There is no basis for the Respondent to argue that the court abused its discretion in any way in entering the Uniform Support Order in this case.

V. The trial court's Order on Motion to Modify Parenting Plan and Permanent Stipulation is not erroneous and is not an unsustainable abuse of discretion.

On February 13, 2018 the Respondent filed a Motion to Modify Parenting Plan and Permanent Stipulation. Resp. Appx. pg. 235. In the Motion to Modify Parenting Plan, the Respondent raises the issue of Paragraph G. (Procedure for Review and Adjustment of

Parenting Plan) within the Parenting Plan. Specifically, the Respondent references a meeting that the parties attended in January of 2018 pursuant to Paragraph G. The Respondent complains that he presented his proposed changes to the Parenting Plan to the Petitioner and she rejected all of the proposed changes. The Respondent references the fact that the Petitioner was looking to enroll the parties' child in a private daycare/kindergarten in Hudson, New Hampshire. The Respondent did not agree to this enrollment and stated that Faith is welcome to come back to Burlington, Massachusetts and attend the Burlington Public School District. Finally, the Respondent is requesting that the court delete his obligation to maintain life insurance as provided in the Final Decree.

By an Order dated May 14, 2018 (Pet. Appx. pg. 23), the court denied the Respondent's request to modify Paragraph C. of the Parenting Plan and stated that there was no factual justification or legal basis for this request. Paragraph C., which was agreed to by the Respondent, provided that the minor child would attend school in the district where Crystal lived. The Respondent was looking to modify this provision to Burlington, Massachusetts, where the Respondent lives. This represents a major modification to the Parenting Plan and the Respondent provided no justification for such a modification. The court did make a typographical error in the Order and referred to the Petitioner when the court meant to refer to the Respondent. The Respondent was the person who filed a Motion to Modify with this court. The court further ordered that the Respondent's request to modify the vacation time provisions in the Parenting Plan was denied because it was without factual justification or legal basis. Again, the court made a typographical mistake and referred to the Petitioner, when it should have referred to the Respondent. In its Order, the court went on to vacate Paragraph G. of the Parenting Plan finding that it was a source

of more conflict and it did not benefit the parties or the parties' minor child.

The Respondent next requested that the court vacate the obligation in the Final Order for the Respondent to maintain life insurance. The court found that the Respondent never appealed this issue to the Supreme Court and it appears that the Respondent never filed a Motion to Reconsider on this issue. There is no basis for the court to have modified this provision based upon the presentation made by the Respondent.

The Respondent asserted that because the court mistakenly referred to the Petitioner when it meant the Respondent, that this is a reversible error. Clearly, this is not the case. This was a simple mistake and a harmless error made by the court. Both parties, by reading the Order of the court, understood that the court was referring to the Respondent when the court mistakenly referred to the Petitioner. The Respondent clearly understood the impact of the court's Order and the Respondent was clearly disappointed that the court denied the relief that he requested.

The Respondent argues that the court did not have the statutory authority to vacate Paragraph G. Paragraph G. indicates that meetings between the parties shall not be on a set schedule but shall be as often as necessary for the benefit of the child. This paragraph also states that the parties agree to meet in March, 2017 to revise this Plan before Faith goes to school. The parties did in fact meet in January of 2018. The meeting proved to be pointless and an exercise in futility for the parties. Resp. Appx. pg. 23, LN 5-10. At this point, Paragraph G. appears to be a futile effort to resolve issues that only results in frustration and an intensification of the issues between the parties. The court was justified in vacating Paragraph G. since it is clearly is a cause for dispute, rather than a mechanism for resolution.

Vacating Paragraph G. is minor change to the Parenting Plan that results in no substantive change to the Parenting Plan. The minor modification of the Parenting Plan by the court does not impact the parenting time of the Respondent in any way. The minor modification simply eliminates a further cause for dispute between the parties. RSA 461-A:11, I, (f) states as follows: "The modification makes either a minimal change or no change in the allocation of parenting time between the parents, and the court determines that such change would be in the best interests of the child." Deleting Paragraph G. has no impact on the allocation of parenting time between the parents. Vacating this provision is clearly in the best interests of the child since it eliminates another source of friction between contentious parents. Vacating Paragraph G. is justified by the facts in this case as reflected in the record.

The Respondent was looking for a major modification of the Parenting Plan. As indicated in his presentation to the court on May 10, 2018, the Respondent was looking for a 50/50 Parenting Plan and was looking for the minor child to spend half her time with the Respondent and half the time with the Petitioner. Resp. Appx. pg. 8, LN 4-7. The Respondent agreed to Paragraph B. 1 (b) of the Parenting Plan, which stated as follows: "The child shall reside primarily with Crystal except for the following days and times when the other parent shall have parenting time with the child: Beginning 5/27/16 Joshua shall have two (2) consecutive weekends from Friday at 6:00 PM until Sunday at 6:00 PM and Crystal shall have one (1) weekend Friday at 6:00 PM until Sunday at 6:00 PM, followed by Joshua have two (2) consecutive weekends." There is no indication in the Final Parenting Plan that the residential responsibility and parenting schedule that was agreed to by the parties was to be a temporary schedule or it was a schedule that was

dictated by the work schedule of either party. The Respondent points to RSA 461-A:11, I (h) as the statutory provision justifying the major modification to the schedule that is being proposed by the Respondent. However, the Respondent failed to present any evidence to support his proposal to change the Parenting Plan from the primary residence at Crystal's home to a 50/50 parenting schedule. In fact, at the time that the Parenting Plan was agreed to by the Respondent, the Respondent was apparently unemployed. Upon obtaining full-time employment, one would think that the Respondent would have less time for a 50/50 parenting schedule. In any event, the Respondent provided no evidence to the court to justify a major modification of the Parenting Plan and the parenting schedule.

The Respondent also argues that the vacation provision of the Parenting Plan should be modified. The Respondent agreed to the vacation provision in the Parenting Plan when he signed the Parenting Plan on May 11, 2016. This provision, which is found in Paragraph B. 4 (b) (3), which provides in part as follows: "Each parent shall have 2 nonconsecutive weeks of vacation with Faith during the year with sixty (60) days notice to the other party. In the event of conflict, in even years Crystal's choice of weeks to prevail in odd years Joshua's choice of weeks to prevail." It appears that the Respondent was looking to change the vacation from two (2) nonconsecutive weeks to two (2) consecutive weeks. Again, the Respondent provided no justification for this change and the Petitioner did not agree to this change.

The Respondent next goes on to challenge the award of attorney's fees in this matter. The court found that the Respondent's Motion to Modify the Parenting Plan and Permanent Stipulation was a frivolous Motion and without any established legal basis. As the record clearly reflects in this case, the Respondent has filed many Motions with the

Family Court. Each time the Respondent files a Motion, the Petitioner incurs attorney's fees to defend against the Motion. The award of attorney's fees in the amount of $750.00 was a reasonable award and is supported by the law and the facts of this case. In entering the Order, the court found that the Motion filed by the Respondent was frivolous and in essence the Motion was filed in bad faith.

The court can award attorney's fees when the court finds: "...a claim is partially unreasonable when it is commenced, prolonged, required or defending without any reasonable basis in the facts provable by evidence, or any reasonable claim in the law as it is, or as it might arguably be held to be." *Glick v. Naess*, 143 N.H. 172 (1998).

VI. The trial court's Order approving daycare/kindergarten enrollment for the minor child was <u>not</u> unnecessary and <u>not</u> an abuse of discretion.

By a Notice of Decision dated May 14, 2018, the court approved the Petitioner's Motion to Approve Daycare/Kindergarten Enrollment for the Minor Child. Pet. Appx. pg. 28. The court further ordered that should there be any expenses involved in daycare, they should be paid by the party using the service; absence an agreement otherwise. The record for this matter reflects that the Respondent actually agreed to this Order. During the course of the hearing on May 10, 2018, the court indicated that Crystal had the authority to enroll the minor child in private daycare during her parenting time and that she would be responsible for that expense. The Respondent indicated on the record that he was not in disagreement with that position. Resp. Appx. pg. 27, LN 7-8.

The Respondent filed an Objection (Response) to Motion to Approve Daycare/Kindergarten Enrollment for Minor Child on May 3, 2018. Resp. Appx. pg. 225.

By reading the response, it is clear that the Respondent thought the Petitioner was trying to obtain the sole right to make education decisions for the parties' minor child. This was clearly not the case and the record for this matter reflects the fact that the Petitioner was not seeking sole decision making authority for education issues for the parties' minor child. Resp. Appx. pg. 21, LN 15-25, pg. 22, LN 1-25, pg. 24, LN 10-25, pg. 25, LN 5-25. In Paragraph 14 of the Respondent's Response, the Respondent stated in part as follows: "Petitioner can enroll Faith in daycare and kindergarten, if she has elected to solely meet the cost, but this cannot and should not be used as a discriminatory tool to deny me my parental rights." Further, in the final paragraph of the Respondent's Response to the Motion, the Respondent stated in part as follows: "THEREFORE, Respondent is not against the enrollment of Faith in any institution for daycare or kindergarten and has not insisted that Faith be brought back to Burlington, Massachusetts."

Despite the fact that the Respondent clearly agreed with the court Order in his pleadings and on the record, the Respondent now argues that the Order approving daycare/kindergarten enrollment for minor child was unnecessary and an abuse of discretion. Again, there is no support for the Respondent's position in the record for this case or in the law for the state.

VII. Conclusion

The Respondent has appealed several Orders of the Nashua Family Division. In making these Orders, the Family Court properly acted within its discretion and the Orders of the Family Court were consistent with the facts of the case and the law of the state. The Respondent has not established that the Family Court abused its discretion or made an

error of law in entering the many Orders that have been appealed. The Orders of the Family Court should therefore be affirmed.

Oral Argument

The Petitioner/Appellee respectfully request oral argument of not more than 15 minutes.

Certificate of Service

I hereby certify that two (2) copies of the within Appellee Brief has been mailed this 19th day of March, 2019 to Joshua Ndyaija, Respondent/Appellant, *self-represented.*

Robert M. Shepard – NH Bar #2326