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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

DOCKET NO: 2018-0264

In The Matter of:
Steven Summers and Christine Summers

RULE 7 DISCRETIONARY APPEAL OF CHRISTINE SUMMERS
APPEALING AN ORDER OF THE
9th CIRCUIT COURT - FAMILY DIVISION - MERRIMACK

BRIEF ON BEHALF OF APPELLANT, CHRISTINE SUMMERS

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	4
QUESTIONS PRESENTED.....	6
RELEVANT FINAL ORDERS AND STATUTES	Appendix 1 - 19
STATEMENT OF THE FACTS AND THE CASE.....	9
SUMMARY OF ARGUMENT.....	12
ARGUMENT	15
I. STANDARD OF REVIEW	15
II. The Merrimack Family Court erred in classifying Ms. Summers’ request to return to shared parenting as a substantial one when the Court itself established a Review Hearing to determine if a return to shared Parenting was warranted.....	15
III. The Merrimack Family Court unreasonably failed to return Ms. Summers to shared parenting when, after finding her compliant with its prior Orders on Parenting, it focused on a potential future relapse to bar same.....	17
IV. The Merrimack Family Court established that the purpose and standard of the Review Hearing was to determine if a return to shared parenting was in the best interest of the minor children. The Court then arbitrarily chose not to apply that purpose and standard in issuing its Order on Review Hearing.....	20
V. The Merrimack Family Court unreasonably interfered with Ms. Summers’ parental rights when it found her to be in compliance with the Court’s Orders, that her parenting time had occurred without incident, and that she has a strong bond with the children, and they with her, but failed to restore her to shared parenting.....	22

VI.	The Merrimack Family Court abused its discretion and made an error of fact and/or law in characterizing the parties' Parenting Plan as Final when certain paragraphs under the Plan were subject to review.....	23
	CONCLUSION.....	26
	NEW HAMPSHIRE SUPREME COURT RULE 16(3)(I) CERTIFICATION.....	28
	STATEMENT REGARDING ORAL ARGUMENT.....	29
	CERTIFICATE OF SERVICE.....	29
	ADDENDUM (9 th Circuit Court – Family Division - Merrimack) Order on Review Hearing, Respondent's Motion to Reconsider, Order on Motion to Reconsider	30

TABLE OF AUTHORITIES

Page

NEW HAMPSHIRE CASES

<u>In the Matter of Breault & Breault</u> , 149 N.H. 359 (2003) (1970).....	15
<u>In the Matter of Choy & Choy</u> , 154 N.H. 713 (2007).....	20
<u>In the Matter of Hampers & Hampers</u> , 154 N.H. 713 (2006).....	21
<u>In the Matter of Huff & Huff</u> , 158 N.H. 420 (2009).....	22
<u>Jacobs v. Director, N.H. Div. of Motor Vehicles</u> , 149 N.H. 502, 504 (2003).....	17
<u>State v. Johnson</u> , 145 N.H. 647 (2000).....	15
<u>In the Matter of Kurowski & Kurowski</u> , 161 N.H. 585 (2011).....	21, 25
<u>State v. Lambert</u> , 147 N.H. 295 (2001).....	15
<u>In the Matter of Laura & Scott</u> , 161 N.H. 333, 335(2010).....	15
<u>In the Matter of Muchmore & Jaycox</u> , 159 N.H. 470 (2009).....	25
<u>In the Matter of Nelson & Horsley</u> , 149 N.H. 545 (2003).....	22
<u>Ocasio v. Federal Exp. Corp.</u> , 162 N. H. 436 (2011).....	17
<u>In the Matter of Silva & Silva</u> , 171 N.H. 1, 4 (2018).....	15

NEW HAMPSHIRE STATUTES AND COURT RULES

N.H.R.S.A. 461-A:2	19, 20, 21, 22
N.H.R.S.A.461-A:4	25
N.H.R.S.A. 461-A:6	25, 26

Family Division Rule 2.1.....	23
Part 1, Article 2 New Hampshire State Constitution.....	22

SECONDARY AND MISCELLANEOUS SOURCES

Webster’s Third New International Dictionary unabridged ed. 2280 (1993).....	16
Webster’s Third New International Dictionary unabridged ed. 1775 (1993).....	19
Webster’s Third New International Dictionary unabridged ed. 2353 (1993).....	25
Black’s Law Dictionary, 1261, 5th ed. (1979).....	17
Black’s Law Dictionary, 1052, 5th ed. (1979).....	19
Black’s Law Dictionary, 567, 5th ed. (1979).....	24
Black’s Law Dictionary, 1312 5th ed. (1979).....	25

QUESTIONS PRESENTED

I. Did the trial court abuse its discretion or make an error of law and/or fact in its April 2, 2018 Order by characterizing Ms. Summers' request to return to a shared or equal parenting schedule for the parties' two minor children as a "substantial change", when the Court itself in its October 31, 2016 Final Order on Parenting Plan at Paragraph 4, pages 1 and 2, specifically ordered a review hearing to determine if the parenting schedule "should be modified to again allow for shared or equal parenting time"...and "that the standard applied to any change would be ...whether a modification is in the best interest of the minor children"?

This issue was raised at the Review Hearing pursuant to an offer of proof by Ms. Summers' counsel that the Review Hearing, scheduled as part of the Court's Final Order on Parenting Plan, was to assess her continued sobriety to determine if there should be a return to shared parenting and that upon review the Court would apply the best interests standard. (TRANSCRIPT (TR.)), 26. This issue was also raised in Respondent's Motion to Reconsider, Appellant Addendum (Appellant Add.), at 34, paragraphs 3, 4 and 5.

II. Did the trial court abuse its discretion or make an error of law and/or fact when it stated in its October 31, 2016 Final Order on Parenting Plan that Ms. Summers was entitled to a review hearing to determine if shared or equal parenting is in the best interests of the minor children, and then created an unreasonable and untenable bar concerning a potential relapse in its April 2, 2018 Order on Review Hearing to deny her a return to shared or

equal parenting time, which bar, by its very nature, effectively prevents Ms. Summers from ever obtaining, much less exercising, shared or equal parenting time?

This issue was raised in Respondent's Motion to Reconsider, Appellant Add. at 35, paragraphs 7 and 8.

III. Did the trial court abuse its discretion or make an error of law and/or fact when it specifically referred to a potential modification of the parties' Final Parenting Plan, and then declined to modify the parties' Parenting Plan to permit Ms. Summers shared or equal parenting time in its April 2, 2018 Order, despite definitively finding that Ms. Summers has complied with its Order to remain sober; has been fully and successfully compliant in her testing through Paymer Associates; has exercised her parenting time with the children without any problems occurring; has been employed since December 12, 2016; has continued in counseling; and has a strong bond with the children and they with her?

This issue was raised at the Review Hearing pursuant to an offer of proof by Ms. Summers' counsel that the Review Hearing was scheduled as part of the Court's Final Order on Parenting Plan to assess her continued sobriety to see if there should be a return to shared parenting and that the review would apply the best interests standard. TR. 26. This issue was raised in Respondent's Motion to Reconsider, Appellant Add. at 35, paragraphs 6, 7 and 8.

IV. Did the trial court abuse its discretion or make an error of law and/or fact and unreasonably interfere with or curtail Ms. Summers' parental rights when, in addition to finding Ms. Summers in compliance with the Court's Orders, it eliminated the need for supervision of her parenting time, increased her overnight parenting time by one night each week and on alternating Sunday nights, but then failed to restore her to shared or equal parenting time?

This issue was raised in Respondent's Motion to Reconsider, Appellant Add. at 35, paragraph 7.

V. Did the trial court abuse its discretion or make an error of law and/or fact in characterizing the parties' Parenting Plan as Final in its Order dated October 31, 2016, when the Parenting Plan contained a built-in Review Hearing, complete with its own standard of review, to address a potential change of the Final Parenting Plan to restore Ms. Summers to shared or equal parenting time and was, therefore, temporary as to that issue and not final in nature?

This issue was raised at the Review Hearing pursuant to an offer of proof by Ms. Summers' counsel that the Review Hearing was scheduled as part of the Court's Final Order on Parenting Plan and that the issues to be addressed on review were, therefore, temporary and not final in nature and that the Court should have properly applied the best interests standard in determining whether there should be a return to shared parenting. TR. 37; and in Respondent's Motion to Reconsider, Appellant Add. at 34, paragraphs 3 and 4.

STATEMENT OF THE FACTS AND THE CASE

This appeal by Respondent/Appellant, Christine Summers, is from an Order issued by the 9th Circuit Court - Family Division - at Merrimack on April 20, 2018, denying her Motion to Reconsider the court's order of April 2, 2018 wherein the Court declined to restore her to shared parenting of the parties' two minor children.

The case originated with a Petition for Divorce filed in the 9th Circuit Court - Family Division - Merrimack on January 10, 2014. On August 4, 2014, the Court temporarily awarded the parties shared decision-making and shared residential responsibility of their minor twin children, Abrielle and Tobias, born 10/14/2009. During the course of the divorce, the Court amended those orders such that the children temporarily resided primarily with Steven Summers. Christine Summers had parenting time under the supervision of her parents with whom she was living at the time. A Final Hearing on the Merits occurred on September 15, 16, and 17, 2015.

By way of Notice of Decision dated October 31, 2016, the Court issued a Final Order on Decree, Final Decree, Final Order on Parenting Plan and Final Parenting Plan. These Orders issued after a Hearing to Supplement the Record on March 9, 2016; an Ex-Parte Hearing on June 30, 2016; and an Ex-Parte Hearing on August 2, 2016. The Final Parenting Plan awarded primary residential responsibility to Steven Summers and limited parenting time to Christine Summers. Christine Summers' parenting time was to be "supervised by her parents until this Parenting Plan is modified by agreement of the parties or an Order from this Court. Christine shall not consume alcohol and shall continue in the

Paymer Associates program until such time as there is a further review hearing.”

APPELLANT APPENDIX TO BRIEF (Appellant Appx.) at 8, Final Parenting Plan.

It is undisputed that the Court in its Final Order on Parenting Plan stated that “all the hearings held after the Final Hearing were due [to] Ms. Summers alcohol addiction.” It is also undisputed that the Court also clearly stated that “While the attached Parenting Plan is Final, it is subject to review in 6 months to determine if the parenting schedule should be modified again to allow shared or equal parenting time. Any change or modification in the Parenting Plan shall be subject to Ms. Summers addressing her alcoholism in a meaningful way...and whether modification is in the best interest of the minor children.” Appellant Appx. at 4, Final Order on Parenting Plan.

The Review Hearing occurred on February 6, 2018 and the Court issued an Order on April 2, 2018. The Court’s Order found that “Ms. Summers has complied with its Order to remain sober and has been compliant and successful in her testing through Paymer Associates” and then stated “while the Court did allow for the possibility of a modification of the Final Parenting Plan in its Final Order, the Court did not allow for there to be a modification of the Final Parenting Plan such that Ms. Summers would have shared parenting time.” Although the Court stated “it is concerned about the possibility that Ms. Summers may relapse,” it modified the Plan to give her a more standard parenting scheduled, recognizing that “she has a strong bond with the children and they with her.” APPELLANT ADDENDUM TO BRIEF (Appellant Add.) at 32, Order on Review Hearing. The Court released her from supervised parenting time and increased her overnight parenting time. Ms. Summers filed a Motion for Reconsideration. The Court declined to

restore shared parenting, but granted her earlier pick-ups in the week and another overnight with the children. Appellant Add. at 42, Order on Motion to Reconsider. With the Court having clearly ruled one way in its Final Order on Parenting Plan and then another in its Order on Review Hearing, this appeal ensued.

SUMMARY OF ARGUMENT

The 9th Circuit Court – Family Division at Merrimack issued its Final Order on Parenting Plan in this case on October 31, 2016 including a Review Hearing to determine if the parenting schedule should be modified to again allow shared or equal parenting time of the parties' two minor children and established the standard of review as whether any modification is in the best interests of the minor children.

The Court stated that “any change or modification in the Parenting Plan shall be subject to Ms. Summers addressing her alcoholism in a meaningful way which would include at a minimum participation in an Intensive Outpatient Program, her continued sobriety as shown with compliance with Paymer Associates rules....” Appellant Appx. at 4 and 5, Final Order on Parenting Plan.

The Parenting Plan fashioned by the Court contained language that “Christine shall not consume alcohol and shall continue in the Paymer Associates program until such time as there is a further review hearing.” Concerning February, April and Summer Vacations, the Court ordered that “Unless the parties reach an agreement on the February, April and summer vacations, the routine parenting time shall apply until the next Review Hearing.” Appellant Appx. at 7, Final Parenting Plan, Paragraph B.1, and Paragraph 4(b).

The case remained open as there were outstanding issues on appeal and concerning child support. On October 2, 2017 Ms. Summers filed a Motion to Schedule the Review Hearing included in the Court's Final Order on Parenting Plan which was granted by the Court on October 5, 2017. Significantly, Ms. Summers did not file a Petition to Bring Forward and for Modification nor did she pay a filing fee to reopen the case as the case

was never closed.

The Review Hearing occurred on February 6, 2018. Expert testimony was provided by Steven Paymer relative to Ms. Summers' compliance with his alcohol testing program. The parties offered testimony via offers of proof by their respective attorneys. Ms. Summers' counsel of record reminded the Court of the provisions in the Court's Final Order on Parenting Plan that the Court's stated purpose of the Review Hearing was to ascertain Ms. Summers' compliance with the Court's orders and to determine if a return to shared parenting time was appropriate in light of the best interest standard for the children. TRANSCRIPT (TR.), 26. Ms. Summers requested that the Court restore her to shared parenting, release her from supervised parenting time, order a step-down process from Paymer Associates alcohol testing program and discontinue her child support payment obligation to Mr. Summers.

In its Order on Review Hearing dated April 2, 2018, the Court found that Ms. Summers was compliant with the Court's Orders to remain sober, was successful in exercising her parenting time without issue, is employed full-time and, although she did not complete an IOP as ordered, she continues in counseling." Appellant Add. at 32, Order on Review Hearing at Paragraph 2. The Court then, inexplicably, stated that "While the Court did allow for the possibility of a modification of the Final Parenting Plan in its Final Order, the Court did not allow for there to be a modification of the Final Parenting Plan such that Ms. Summers would have shared parenting time as she is requesting of the Court." Appellant Add. at 32, Order on Review Hearing. This statement is in direct contravention of the Court's own written Final Order on Parenting. Having met the criteria

established by the Court in its Final Order on Parenting, coupled with the Court's recognition that Ms. Summers "has a strong bond with the children and they with her," Appellant Add. at 32, Order on Review Hearing, the Court, upon review, should have restored Ms. Summers to shared parenting as being in the children's best interests. Instead, the Court chose to arbitrarily and unreasonably overlook, forget, or merely ignore the very language of its Final Order on Parenting Plan.

After finding her compliant with its orders, the Court used its concern over a potential relapse as the reason to deny Ms. Summers' shared parenting. At the time of the Review Hearing, Ms. Summers had been in testing with Paymer Associates for almost eighteen months. According to Mr. Paymer's testimony she had no failed tests within the last twelve months. TR. 20. The Court heard no substantive testimony regarding the probability of Ms. Summers' potential, much less probable, relapse. Using a general concern over a potential, nonspecific event as a standard to deny shared parenting was not only unreasonable at that time but effectively meant that Ms. Summers can never have shared parenting time while maintaining her sobriety. Such a deprivation of additional parenting time unreasonably interferes with Ms. Summers' constitutional rights as a parent.

The Court included a Review Hearing in its Final Order on Parenting Plan which rendered the issues of the routine schedule and holiday and vacation time final, but not permanently decided. Thereafter, the Court improperly denied Ms. Summers' return to shared parenting time when it ignored its stated purpose for its Review Hearing, found her in compliance with its Orders and then denied her shared parenting for the children's minority based on a potential, rather than existing and demonstrative realities.

ARGUMENT

I. **STANDARD OF REVIEW**

The Order on Review Hearing of the 9th Circuit Court - Family Division at Merrimack issued by Judge Michael J. Ryan on April 2, 2004, and subsequent approval in part and denial of Appellant's Motion for Reconsideration of April 20, 2018 cannot stand if it constitutes an unsustainable exercise of discretion or an error of law. In the Matter of Vivian Silva and Robert Silva, 171 N.H. 1, 4 (2018); In the Matter of Laura & Scott, 161 N.H. 333,335 (2010). "When we determine whether a ruling made by a judge is a proper exercise of judicial discretion, we are really deciding whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." State v. Lambert, 147 N.H. 295 (2001); In the Matter of Breault & Breault, 149 N.H. 359 (2003). The Appellant must demonstrate that the court's ruling was clearly untenable or unreasonable to his/her case. State v. Johnson, 145 N.H. 647 (2000).

II. **THE 9th CIRCUIT COURT - FAMILY DIVISION AT MERRIMACK UNREASONABLY RULED THAT MS. SUMMERS' PROPOSED SHARED PARENTING PLAN SUBMITTED TO THE COURT WAS A REQUEST FOR A SUBSTANTIAL CHANGE.**

On October 31, 2016, the Court issued its Final Order on Parenting, stating:
"While the Parenting Plan is Final, it is subject to review in 6 months to determine if the parenting schedule should be modified again to allow shared or equal parenting time. Any change or modification in the Parenting plan shall be subject to Ms. Summers addressing her alcoholism in a meaningful way which would include at a minimum participation in an Intensive Outpatient Program, her continued sobriety as shown with compliance with

Paymer Associates rules and whether a modification is in the best interests of the children.....” Appellant Appx. at 4 AND 5, Final Order on Parenting.

At the Review Hearing, Ms. Summers reasonably requested the Court to restore shared parenting based upon her compliance with the Court’s Orders and her continued sobriety, all of which were contemplated in the language of the Final Order on Parenting Plan and which were not classified as substantial in the Final Order on Parenting Plan.

Only in the Order on Review Hearing, did the Court state: “Ms. Summers is requesting the Court to make a *substantial* change in the Final Parenting Plan” (italics added) and added that “While the Court did allow for the possibility of a modification of the Final Parenting Plan in its Final Order, the Court did not allow for there to be a modification of the Final Parenting Plan such that Ms. Summers would have shared parenting time as she is requesting of the Court.” Appellant Add. at 32, Order on Review Hearing.

Substantial is defined as “something of moment” and “an important material matter, thing or part.” See Webster’s Third New International Dictionary 2280 (unabridged ed. 1993) The Court clearly contemplated a return to shared parenting in its Final Order on Parenting. The Court offered no explanation why it stated in its Order on Review Hearing that it never considered such a change when clearly it did; instead it appeared to use the classification of a substantial change to deny Ms. Summers her reasonable request to restore her shared parenting time. The Court appears to have forgotten, overlooked or merely ignored the language in its Final Order on Parenting relative to the purpose and scope of the Review Hearing. As such, it arbitrarily and capriciously altered its very own

criteria for, and the purpose of, the Review Hearing. The Court's inconsistencies are an abuse of discretion and undermine the reasonable reliance Ms. Summers was entitled to place on and trust in Orders issued by the Court.

This Court usually diligently adheres to, and can understand the importance of, stare decisis: "to abide by, or adhere to, decided cases" and further that, "under doctrine a deliberate or solemn decision of court made after argument on questions of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court..." See Black's Law Dictionary, Fifth Edition 1261(1979). It is unfair, unusual, and unprecedented for this Court to ignore one order to proceed with another. Therefore, if this Court makes a decision and sometime later another party approaches this Court with similar facts and circumstances and asks this Court to change its original decision, the request would be rejected out of hand. "The doctrine of stare decisis demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results." Ocasio v. Federal Exp. Corp, 162 N.H. 436 at 452, *citing* Jacobs v. Director, N.H. Div. of Motor Vehicles, 149 N.H. 502, 504 (2003). Having set the purpose and standard of the Review Hearing, the Court was bound by the principles or stare decisis to apply them.

III. THE TRIAL COURT ABUSED ITS DISCRETIONARY POWERS AND ARBITRARILY FAILED TO RETURN MS. SUMMERS TO SHARED PARENTING OF HER MINOR CHILDREN BY RELYING ON A POTENTIAL FUTURE RELAPSE TO DENY HER SAME.

In its Order on Review Hearing the Court stated:

"As it would with anyone with a drug or alcohol addiction, the Court is concerned

about the possibility that Ms. Summers may relapse. However, the Court finds that it is time for the Parenting Plan to be modified to allow Ms. Summers to have a more standard parenting schedule than presently exists, the court also recognizes that she has a strong bond with the children and they with her." Appellant Add. at 32, Order on Review Hearing at Paragraph 4.

At the Review Hearing, Steven Paymer of Paymer Associates testified that Ms. Summers had been compliant with her testing. TR. 11. Mr. Paymer further testified that there was no evidence or any pattern that Ms. Summers was attempting to drink around her scheduled testing times in the last year. TR. 20. In fact, Mr. Paymer answered this question, posed by Mr. Summers' counsel of record: "In your opinion, a person such as Christine, from your observations, is there a chance of relapse?" by stating: "I think there's a chance of relapse with anybody who's an alcoholic regardless of the treatment." TR. 16. Mr. Paymer never testified specifically on Ms. Summers' potential to relapse. Indeed, in response to this question posed by Ms. Summers' counsel: "With regard to your experience over the last 20 years, there –are there some people that you know who are sober and have maintained their sobriety?" Mr. Paymer stated: "Yes, many." and confirmed that "not everyone, perhaps, drinks in the future and many people maintain their sobriety." TR. 20.

Despite its stated concern over her potential relapse, the Court increased Ms. Summers' parenting to include an additional overnight during every week, and in its Order on Ms. Summer's Motion to Reconsider, granted her an additional night overnight on alternating weekends. Appellant Add. at 33, Order on Review Hearing at Paragraph 1. a and Appellant Add. at 42, Order on Motion to Reconsider granting Prayer C. The Court released her from supervised parenting time, ordered a step-down phase for her testing with Paymer Associates for a period of three months and ordered counseling to

continue for six months. Appellant's Add. at 33, Order on Review Hearing at 2.

New Hampshire RSA 461-A:2. Statement of Purpose of Chapter 461-A. PARENTAL RIGHTS AND RESPONSIBILITIES states, in part, that

- I. Because children do best when both parents have a stable and meaningful involvement in their lives, it is the policy of this state, unless it is clearly shown that in a particular case it is detrimental to a child to:
 - (a) Support frequent and continuing contact between the each child and both parents.
 - (b) Encourage parents to share in the rights and responsibilities of raising their children after parents have separated or divorced.
 - (c) Encourage parents to develop their own parenting plan with the assistance of legal and mediation professionals, unless there is evidence of domestic violence, child abuse, or neglect.
 - (d) Grant parents and courts the widest discretion in developing a parenting plan.
 - (e) Consider both the best interests of the child in light of the factors listed in RSA 461-A:6 and the safety of the parties in developing a parenting plan.

Having stated in its Final Order on Parenting that the Review Hearing in this matter would be to determine whether a return to shared or equal parenting was warranted and that the standard of review would be the best interests of the children, the Court cited no present reason why Ms. Summers should not equally share in parenting the parties' children. Instead of granting a return to shared parenting, the Court denied Ms. Summers shared parenting due to a potential relapse. "Potential" means "existing in possibility," and "state of which is not yet fully realized." See Webster's Third New International Dictionary 1775 (unabridged ed. 1993); and "existing in possibility but not in act." See also Black's Law Dictionary, Fifth Edition 1052 (1979).

RSA 461-A:2,1(d) grants courts the widest discretion in developing a parenting plan; but the plan must be reasonably based upon the facts and evidence presented to the Court. On appeal, this Court must consider "whether the record establishes an objective basis

sufficient to sustain the discretionary judgment made.” In the Matter of Choy & Choy, 154 N.H. 713 (2007). Given the lack of statistical evidence or clear expert testimony that Ms. Summers would, rather than possibly, relapse at some point in the future, the Court had no objective basis for denying Ms. Summers’ return to shared parenting time. Indeed, if it were a concern, it is hard to fathom why the Court would increase overnights with the children. Such a bar on its face is an unsustainable act of discretion which is unsupported by the record. Should Ms. Summers prove the Court wrong and never relapse, she will be denied shared parenting based upon a mere possibility. Such a standard of review effectively denies Ms. Summers, or any other parent in her position, from ever exercising her constitutional parental rights and the shared parenting policy championed by the State of New Hampshire. See RSA 461-A:2.

IV. THE 9th CIRCUIT COURT - FAMILY DIVISION AT MERRIMACK ESTABLISHED THE CRITERIA FOR A REVIEW HEARING TO DETERMINE IF SHARED PARENTING WAS IN THE BEST INTERESTS OF THE MINOR CHILDREN AT THE TIME OF THE HEARING AND THEN ARBITRARILY CHOSE TO IGNORE THE PURPOSE AND STANDARD IT ESTABLISHED.

The Court specifically stated in its Final Order on Parenting: **“The Clerk is to schedule a 1 hour Review Hearing in approximately 6 months to determine whether the Final Parenting Plan should be modified.”** Appellant’s Appx. at 5, Final Order on Parenting Plan, final paragraph. The Court further held that “While the attached Parenting Plan is Final, it is subject to review in 6 months to determine if the parenting schedule should be modified to again allow shared or equal parenting time.” Appellant’s Appx. at 4, Final Order on Parenting Plan, at Paragraph 4. The Court then established the criteria Ms. Summers needed to adhere to in order for such a change to occur and that the Court would

use the best interests of the children in considering such a change. Appellant Appx. at 4, Final Order on Parenting Plan Paragraph 4; AND at 5, Paragraph 1.

In its Order on Review Hearing the Court found that Ms. Summers “has complied with its’ Order to remain sober and has been compliant and successful in her testing through Paymer Associates; that Ms. Summers has exercised her parenting time with the children without any problems occurring; that Ms. Summers has been employed full-time since December 12, 2016, first with General Dynamics and now with Mercury Systems, Inc. While Ms. Summers has not completed an IOP as ordered, she has continued in counseling with Julia Gamache.” Appellant Add. at 32, Order on Review Hearing, at Paragraph 2. The Court also recognized “that she has a strong bond with the children and they with her.” Appellant Add. at 32, Order on Review Hearing, at Paragraph 4.

The Court has wide discretion in issuing orders granting “parents and courts the widest discretion in developing a parenting plan. See RSA 461-A:2, i(d). However, that discretion is not absolute where it is unreasonable based upon the record, or arbitrary or capricious. Upon appeal, this Court considers only “whether the record establishes an objective basis sufficient to sustain the discretionary judgment made.” In the Matter of Kurowski and Kurowski, 161 N.H. 585 (2011). “Resolution of the best interests of a child depends to a large extent upon the first hand assessment of the credibility of witnesses, and the findings of the trial court are binding upon this court if supported by the evidence.” (See id.; referencing In the Matter of Hampers & Hampers, 154 N.H. 275, 281(2006).

The rulings of the Court in its Order on Review Hearing are not supported by either the evidence or the record and are, therefore, not binding on this Court on appeal. The

Court found Ms. Summers to be in compliance with its Order; found that she had a strong bond with the children and they with her; released her from further alcohol testing on a step-down basis and increased her parenting time with the children. Based upon the Court's findings and lack of expert or other testimony that Ms. Summers would relapse, the Court should have objectively applied the standard the Court set in its Final Order on Parenting Plan and restored shared parenting to Ms. Summers.

V. THE 9th CIRCUIT COURT - FAMILY DIVISION AT MERRIMACK UNREASONABLY INTERFERED WITH MS. SUMMERS' PARENTAL RIGHTS WHEN IT FOUND MS. SUMMERS IN COMPLIANCE WITH ITS FINAL ORDER ON PARENTING PLAN BUT DENIED HER SHARED PARENTING OF THE PARTIES' MINOR CHILDREN.

Subsequent to the Review Hearing, the Court found Ms. Summers was in compliance with its Final Order on Parenting. The Order on Review Hearing failed to find Ms. Summers represented any present safety concern to parenting the parties' children but failed to restore her to the parties' prior equal parenting schedule. Thereby, "because children do best when both parents have a stable and meaningful involvement in their lives, it is the policy of this state, *unless it is clearly shown that in a particular case it is detrimental to a child*, to: (a) support frequent and continuing contact between each child and both parents. (b) *Encourage parents to share in the rights and responsibilities of raising their children after the parents have separated or divorced.*" (*Italics added.*) See RSA 461-A:2.; the Court should have restored shared parenting to Ms. Summers.

"The right of parents to raise and care for their children is a fundamental liberty interest protected by Part 1, Article 2 of the New Hampshire Constitution." In the Matter of Huff and Huff, 158 N.H. 414, 420 (2009), citing In the Matter of Nelson & Horsley, 149

N.H. at 547 (2003). The trial court determined in its Final Order on Parenting Plan that a return to equal parenting time between Mr. and Ms. Summers would be reviewed at a subsequent hearing. Ms. Summers complied with the Court's Orders in its Final Order on Parenting Plan and reasonably relied upon the Court's own language that by complying with its Orders, the Court would consider restoring shared parenting. There was no clear showing or evidence presented at the Review Hearing or in its Order on Review Hearing that a return to equal parenting time was detrimental to the minor children or that any factors listed in the best interest standard in determining parental rights and responsibilities prevented Ms. Summers' restoration to shared parenting. Lacking such evidence, the Court abused its discretion in limiting Ms. Summers to any schedule less than the prior shared parenting schedule and, as such, unreasonably interfered with her parental rights as guaranteed by the New Hampshire State Constitution and this Court.

VI. THE 9th CIRCUIT COURT - FAMILY DIVISION AT MERRIMACK ABUSED ITS DISCRETION AND MADE AN ERROR OF FACT AND/OR LAW IN CHARACTERIZING THE PARTIES' PARENTING PLAN AS FINAL WHEN CERTAIN PARAGRAPHS UNDER THE PLAN WERE SUBJECT TO REVIEW.

In its Order on Review Hearing, the Court stated: "While the Court recognizes that it is Mr. Summers' position that the Court lacks statutory authority to make any modification of the Final Parenting Plan citing RSA 461-A:11, the Court asserts that it can when the Final Order allowed for a modification based upon Ms. Summers meeting certain criteria." Appellant Add. At 32, Order on Review Hearing, Paragraph 3.

Family Division Rule 2.1 states in pertinent part, that:

"The family division has jurisdiction over all divorces, parenting actions,

legal separations, annulments, child support actions.....and any actions to change or enforce any of these orders once they become final....."

Thus, the Court had continuing jurisdiction over this matter to review and decide issues it had reserved for further review, which though termed "final" were not permanent.

The Court stated: "While the attached Parenting Plan is Final, it is subject to review in 6 months to determine if the parenting schedule should be modified to again allow shared or equal parenting time." Appellant Appx. at 4, Final Order on Parenting Plan, Paragraph 4. A Final Order is: "One which terminates the litigation between the parties and the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." See Black's Law Dictionary, Fifth Edition 567 (1979).

The Final Parenting Plan at Paragraph B.1. Routine Schedule contains language that "Christine shall not consume alcohol and shall continue in the Paymer Associates program until such time as there is a further review hearing." Paragraph 4 (b) Vacation Schedule states: " Unless the parties reach an agreement on the February, April and summer vacations, the routine parenting schedule shall apply until the next Review Hearing." Appellant Appx. at 8, Final Parenting Plan, Paragraphs B.1 and 4.(b).

Clearly there was work yet to be done in the parties' Parenting Plan; work which was to be addressed either by agreement or at the parties' Review Hearing. The Court did not make final determinations on all issues contained within the Final Parenting Plan; indeed it left the fundamental issue, the day-to-day residential schedule for the children, open to a return to shared parenting time. The Court's own language supports this conclusion.

This Court has previously noted that a “parenting plan governing parenting time schedule was incorporated within the court decree” In the Matter of Muchmore & Jaycox, 159 N.H. at 473 (2009) and that under “RSA 461-A:4 (parenting plan is included within court judgment providing for parenting time with a child.” In the Matter of Kurowski and Kurowski, 161 N. H. 578, 587 (2011). However, in deciding Kurowski, this Court opined that while the Kurowski’s Parenting Plan was Final, it did not “amount to a permanent court order.” Id. In Kurowski, the parties could not agree on the issue of school placement for their child and reserved the daughter’s school as a disputed issue. Id. at 587, 588.

The Summers could not agree on a routine schedule, holiday and vacation schedule for the minor children and the Court reserved these issues for the Review Hearing. RSA 461-A:6 provides that “If the parties are unable to develop a parenting plan, the court may develop it.” Absent agreement, the Court developed a parenting plan that, while final, was not permanent in all aspects. This is significant. A trial court resolving issues which are not permanent in a final parenting plan may do so under the best interest standard “without first considering whether circumstances permitting modification under RSA 461-A:11 existed.” Id.

Temporary is “that which is to last for a limited time only” and “not permanent.” See Black’s Law Dictionary, Fifth Edition, 1312 (1979). Temporary is also defined as “existing or continuing for a limited time” and “transitory.” See also Webster’s Third New International Dictionary 2353 (unabridged ed. 1993). The Court clearly intended that while the Parenting Plan was final, some of the provisions therein were not permanently resolved, and therefore temporary in nature, until the parties either agreed, or absent

agreement, the Court issued final orders after a Review Hearing on those issues.

CONCLUSION

The 9th Circuit Court – Family Division at Merrimack committed an unsustainable, unreasonable exercise of discretion when it changed the purpose and standard of the Review Hearing as established in its Final Order on Parenting Plan. In this case, the Court established a Review Hearing within a Final Order on Parenting Plan with a set purpose, a return to shared parenting should Ms. Summers be in compliance with the Court's orders should such a return be in the best interests of the children.

In its Order on Review Hearing, the Court retreated from its clear Final Order on Parenting Plan, stating that it never contemplated such a change in its Final Order on Parenting Plan when it clearly did, and that any such requested change by Ms. Summers was a substantial one. The Court found Ms. Summers compliant with its Orders, including her testing with Paymer Associates and, in citing some of the best interests standards of RSA 461-A:6, found that she has a good relationship with the children and they with her and no incidences had occurred during her parenting time. The Court granted her Motion to Reconsider in part, increasing her weekday and overnight parenting time; but denied Ms. Summers a return to shared parenting.

Having so found, the Court failed to return her shared parenting based upon a concern over her potential relapse, although no expert or other evidence was presented to show whether Ms. Summers would do so. The expert testimony was that she was compliant in her testing with no evidence of present alcohol consumption. The Court

arbitrarily chose to limit her parenting time based upon a then nonexistent event of relapse and further based upon a potentially nonexistent future relapse.

Parents have a right to depend on orders issued from the family court to be consistent and reasonable; not arbitrary and capricious. Having met the parameters and standard established by the Court itself, Ms. Summers' shared parenting must be restored so that she can equally share in the parenting of the parties' children.

For all the reasons above, Christine Summers respectfully requests that this Court rule that the trial court exceeded its discretionary powers and made errors of fact and/or law in issuing its Order on Review Hearing such that the order is vacated and remanded for further proceedings consistent with this Court's opinion.

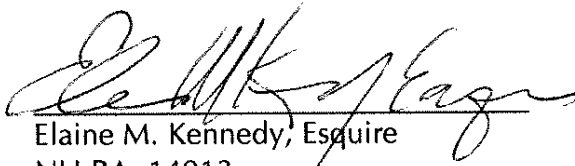
NEW HAMPSHIRE SUPREME COURT
RULE 16(3) (i) CERTIFICATION

Pursuant to New Hampshire Supreme Court Rule 16(3) (i), I certify that copies of the decisions of the 9th Circuit - Family Division – Merrimack being appealed from are attached hereto.

Respectfully submitted by:

Christine Summers

By Her Attorneys,
Solomon Professional Association

By: 
Elaine M. Kennedy, Esquire
NH BA: 14013
One Buttrick Road
P.O. Box 937
Londonderry, New Hampshire 03053
(603) 437-3700

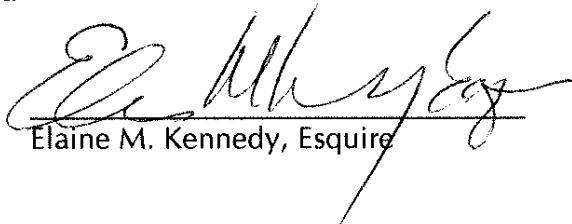
STATEMENT REGARDING ORAL ARGUMENT

Elaine M. Kennedy, Esquire, will present oral argument on behalf of Christine Summers, and hereby requests fifteen minutes for this purpose.

CERTIFICATE OF SERVICE

I, Elaine M. Kennedy, Esquire hereby certify that two copies of Appellant's Brief and accompanying Appendix were this day mailed, postage prepaid, to Robert Shepard, Esquire, Counsel for Petitioner/Appellant.

2-21, 2019


Elaine M. Kennedy, Esquire

ADDENDUM
TABLE OF CONTENTS

	Pages
Notice of Decision - Order on Review Hearing, dated April 2, 2018.....	31 - 33
Respondent's Motion to Reconsider, dated April 9, 2018.....	34 - 37
Notice of Decision – Order on Respondent's Motion to Reconsider, dated April 20, 2018.....	38 – 42

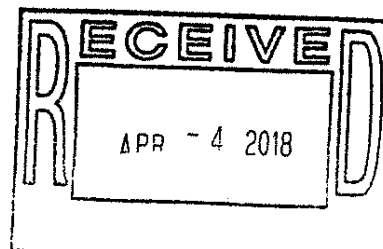
**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT**

9th Circuit - Family Division - Merrimack
4 Baboosic Lake Road
Merrimack NH 03054-3605

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

**ELAINE M. KENNEDY, ESQ
SOLOMON PROFESSIONAL ASSOCIATION
ONE BUTTRICK ROAD
PO BOX 937
LONDONDERRY NH 03053**



Case Name: **In the Matter of Steven Summers and Christine Summers**
Case Number: **657-2014-DM-00012**

Enclosed please find a copy of the Court's Order dated April 02, 2018 relative to:
Order On Review Hearing

Any party obligated to pay child support is advised that it is his/her responsibility to keep the Court (and the Division of Human Services if appropriate) advised of his/her current mailing address in writing, until such time as support payments are terminated.

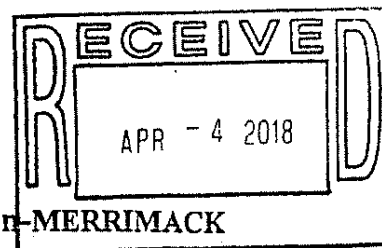
April 02, 2018

Lynn R. KillKelley
Clerk of Court

(39)

C: Robert M. Shepard, ESQ; Kysa M. Crusco; DCYF

The State of New Hampshire



HILLSBOROUGH, SS

9th Circuit-Family Division

In the Matter of Mr. Stephen M. Summers and Ms. Christin L. Summers

657-2014-DM-00012

ORDER ON REVIEW HEARING

A Review Hearing on Ms. Summers' parenting time was held on February 6, 2018. Both parties appeared with counsel. Also present was the GAL.

The Court finds that Ms. Summers has complied with its' Order to remain sober and has been compliant and successful in her testing through Payment Associates. The Court finds that Ms. Summers has exercised her parenting time with the children without any problems occurring. Ms. Summers has been employed full-time since December 12, 2016, first with General Dynamics and now with Mercury Systems, Inc. While Ms. Summer has not completed an IOP as ordered, she has continued in counseling with Julia Gamache.

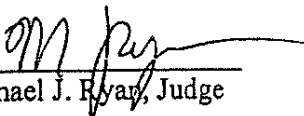
Ms. Summer is requesting the Court to make a substantial change in the Final Parenting Plan. While the Court did allow for the possibility of a modification of the Final Parenting Plan in its Final Order, the Court did not allow for there to be a modification of the Final Parenting Plan such that Ms. Summers would have shared parenting time as she is requesting of the Court. While the Court recognizes that it is Mr. Summers position that the Court lacks the statutory authority to make any modification of the Final Parenting Plan citing RSA 461-A:11, the Court asserts that it can when the Final Order allowed for a modification based upon Ms. Summers meeting certain criteria.

As it would with anyone with a drug or alcohol addiction, the Court is concerned about the possibility that Ms. Summers may relapse. However, the Court finds that it is time for the Parenting Plan to be modified to allow Ms. Summers to have a more standard parenting schedule then presently exists, the Court also recognizes that she has a strong bond with the children and they with her.

The Court enters the following Orders:

- 1) The Court's Final Parenting Plan is modified as follows:
 - a) Beginning on Friday, April 13, 2018, Ms. Summers shall have unsupervised parenting time every other weekend from Friday at 5:00 pm until Sunday at 7:00 pm. She shall have parenting time every Wednesday from 5:00 pm until Thursday morning at 8:00 am.
- 2) Ms. Summers shall enter a step-down continue testing phase with Paymer Associates for a period of three months beginning May 1, 2018. Ms. Summers shall have testing as recommended by Steven Paymer.
- 3) Ms. Summers shall continue in counseling for a period of six months.
- 4) Ms. Summers shall not drink alcohol at any time.
- 5) The GAL's involvement in the case is hereby terminated with the Court's thank you for a job well done.
- 6) The parties are to work together to try to come together with a Final Parenting Plan that includes all holidays and vacations based upon the above modification the Court has made to the Final Parenting Plan. If the parties are unable to come to an agreement on holidays and vacations within 30 days, then the Court will make the decision regarding holidays and vacations.

So ordered this 2nd day of March 2018.


Michael J. Ryan, Judge

THE STATE OF NEW HAMPSHIRE

JUDICIAL BRANCH

Court Name: 9th Circuit - Family Division - Merrimack
Case Name: In the Matter of: Steven M. Summers and Christine L. Summers
Case Number: 657-2014-DM-00012

Respondent's Motion to Reconsider

NOW COMES the Respondent, Christine L. Summers, by and through her attorneys, SOLOMON PROFESSIONAL ASSOCIATION and Elaine M. Kennedy, Esquire, and respectfully requests that the Court reconsider its Order On Review Hearing dated April 2, 2018 and states in support thereof as follows:

1. After a Review Hearing on February 6, 2018 at which both parties appeared with counsel and the GAL was present, the Court issued an Order dated by Clerk's Notice on April 2, 2018 and received by undersigned counsel on April 4, 2018.

2. Respondent upon review of said Order believes that the Court either misapprehended and/or overlooked certain evidence and facts submitted at the Review Hearing and contained in the Court's Final Order on Parenting.

3. The Order On Review Hearing states at Paragraph 3, Page 1, that "Ms. Summers is requesting the Court to make a substantial change in the Final Parenting Plan. While the Court did allow for the possibility of a modification of the Final Parenting Plan in its Final Order, the Court did not allow for there to be a modification of the Final Parenting Plan such that Ms. Summers would have shared parenting time as she is requesting of the Court."

4. Respondent respectfully states that, to the contrary, in its Final Order on Parenting Plan, the Court specifically stated at Paragraph 4, Pages 1 and 2, that "While the attached Parenting Plan is Final, it is subject to review in 6 months to determine if the parenting schedule should be modified to again allow for shared or equal parenting time...." and that the standard applied to any change would be ".....whether a modification is in the best interests of the minor children."

5. Respondent submitted a Parenting Plan at the Review Hearing containing a shared parenting schedule as was contemplated in the Court's Final Order on Parenting. She is therefore, not asking the Court to make a substantial change in the Final Parenting

Plan, nor is she asking the Court to make a change that the Court itself did not contemplate, just to modify the parenting plan to again allow for shared parenting time.

6. In its Order on Review the Court notes that Respondent has a strong bond with the children and they with her. In light of that bond, it is in the children's best interests to spend equal time with both parents.

7. The Court states that it is concerned with the possibility that Respondent may relapse; however she has maintained her sobriety for well over a year, she continues in counseling and is participating in a step down program with Paymer Associates for a period of 3 months beginning May 1, 2018. Preventing Respondent from reassuming a shared parenting role based upon a possibility, as opposed to an actual relapse, unreasonably interferes with her rights to parent the children and is also not in the children's best interests considering the bonds between them.

8. Respondent has maintained her sobriety and certainly plans to continue to maintain her sobriety. To the end that the Court is concerned about a potential relapse as the sole factor in preventing a return to shared parenting, Respondent is willing to extend her testing period with Paymer Associates to occur around her parenting time from July 31, 2018 until October 1, 2018.

And to the extent that the Court does not grant Respondent's request to return to a shared parenting schedule, the Respondent respectfully requests that the Court reconsider the Routine Schedule at Paragraph 1) a) as written and states in support of her request the following:

9. In its Order on Review Hearing the Court states at 1) a) that "Beginning on Friday, April 13, 2018, Ms. Summers shall have unsupervised parenting time every other weekend from Friday at 5:00 pm until Sunday at 7:00 pm. She shall have parenting time every Wednesday from 5:00 pm until Thursday morning at 8:00 am."

10. The parties have been following a schedule whereby Respondent's parenting time begins every Tuesday and on alternating Fridays after school.

11. Respondent is able to either pick the children up or have one of her parents pick the children up directly from school, eliminating the need for afterschool care every Tuesday and on alternating Fridays.

12. Respondent is able to return the children directly to school on alternating Monday mornings, eliminating the need for an exchange of the children between the parties on Sunday evenings.

13. Given the high degree of conflict between the parties, it is in the best interests of the minor children to have fewer exchanges occurring between the parties and more transitions at a neutral site such as the children's school or when there is no school from any daycare/camp.

WHEREFORE, YOUR RESPONDENT respectfully requests that this Honorable Court:

A. Grant Respondent's Motion to Reconsider and restore the parties to a shared parenting schedule by adopting the Parenting Plan as submitted to the Court by the Respondent at the February 6, 2018 Review Hearing;

B. In conjunction with the restoration of the shared parenting schedule, Order that Respondent's obligation to pay child support is terminated and the parties shall each pay for any daycare he/she occurs in connection with his/her parenting time with the children;

C. Or, in the alternative order time for Respondent to have with the minor children every Tuesday with pick up directly from school and return to school every Wednesday morning and alternating Fridays with pick up directly from school and a return of the children directly to school on Monday morning. If there is no school then pick-ups and drop-offs shall occur at the applicable daycare/camp; and

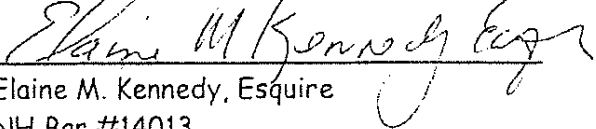
D. For such other and further relief the Court deems necessary.

Respectfully submitted,

Christine L. Summers

By Her Attorneys,

SOLOMON PROFESSIONAL ASSOCIATION

By: 

Elaine M. Kennedy, Esquire


NH Bar #14013

One Buttrick Road, P.O. Box 937

Londonderry, New Hampshire 03053-0937

(603) 437-3700

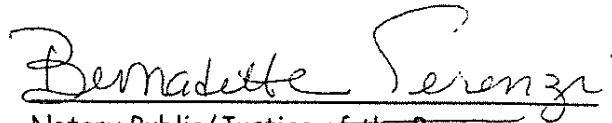
Dated: April 6, 2018


Christine L. Summers

State of New Hampshire
County of Rockingham

On this the 9th day of April, 2018, personally appeared Christine L. Summers and made oath that the facts contained in the foregoing Motion To Reconsider are true to the best of her knowledge and belief.

Before me,



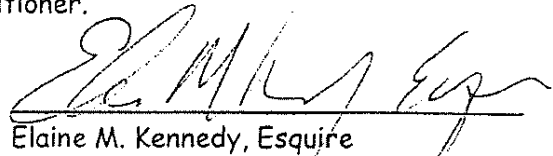
Notary Public/Justice of the Peace

My Commission Expires



CERTIFICATE OF SERVICE

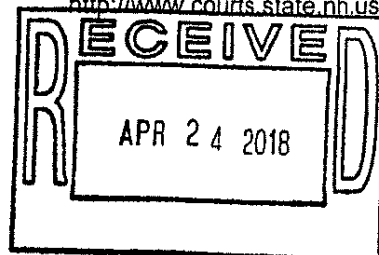
I, Elaine M. Kennedy, Esquire hereby certify that a co of the foregoing Respondent's Motion To Reconsider was this 9th day of April, 2018 forwarded to Robert Shepard, Esquire, as counsel for the Petitioner.


Elaine M. Kennedy, Esquire

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

9th Circuit - Family Division - Merrimack
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NOTICE OF DECISION

ELAINE M. KENNEDY, ESQ
SOLOMON PROFESSIONAL ASSOCIATION
ONE BUTTRICK ROAD
PO BOX 937
LONDONDERRY NH 03053

Case Name: **In the Matter of Steven Summers and Christine Summers**
Case Number: **657-2014-DM-00012**

Enclosed please find a copy of the Court's Order dated April 19, 2018 relative to:

**Respondent's Motion to Reconsider: Denied as to Prayers A &
B. Granted as to Prayer C.**

Any party obligated to pay child support is advised that it is his/her responsibility to keep the Court (and the Division of Human Services if appropriate) advised of his/her current mailing address in writing, until such time as support payments are terminated.

April 20, 2018

A handwritten signature in black ink that reads "Lynn R. KillKelley". The signature is written in a cursive style.

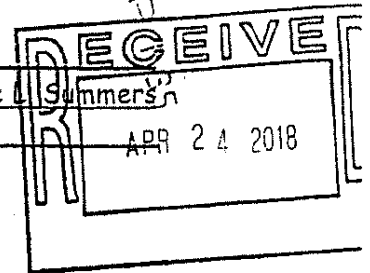
Lynn R. KillKelley
Clerk of Court

(862)

C: Robert M. Shepard, ESQ; Kysa M. Crusco; DCYF

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH

Court Name: 9th Circuit - Family Division - Merrimack
Case Name: In the Matter of: Steven M. Summers and Christine L. Summers
Case Number: 657-2014-DM-00012



Respondent's Motion to Reconsider

NOW COMES the Respondent, Christine L. Summers, by and through her attorneys, SOLOMON PROFESSIONAL ASSOCIATION and Elaine M. Kennedy, Esquire, and respectfully requests that the Court reconsider its Order On Review Hearing dated April 2, 2018 and states in support thereof as follows:

1. After a Review Hearing on February 6, 2018 at which both parties appeared with counsel and the GAL was present, the Court issued an Order dated by Clerk's Notice on April 2, 2018 and received by undersigned counsel on April 4, 2018.

2. Respondent upon review of said Order believes that the Court either misapprehended and/or overlooked certain evidence and facts submitted at the Review Hearing and contained in the Court's Final Order on Parenting.

3. The Order On Review Hearing states at Paragraph 3, Page 1, that "Ms. Summers is requesting the Court to make a substantial change in the Final Parenting Plan. While the Court did allow for the possibility of a modification of the Final Parenting Plan in its Final Order, the Court did not allow for there to be a modification of the Final Parenting Plan such that Ms. Summers would have shared parenting time as she is requesting of the Court."

4. Respondent respectfully states that, to the contrary, in its Final Order on Parenting Plan, the Court specifically stated at Paragraph 4, Pages 1 and 2, that "While the attached Parenting Plan is Final, it is subject to review in 6 months to determine if the parenting schedule should be modified to again allow for shared or equal parenting time...." and that the standard applied to any change would be ".....whether a modification is in the best interests of the minor children."

5. Respondent submitted a Parenting Plan at the Review Hearing containing a shared parenting schedule as was contemplated in the Court's Final Order on Parenting. She is therefore, not asking the Court to make a substantial change in the Final Parenting

Plan, nor is she asking the Court to make a change that the Court itself did not contemplate, just to modify the parenting plan to again allow for shared parenting time.

6. In its Order on Review the Court notes that Respondent has a strong bond with the children and they with her. In light of that bond, it is in the children's best interests to spend equal time with both parents.

7. The Court states that it is concerned with the possibility that Respondent may relapse; however she has maintained her sobriety for well over a year, she continues in counseling and is participating in a step down program with Paymer Associates for a period of 3 months beginning May 1, 2018. Preventing Respondent from reassuming a shared parenting role based upon a possibility, as opposed to an actual relapse, unreasonably interferes with her rights to parent the children and is also not in the children's best interests considering the bonds between them.

8. Respondent has maintained her sobriety and certainly plans to continue to maintain her sobriety. To the end that the Court is concerned about a potential relapse as the sole factor in preventing a return to shared parenting, Respondent is willing to extend her testing period with Paymer Associates to occur around her parenting time from July 31, 2018 until October 1, 2018.

And to the extent that the Court does not grant Respondent's request to return to a shared parenting schedule, the Respondent respectfully requests that the Court reconsider the Routine Schedule at Paragraph 1) a) as written and states in support of her request the following:

9. In its Order on Review Hearing the Court states at 1) a) that "Beginning on Friday, April 13, 2018, Ms. Summers shall have unsupervised parenting time every other weekend from Friday at 5:00 pm until Sunday at 7:00 pm. She shall have parenting time every Wednesday from 5:00 pm until Thursday morning at 8:00 am."

10. The parties have been following a schedule whereby Respondent's parenting time begins every Tuesday and on alternating Fridays after school.

11. Respondent is able to either pick the children up or have one of her parents pick the children up directly from school, eliminating the need for afterschool care every Tuesday and on alternating Fridays.

12. Respondent is able to return the children directly to school on alternating Monday mornings, eliminating the need for an exchange of the children between the parties on Sunday evenings.

13. Given the high degree of conflict between the parties, it is in the best interests of the minor children to have fewer exchanges occurring between the parties and more transitions at a neutral site such as the children's school or when there is no school from any daycare/camp.

WHEREFORE, YOUR RESPONDENT respectfully requests that this Honorable Court:

A. Grant Respondent's Motion to Reconsider and restore the parties to a shared parenting schedule by adopting the Parenting Plan as submitted to the Court by the Respondent at the February 6, 2018 Review Hearing;

B. In conjunction with the restoration of the shared parenting schedule, Order that Respondent's obligation to pay child support is terminated and the parties shall each pay for any daycare he/she occurs in connection with his/her parenting time with the children;

C. Or, in the alternative order time for Respondent to have with the minor children every Tuesday with pick up directly from school and return to school every Wednesday morning and alternating Fridays with pick up directly from school and a return of the children directly to school on Monday morning. If there is no school then pick-ups and drop-offs shall occur at the applicable daycare/camp; and

D. For such other and further relief the Court deems necessary.

Respectfully submitted,

Christine L. Summers

By Her Attorneys,

SOLOMON PROFESSIONAL ASSOCIATION

By: 

Elaine M. Kennedy, Esquire

NH Bar #14013

One Buttrick Road, P.O. Box 937

Londonderry, New Hampshire 03053-0937

(603) 437-3700

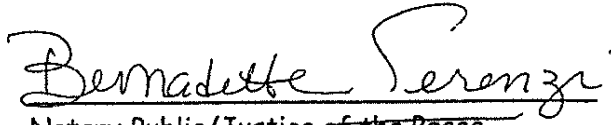
Dated: April 6, 2018


Christine L. Summers

State of New Hampshire
County of Rockingham

On this the 9th day of April, 2018, personally appeared Christine L. Summers and made oath that the facts contained in the foregoing Motion To Reconsider are true to the best of her knowledge and belief.

Before me,



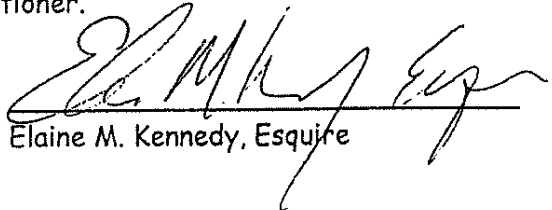
Notary Public/Justice of the Peace

My Commission Expires



CERTIFICATE OF SERVICE

I, Elaine M. Kennedy, Esquire hereby certify that a co of the foregoing Respondent's Motion To Reconsider was this 9th day of April, 2018 forwarded to Robert Shepard, Esquire, as counsel for the Petitioner.


Elaine M. Kennedy, Esquire

4/19/18
Motion to Reconsider ~~is~~ denied
as to Prayer A + B.
Motion to Reconsider is granted
as to Prayer C.


Michael J. Ryan