

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
DOCKET NO: 446-8-19 Wncv

In re: Estate of A [REDACTED] Ja [REDACTED] [REDACTED]
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)

KI [REDACTED] H [REDACTED] MOTION FOR SUMMARY JUDGMENT

NOW COMES K [REDACTED] H [REDACTED] by and through his attorney, William W. Cobb, and pursuant to Rule 56 of the Vermont Rules of Civil Procedure, hereby moves this Court for Summary Judgment. In support thereof, K [REDACTED] H [REDACTED] states as follows:

Introduction

This matter involves the wrongful death of a 2-year-old boy ("AJ") who, on July 5, 2017, tragically drowned in a swimming pool while in DCF custody. At that time, he was residing with his foster parents, [REDACTED] in East Montpelier, Vermont.

AJ's biological parents, [REDACTED] ("Father") and [REDACTED] ("Mother"), opened an estate proceeding in Washington County Probate Division (Docket No. 515-9-18 Wnpr) and commenced a wrongful death action. The parties mediated a settlement but could not agree on a division of the assets. They have now filed this action with the Civil Division so that the Court can decide how the settlement proceeds should be apportioned. 14 VSA § 1492(c).

Father now files this Motion for Summary Judgment on the ground that pursuant to 14 VSA § 1492(c)(4) Mother is statutorily barred from collecting any portion of the wrongful death proceeds. 14 VSA § 1492(c)(4) states as follows:

"No share of the damages or recovery shall be allowed in the estate of a child to a parent who has neglected or refused to provide for the child during infancy or who has abandoned the child whether or not the child dies during infancy, unless

the parental duties have been subsequently and continuously resumed until the death of the child.” Id.

As K [REDACTED] H [REDACTED] will argue more fully below, Mother’s negligence of AJ was already conclusively established in a juvenile hearing (In Re: A [REDACTED], Docket No. 209-11-16 Wnjv) whereby Mother admitted to her negligence at a CHINS merits hearing on February 17, 2017, and where the juvenile court (Hon. Kevin Griffin) made findings of fact supporting the Order that Mother was negligent. K [REDACTED] H [REDACTED] will show that Mother is not entitled to re-litigate the issue of negligence as Collateral Estoppel principles apply as per In re: PJ, 185 Vt. 606 (2009) and Trapanier v. Getting Organized, Inc., 155 Vt. 259 (1990). Further, K [REDACTED] H [REDACTED] will show that Mother lost custody of AJ and never resumed her parental duties of AJ, as AJ remained in DCF custody until his death. For these reasons, the elements of 14 VSA § 1492(c)(4) have been met and Mother is barred from receiving any wrongful death damages. Finally, K [REDACTED] H [REDACTED] moves for Judgment awarding him the wrongful death damages award in full.

Factual Background

The facts of this case are as follows:

1. A [REDACTED] (hereinafter “AJ”) (DOB: 2/6/15) is the minor child who is the subject of the wrongful death action. (See Statement of Undisputed Material Facts Supporting Motion for Summary Judgment, Par. 1)
2. AJ died while in DCF custody at his foster parents’ home in East Montpelier, Vermont on July 5, 2017. (Id., Par. 2)
3. [REDACTED] (DOB: 1/4/93)(“Mother”) is AJ’s biological mother. (Id., Par. 3)

4. [REDACTED] (DOB: 7/3/89) ("Father") is AJ's biological father. (Id., Par. 4)
5. Mother and Father stipulated to a parentage order whereby both acknowledged they were AJ's biological parents. ¹ (Id., Par. 5)
6. At the time of AJ's birth, Mother resided at 95 Granite Street, Barre, Vermont with a number of housemates. (Id., Par. 6)
7. At that time, she had shared custody of her daughter, A [REDACTED] C [REDACTED] whose father is B [REDACTED] C [REDACTED] (Id., Par. 7)
8. DCF's involvement with Mother is extensive. DCF first became involved with Mother regarding her care for her daughter, A [REDACTED] C [REDACTED] (DOB: 2 [REDACTED]). ² (Id., Par. 8)
9. On April 30, 2013, Dr. Deborah Jerard called Family Services to report that on April 25, 2013, she had been treating A [REDACTED] for a follow-up urinary tract infection, and A [REDACTED] presented with a "greenish blue bruise on her cheekbone." A [REDACTED] told the doctor that Mother had struck her causing the bruise. ³ (Id., Par. 9)(Exhibit A, Affidavit of DCF Social Worker [REDACTED]), Dated 9/17/15, Par. 1)
10. On August 7, 2013, A [REDACTED] grandmother and father, [REDACTED] wrote a letter to Family Services Central Intake Office detailing concerns regarding Mother's treatment of A [REDACTED]. According to [REDACTED] A [REDACTED] frequently had bruises on her face and body after spending time with Mother. (Id., Par. 10)(Id., Par. 2)
11. On September 31, 2013, Mother's friend, [REDACTED] reported that A [REDACTED] had a

¹ Parentage of AJ was established in Docket No. 304-8-16 Wnjv (K [REDACTED] H [REDACTED] requests that the Court take judicial notice of this docket and all other referenced dockets from the Washington County Family Division (169-9-15 Wnjv and 170-9-15 Wnjv, 209-11-16 Wnjv, and 227-11-16 Wnjv)

² Docket Nos. 169-9-15 Wnjv and 170-9-15 Wnjv

³ Exhibit A – Affidavit of DCF Social Worker [REDACTED] Dated 9/17/15, Par. 1.

bruise on her hip as well as facial bruising. When [REDACTED] asked A [REDACTED] how she got the bruises, A [REDACTED] told her, "Mommy did, when Mommy gets mad at me." (Id., Par. 11)(Id., Par. 3)

12. On July 12, 2014, A [REDACTED]'s grandmother, [REDACTED], reported to Family Services her concerns about, among other things, lack of dental care. (Id., Par. 12)(Id., Par. 4)

13. On July 18, 2014, [REDACTED] called to report that she had observed bruises on A [REDACTED]'s back. (Id., Par. 13) (Id., Par. 5)

14. On September 14, 2015, daycare provider [REDACTED] called Family Services to report that she had observed multiple bruises on AJ's upper thigh and buttocks when changing his diaper earlier that day. [REDACTED] said she had asked Mother about the bruising and Mother said she had not noticed anything. This report was accepted as a Chapter 49 Investigation for Physical Abuse and assigned to S [REDACTED]. (Id., Par. 14)(Id., Par. 8)

15. On September 14, 2015, police officers arrived at Mother's house and took photographs of the bruising on AJ. When questioned by the police about how the bruising occurred, Mother said she did not know. She further speculated that perhaps a new babysitter, her [REDACTED] [REDACTED] had bounced AJ too high on her knee. Thereafter, a safety plan was put in place to not allow Mother to have unsupervised contact with either child. (Id., Par. 15)(Id., Par. 9)

16. Police spoke with [REDACTED] who denied ever causing the bruising. She stated that she had bounced AJ softly on her knee. (Id., Par. 16) (Id., Par. 10)

17. On September 16, 2015, the photos were forwarded to Dr. Karyn Patno who stated that it was "highly unlikely that the bruising was accidental." (Id., Par. 17) (Id., Par. 14)

18. On September 17, 2015, Dr. Joe Hagan, Child Abuse Expert, reviewed the photos. Dr. Hagan also confirmed that the bruising was not accidental. (Id., Par. 18)(Id., Par. 15)

19. Per Dockets 169-9-15 and 170-9-15, AJ was placed in a community foster home with [REDACTED]. A [REDACTED] was placed in the Conditional Custody of her maternal grandmother, [REDACTED] (DOB: 8/5/58) and maternal great grandmother, [REDACTED] (DOB unknown). Judge Griffin ordered liberal visitation between Mother and her children, with much of the visitation taking place at [REDACTED]'s house and being supervised by [REDACTED].⁴ (Id., Par. 19)(Exhibit B, [REDACTED] Aff., Dated 12/28/15)

20. On November 23, 2015, both [REDACTED] reported at a DCF team meeting that Mother spent most of the visitation texting instead of interacting with the children. Further, that she had anger issues and often screamed at A [REDACTED] using foul language. Both [REDACTED] stated that Mother "was not fit to be a parent." (Id., Par. 20)(Id., Par. 1)

21. [REDACTED] stated that during court-ordered visits, Mother strikes A [REDACTED] "by pulling her hand back so she can use a lot of force." She stated that Mother hit A [REDACTED] repeatedly anytime Mother is annoyed or feels that A [REDACTED] "has to get ready to do something." (Id., Par. 21)(Id., Par. 4)

22. On January 20, 2016, SW [REDACTED] met with A [REDACTED] at [REDACTED] School. There, A [REDACTED] confided to SW [REDACTED] that Mother strikes her repeatedly ("A [REDACTED] said [REDACTED] pushes and hits her during visits. She said she hits her often at visits and this makes her scared. She said the hitting looks like a slap. A [REDACTED] said [REDACTED] hits her all over her body and sometimes leaves bruises. She said the hitting hurts. She said she cries when [REDACTED] hits her.").⁵ (Id., Par. 22)(Exhibit C, [REDACTED] Aff., Dated 1/20/16)

23. On January 21, 2016, a contested merits hearing through Dockets 169/170-9-15 was held

⁴ Exhibit B - Affidavit of [REDACTED] Dated 12/28/15

⁵ Exhibit C - Affidavit of [REDACTED] Dated 1/20/16, Par. 3

regarding the bruising discovered on AJ. The Court found that the State was unable to prove that Mother caused the injury to her son and the case was dismissed. ⁶ (Id., Par. 23)(Exhibit D, [REDACTED] Aff, Dated 2/23/16, Par. 17)

24. On February 15, 2016, A [REDACTED]'s kindergarten teacher, Matt [REDACTED], called Family Services to report that A [REDACTED] had come to school with a "two-inch long, vertical and fairly deep scratch on her cheek." (Id., Par. 24)(Id., Par. 18)

25. Later that morning, A [REDACTED] old para-educators, [REDACTED] that her mother had scratched her because she was angry. (Id., Par. 25)(Id., Par. 19)

26. She further reported that Mother had told her not to tell anyone and that it was not accidental. (Id., Par. 26)(Id.)

27. On February 17, 2016, foster parent [REDACTED] was baby-sitting AJ and A [REDACTED]. She saw the scratch on A [REDACTED]'s face and A [REDACTED] told [REDACTED]: "Don't tell anyone but my mom did it." (Id., Par. 27)(Id.)

28. [REDACTED] took photos and forwarded them to SW [REDACTED]. [REDACTED] said she was also concerned that AJ "had a scratch behind his testicles." (Id., Par. 28)(Id.)

29. SW [REDACTED] and [REDACTED] met with Mother, who told her that A [REDACTED] had told multiple people that Mother had caused the scratch. Mother denied that she had caused the scratch. However, she admitted that she was present with A [REDACTED] when she noticed the scratch. (Id., Par. 29)(Id., Par. 26).

30. During the meeting, Mother agreed to not talk about the scratch with A [REDACTED] and to not challenge A [REDACTED] as to what had happened. However, that same day, Mother went to pick up A [REDACTED] from [REDACTED] School. There, she berated A [REDACTED] in a loud voice for

⁶ Exhibit D – Affidavit of [REDACTED] Dated 2/23/16, Par. 17

“lying.” According to the school nurse, [REDACTED] Mother came into school to pick A [REDACTED] up on the afternoon of February 18, 2016. Mother went to A [REDACTED]’s classroom and loudly demanded to know who A [REDACTED] talked to about the scratch. She then started “loudly berating” A [REDACTED] for lying and demanded that A [REDACTED] admit that she had lied. (Id., Par. 30)(Id., Par. 30)

31. On February 19, 2016, A [REDACTED] met with the school nurse, [REDACTED] and A [REDACTED] said she did not lie but told the truth when she said [Mother] scratched her when she was angry with her. (Id., Par. 31)(Id., Par. 31)

32. On October 15, 2016, foster parent [REDACTED] called Family Services with concerns about AJ. She advised that she had custody of AJ earlier in the year, but still takes care of him most weekends. [REDACTED] stated that two weeks prior [AJ] came to her with a swollen eye which turned black. [REDACTED] stated that [Mother] had told her that [AJ] “stepped on a crutch which hit him in the eye causing the injury.” ⁷ (Id., Par. 32)(Exhibit E, [REDACTED] Aff., Dated 11/7/16, Par. 1).

33. [REDACTED] expressed further concerns that AJ’s home with Mother at 95 Granite Street is “very dirty and has an intolerable smell.” [REDACTED] said she does not fully enter the home when she drops off AJ “due to the smell and garbage.” On one occasion, [REDACTED] and her husband [REDACTED] observed “sketchy” people at the home, that a number of them were “clearly under the influence.” [REDACTED] observed beer cans on the floor. (Id., Par. 33)(Id., Par.1)

34. Marcie further stated that she is friends with Brandi [REDACTED] whose son [REDACTED] resided at 95 Granite Street with Mother. According to [REDACTED], her son, [REDACTED] had just moved into the house two weeks prior. After moving in, he overdosed on

⁷ Exhibit E – Affidavit of [REDACTED], Dated 11/7/16.

heroin and was hospitalized. [REDACTED] told [REDACTED] that her son, [REDACTED] is a drug addict and that the house is being used to sell drugs. (Id., Par. 34)(Id., Par. 2)

35. [REDACTED] further reported that AJ had “a blistering rash that covers his bottom, testicles, and upper legs” and that the rash had been present for a long time. However, Mother did not seem concerned about it. (Id., Par. 35)(Id., Par. 3)

36. [REDACTED] said AJ “seems to be in pain as he is walking with his legs spread apart.” (Id., Par. 36)(Id.)

37. On October 20, 2016, the police and SW [REDACTED] went to 95 Granite Street to meet with Mother. There were no lights on, as the house did not have electricity. Upon opening the door, there was “a strong odor of marijuana.” (Id., Par. 37)(Id., Par. 5)

38. They met with residents of the home, [REDACTED] and boyfriend, [REDACTED] along with [REDACTED] confirmed that Mother resided at the 95 Granite Street with AJ. (Id., Par. 38)(Id., Par. 7)

39. On November 2, 2016, the photos of AJ’s swollen eye were sent to Dr. Hagan for consult. Dr. Hagan said he could not determine how the injury occurred. (Id., Par. 39)(Id., Par. 9)

40. On November 3, 2016, SW [REDACTED] spoke with [REDACTED], who is a well-known drug dealer. [REDACTED] said she has sold crack to [Mother]. She said recently, [Mother] came over to her house with her son, [AJ], to buy crack. [Mother] gave [AJ] to [REDACTED] to hold while [Mother] used crack. (Id., Par. 40)(Id., Par. 10).

41. On November 3, 2016, SW [REDACTED] spoke with [REDACTED] Both [REDACTED] and [REDACTED] confirmed that A [REDACTED] now resided with them. (Id., Par. 41)(Id., Par. 11)

42. On November 4, 2016, [REDACTED] brought AJ to see his local pediatrician who

confirmed that there was no way to tell what caused AJ's swollen eye. [REDACTED] reported that AJ was behind on his well-child check-ups and she had scheduled two appointments to bring him up to date. (Id., Par. 42)(Id., Par. 12).

43. On November 8, 2016, a CHINS petition was filed with the Washington Family Division.⁸ The Petition alleged that AJ was a child without proper parental care and requested that the State take custody. (Id., Par. 43)(Exhibit F – CHINS Petition, Docket No. 209-11-16 Wnjv)

44. Mother was substantiated by DCF for physical abuse of AJ in 2016.⁹ (Id., Par. 44)(Exhibit G, Initial Case Plan, Dated 2/10/17, Page 4)

45. Mother never appealed or challenged the substantiation. The substantiation remains on her DCF record today. (Id., Par. 45)

46. The DCF case was originally opened on September 14, 2015 when AJ was 7 months old.¹⁰ (Id., Par. 46)

47. AJ went into DCF custody for a brief period of time following the September 2015 incident when unexplained bruising was discovered. He then went into DCF custody again on November 23, 2016 when he was 21 months old.¹¹ He remained in DCF custody until his death. (Id., Par. 47)

48. DCF took custody of AJ in November 2016 because Mother was negligent. (Id., Par. 48)(Exhibits A-L)

49. DCF took custody of AJ in November 2016 because Mother was abusive. (Id., Par.

⁸ Exhibit F – CHINS Petition, Docket No. 209-11-16 Wnjv

⁹ Exhibit G, Initial Case Plan, Dated 2/10/17, Page 4

¹⁰ Id.

¹¹ Id.

49)(Exhibits A-L)

50. Beginning on October 20, 2016, AJ lived with foster family [REDACTED] in East Montpelier, Vermont. ¹² (Id., Par. 50)(Exhibit E, [REDACTED] Aff., Page 1)

51. On December 12, 2016, a Temporary Care Order – CHINS was ordered and custody of AJ was transferred to DCF. ¹³ (Id., Par. 51)(Exhibit H, Temporary Care Order, Dated 12/2/16)

52. On February 17, 2017, Mother admitted that AJ was a child in need of care and supervision at the time the case started. The parties signed a Merits and Stipulation Order. ¹⁴ In the Stipulation, Mother admitted that AJ was a “Child in Need of Care and Supervision Pursuant to 33 VSA § 5102(3)(B).” She further admitted that she was negligent in her care of AJ as “inappropriate housing and lack of resources placed the children at risk of harm.” Id. The Court found that AJ was a Child in Need of Care or Supervision pursuant to 33 VSA §5102(3), in that the child is “without proper parental care or subsistence, education, medical or other care necessary for his or her well-being.” (Id., Par. 52)

53. Thereafter, the Court issued a Juvenile Disposition Order – CHINS.¹⁵ (Id., Par. 53)(Exhibit J, Juvenile Disposition Order – CHINS, Dated 2/17/17) In that Order, the Court stated: “The Court’s findings and conclusions are based on the following: Factual stipulation of the parties at merits, Facts set forth in the case plan filed by DCF and agreed to by the parties,

¹² Exhibit E, [REDACTED] Affidavit, dated 11/7/16, page 1)

¹³ Exhibit H – Temporary Care Order – Dated 12/2/16

¹⁴ Exhibit I – Merits Stipulation and Order, Dated 2/17/17

¹⁵ Exhibit J – Juvenile Disposition Order – CHINS, Dated 2/17/17

Representations of the parties at the disposition hearing.” (Id., Par. 53)(Id.) The Court further stated: “The Court finds as follows: 1. At merits, the child was found to be a child in need of care and supervision (CHINS); 2. Findings in support of this order are made on the record.” (Id.)(Id.)

54. On February 17, 2017, Mother was granted CCO of her daughter, A [REDACTED]. A [REDACTED] had been with paternal grandmother, [REDACTED] under CCO.¹⁶ (Id., Par. 54)(Exhibit K – CCO (Docket No. 227-11-16 Wnjv)

55. On April 13, 2017, a Post Disposition Review Hearing took place. At that review hearing, the Court noted that AJ was still in foster care with the [REDACTED] and in DCF custody but had contact with Mother. That same day the Court issued a Post Disposition Review Order.¹⁷ Pursuant to the Order, AJ was to remain in DCF custody. (Id., Par. 55)(Exhibit L – Post Disposition Review Order, Dated 4/3/17)

56. On July 5, 2017, AJ drowned while in DCF custody at the [REDACTED] residence. (Id., Par. 56)

As the Undisputed Statement of Facts shows, Mother has an extensive history with DCF involvement as it relates to her two children, A [REDACTED] C [REDACTED] and AJ. Throughout the lives of her two children, DCF was involved to address instances of child abuse and neglect as it related to both children. DCF was first involved with allegation of abuse of A [REDACTED] C [REDACTED]

The allegations against Mother regarding A [REDACTED] involved Mother’s losing her temper and striking A [REDACTED] repeatedly on many occasions bruising her face and body. (See P [REDACTED] Affidavits, Exhibits A-D) Mother would tell A [REDACTED] to not report the abuse to anyone.

¹⁶ Exhibit K – Conditional Custody Order of A [REDACTED] C [REDACTED] to Mother (Docket No. 227-11-16 Wnjv)

¹⁷ Exhibit L – Post Disposition Review Order, Dated 4/13/17.

However, over time, A ██████ started to talk to teachers, doctors, and other adults about Mother's actions. A ██████ went into DCF custody, although she was later returned to Mother with a Conditional Custody Order in February of 2017.

As for AJ, AJ first had unexplained bruising on his upper thighs in September of 2015. (Exhibit A) At that time, a daycare provider saw the bruising while she was changing AJ's diaper. She spoke with Mother about the bruising and Mother said she didn't see any bruising that day. The daycare provider was surprised since the bruising was extensive and clearly visible. Mother then told the daycare provider that perhaps her Aunt, who had been watching AJ the day before, had been bouncing AJ on her knee, and that had caused the bruising. Mother's Aunt denied that she caused the bruising and denied that she had been bouncing AJ with any type of force that could have caused such bruising. The location of the bruises was further inconsistent with the injury occurring from someone "bouncing" AJ on a knee. No reasonable explanation was ever provided. Dr. Karyn Patno and Dr. Joe Hagan both confirmed that the bruising was non-accidental.

In October of 2016, ██████ while caring for AJ saw AJ with a swollen and bruised eye. When ██████ asked Mother about the bruise, Mother said that AJ had "stepped on a crutch" and that the crutch had struck AJ in the eye. The story was questionable at best. The fact remained, however, that AJ, like A ██████ had unexplained bruises that suggested child abuse or, at the very least, neglect.

Mother's living circumstances were also a further cause for DCF concern. (See ██████ Affidavit, Exhibit E) She lived at 95 Granite Street, Barre, Vermont in a residence with multiple housemates. The housemates had extensive criminal histories as well as DCF involvement. The housemates used and sold drugs at the house and at least one housemate had

overdosed on heroin while living at the house. The house had no electricity. It had piles of garbage throughout the house with evidence of drinking and drug paraphernalia. It had a bad smell so strong that some people were unwilling to enter the residence, others would not enter without covering their nose and face. While Mother went to work, she often left her children in the care of people who were not suitable to care for her children. Mother was negligent in allowing her children to live at 95 Granite Street and to be looked after by residents of the house. She placed her children at risk of harm through her negligence. She was further negligent by allowing her children to have multiple instances of unexplained bruising.

The DCF CHINS petition was filed on November 8, 2016. AJ had already gone into the custody of [REDACTED] on October 20, 2016. On December 2, 2016, the Court issued a Temporary Care Order. On February 17, 2017, Mother admitted through a Merits Stipulation that she was negligent by “placing her children at risk of harm” by “inappropriate housing” and “lack of resources.”

When the Court accepted Mother’s stipulation, it also issued a Juvenile Disposition Order – CHINS on the same date (Exhibit J). The Court made findings based upon “facts set forth in the case plan filed by DCF and approved by the parties.” The facts in the case plan include the following facts:

1. “Allowing unsafe people to be present with AJ - [REDACTED] has allowed known drug users and drug dealers to be in the presence of AJ, thus exposing him to the potential risk of violence, drugs and drug paraphernalia. [REDACTED] also has a history of allowing people she does not know well to care for AJ, without knowing if they are “safe people.” (Id., Page 3)

2. “History of inadequate housing – AJ was living in housing without electricity and in a state described as ‘dirty and smelly.’” (Id.)
3. “History of physical abuse and neglect – DCF has a history with this family with serious concerns of physical abuse and neglect. [REDACTED] was substantiated for physical abuse of AJ in 2016.” Id.

STANDARD OF REVIEW

Summary Judgment may be granted only if, crediting, the non-moving party with the benefit of all reasonable doubts and inference, the case record presents no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Langrock Sperry & Wool, LLP v. Felis, 126 A.3d 509 (2015); Rule 56 V.R.C.P.

To survive a summary judgment motion, a nonmoving party bearing the burden of persuasion must come forward with evidence of a triable issue. Clayton v. Unsworth, 2010 VT 84 ¶ 16, 188 Vt. 432, 8 A.3d 1066. In the present case, Mother, [REDACTED] cannot come forward with a triable issue for the reasons set forth below.

Discussion

I. K [REDACTED] H [REDACTED] IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

A. 14 VSA § 1492(a)

There is a presumption in a wrongful death case that both Mother and Father are entitled to share in the wrongful death proceeds involving the death of a child.

14 VSA § 1492(a) permits an action for death for wrongful act: “The action shall be brought in the name of the personal representative of the deceased person and commenced within two year from the discovery of the death of the person.”

Here, AJ died on July 5, 2017 after drowning in a swimming pool while residing with his foster parents, [REDACTED] in East Montpelier, Vermont. Within two years, Mother, by and through her attorney, filed a petition with the Washington Probate Division to open an estate involving the wrongful death of a child. K [REDACTED] He [REDACTED] filed an appearance through counsel.

The parties mediated their case and reached a financial a settlement on damages. However, the parties were unable to agree on a division of the proceeds. Under 14 §1492(c), the Civil Division must make that determination.

B. 14 VSA §1492(c)(4) Bars Mother from Recovering.

Mother's right to recovery is excluded per 14 VSA §1492(c)(4).

In cases involving a parent who has neglected the child and lost custody of the child, §1492(c)(4) states: "No share of the damages or recovery shall be allowed in the estate of a child to a parent who has neglected or refused to provide for the child during infancy or who has abandoned the child whether or not the child dies during infancy, unless the parental duties have been subsequently and continuously resumed until the death of the child."

Here, K [REDACTED] He [REDACTED] will show that each of the elements has been met to preclude Mother from recovering.

1. Mother Neglected AJ.

CHINS proceedings are generally neglect proceedings. In re: D.D., Juvenile, 194 Vt. 508 (2013) See In re: PJ, 185 Vt. 606 (2009) (CHINS petition based upon affidavit by a DCF caseworker that set forth facts about Mother's neglect of child's medical and nutritional needs). In re: Stephen M. et al., 109 Conn. App. 644 (2008)(calling CHINS petitions "neglect petitions"

and the trial courts findings of “neglect” with respect to sexual abuse allegations of child by father). In this case, the State and DCF filed a petition alleging that Mother neglected AJ.

As for Mother’s neglect of AJ in this case, on February 17, 2017, Mother admitted that she neglected AJ by stipulating to facts which supported child-neglect in a CHINS proceeding. In that stipulation, Mother admitted that AJ was a “Child in Need of Supervision pursuant to 33 VSA § 5102(3)(B).” She admitted that she “placed the children at risk of harm” due to “inappropriate housing and lack of resources.” See Exhibits I and J. She did not contest the Petition which set forth facts supporting the allegations that Mother was neglecting AJ’s basic needs. (Exhibits E and F) Mother stipulated to her neglect at Merits rather than having a hearing. The Court made findings of Mother’s neglect in support of the Stipulation and Order. (Exhibits I and J) By doing so, the Court’s findings of Mother’s neglect explaining that the allegations in the CHINS petition were established necessarily meant that the facts establishing that Mother neglected AJ’s needs were determined to be true. In re: PJ, 185 Vt. 606 (2009)(family court’s findings that the allegations in the CHINS petition were established “necessarily meant that the facts establishing that mother neglected [the child’s] nutritional needs were determined to be true.”). Therefore, the issue of whether Mother was neglectful by putting AJ at risk of harm by having, inter alia, “inappropriate housing and lack of resources” has been decided.

Further, the history of Mother’s care of A [REDACTED] C [REDACTED] as well as other instances of abuse and neglect as it related to AJ, supported such a finding of neglect. Regarding both children, Mother could not account for bruising on both children on multiple occasions. See Exhibits A-E. Further, Mother failed to provide adequate care for her children. She lived in squalor – a house in Barre with no electricity filled with drug dealers and drug trafficking and individuals who had no business taking care of AJ during the day while Mother was out of the

house. The home was filled with garbage and had a strong smell of garbage. Individuals were under the influence and the home had a strong smell of marijuana. There were beer bottles and drug paraphernalia throughout the home. Mother placed her children at risk of harm. Mother's neglect of AJ was supported by the evidence.

On February 17, 2017, the Court made findings to support the CHINS (Exhibits I and J). Not only did the Court consider Mother's admissions through the merits stipulation, but it also incorporated "stipulated facts" from the Initial Case Plan (Exhibit G) which included: (1) DCF's substantiation of Mother for abuse of AJ in 2016; and that Mother had exposed AJ to risk of harm by (2) allowing him to stay in an unsafe home; (3) exposing him to risks associated with drug dealers who resided in the home; and (4) permitting unsafe people to look after AJ while Mother was not present. (Exhibit J)

In sum, the facts as outlined in the Affidavit of Social Worker [REDACTED] (Exhibit E), the CHINS Petition (Exhibit F), the Merits Stipulation and Order (Exhibit I), and the Court's Juvenile Disposition Order (Exhibit J), which incorporate the facts contained in the Initial Case Plan (Exhibit G), conclusively prove that Mother was neglectful in her care of AJ.

2. Mother Cannot Relitigate the Issue of Her Neglect.

The Orders (Exhibits I and J) on February 17, 2017 were final and collateral estoppel prevents Mother from denying her neglect of AJ or relitigating the issue.

In In Re PJ, 185 Vt. 606 (2009), the Supreme Court concluded that a CHINS Order is final and that collateral estoppel principals apply to juvenile cases and to CHINS orders. Id.

In that case, DCF had filed a petition alleging that mother had neglected her child's nutritional and medical needs. At the CHINS Merits hearing, Mother stipulated to a CHINS

order and stipulated that "[a]t the time the petition was filed, [E.M.] was a child in need of care and supervision due to [mother's] mental health issues and substance abuse." Id.

Mother never appealed this order. Mother subsequently attempted to have her DCF record of child-neglect expunged, arguing that she should be entitled to a Fair Hearing at the Human Services Board. The State opposed the request for hearing arguing that collateral estoppel principles applied due to the CHINS order that was issued following Mother's stipulation at the CHINS merits hearing.

The Supreme Court analyzed the collateral estoppel argument as per Trepanier v. Getting Organized, Inc., 155 Vt. 259 (1990). In Trepanier, the Court applied a 5-part test:

- (1) Preclusion is asserted against one who was a party. . . in the earlier action;
- (2) The issue was resolved by a final judgment on the merits;
- (3) The issue is the same as the one raised in the later action;
- (4) There was a full and fair opportunity to litigate the issue in the earlier action;
- (5) Applying preclusion in the later action is fair. Id.

Applying the Trepanier standard to the facts in In re: PJ, supra, the Court found that collateral estoppel principles applied. The Court found that based on collateral estoppel, "we conclude that the CHINS determination precludes relitigation of the nutritional neglect issue." Id., Par. 9.

As for the first element, the Court found that it applied since Mother was a party in the earlier action. Id.

As for the second element, the Court found that the CHINS order was a final judgment ("The CHINS determination became a final judgment when mother did not appeal the

determination.” (See Cent Vt. Pub Sera Corp., 172 Vt at 30 (stating that decision became a final judgment when not appealed)). Id.¹⁸

The third element required that the issue be “the same as the one raised in the later action.” Id. In In re: PJ, 185 Vt. 606, the Court determined that the juvenile court had made findings of Mother’s neglect based upon the Petition. Further, Mother stipulated to her neglect by agreeing that at the time that the Petition was filed, the child was CHINS. Therefore, by the Court’s making findings and Mother’s agreeing that the CHILD was CHINS, “mother necessarily agreed that she had neglected [the child’s] nutritional needs.” Id. at 609.

The fourth and fifth elements are generally considered together – whether there was a full and fair opportunity to litigate and whether it is fair to apply preclusion here. Id. The Court considered a variety of factors including: the type of preclusion, the choice of forum, the incentive to litigate, the foreseeability of future litigation, the legal standards and burdens in each action, the procedural opportunities of each forum and the possibility of inconsistent determinations. Id. (citing Cent. Vt. Pub. Serv. Corp., 172 Vt at 31) The Court held that the “party opposing application of collateral estoppel has the burden of showing that it is appropriate to relitigate the issue.” Id. (citing Trepanier, 155 Vt. At 266). The Court concluded that mother had not met that burden:

“Mother had the opportunity to contest the facts underlying the nutritional neglect allegations at the CHINS merits hearing. That mother chose to stipulate and not contest this issue does not negate the fact that she had the opportunity to do so.”
In re: PJ, Id.

In this case, the Court should find that the collateral estoppel as set forth in In Re: PJ and Trepanier apply to Mother. As for collateral estoppel, the Court should conclude that:

¹⁸ In re D.D., 194 Vt. 508 (2013)(“A merits adjudication in child in need of care or supervision (CHINS) proceeding is a final appealable order. . .”); In re: M.A.V., 2011 WL 4975620 (2011)

- (1) Preclusion is asserted against Mother who was the party in the earlier action. In the juvenile case, DCF and the State had filed a CHINS petition against Mother for her neglect of AJ. Mother was the party in the earlier action and is the same party in this action.
- (2) The issue was resolved by a final judgment on the merits. On February 17, 2017, Judge Griffin accepted Mother's Merits Stipulation and issued an Order (Exhibit I) regarding AJ's being CHINS at the time that the petition was filed. Mother had the opportunity to challenge the State's case, the allegations that she neglected AJ, and opted not to do so. Rather, she stipulated that she neglected AJ through "inappropriate housing and lack of resources" which created "risk of harm." The Court then entered a second Order on the same day, Juvenile Disposition Order – CHINS (Exhibit J). The Court made findings based upon "facts set forth in the case plan filed by DCF and approved by the parties." The facts in the case plan included the following facts:
- A. "Allowing unsafe people to be present with AJ - K[REDACTED] has allowed known drug users and drug dealers to be in the presence of AJ, thus exposing him to the potential risk of violence, drugs and drug paraphernalia. K[REDACTED] also has a history of allowing people she does not know well to care for AJ, without knowing if they are "safe people." (Id., Page 3)
 - B. "History of inadequate housing – AJ was living in housing without electricity and in a state described as 'dirty and smelly.'" (Id.)
 - C. "History of physical abuse and neglect – DCF has a history with this family with serious concerns of physical abuse and neglect. K[REDACTED] was substantiated for physical abuse of AJ in 2016." Id.

From all of the evidence considered by the Court, the conclusion that Mother neglected AJ was supported by the evidence. Mother never appealed either of the two orders entered on February 17, 2017.

- (3) The issue is the same as the one raised in the later action. Here, the issue is whether Mother's neglect in the CHINS proceeding precludes her from taking any share of the wrongful death proceeds pursuant to 14 VSA § 1492(c)(4). The issue in the CHINS proceeding was whether Mother neglected AJ. The issues are identical.
- (4) There was a full and fair opportunity to litigate the issue in the earlier action. On February 17, 2017, Mother had an opportunity to challenge the CHINS petition at a merits hearing. At such a hearing, the State carries the burden of proving the underlying allegations through evidence – testimony and exhibits. At the hearing, Mother could have challenged the State's evidence. She chose not to. At all times Mother had an attorney, Kate Kennedy, representing her. They chose to agree to a Merits Stipulation instead of challenging the allegations through a hearing. Mother also never appealed the Orders. This shows that Mother had a full and fair opportunity to litigate the issue of her neglect of AJ.
- (5) Applying preclusion in the later action is fair. In this case, it is fair for the Court to conclude that Mother's Stipulation to her neglect, and the Court's finding of her neglect in February 2017, makes this a final order that should not be relitigated. There is no reasonable support for Mother to be able to relitigate the same issue since she had a full and fair opportunity to litigate the issue of negligence once already.

In In re: PJ, supra, the Court emphasized the reasoning behind collateral estoppel:

“The purpose of collateral estoppel is to conserve the resources of courts and litigants by protecting them against repetitive litigation, to promote the finality of judgments, to encourage reliance on judicial decisions, and to decrease the chances of inconsistent adjudication.” *Id.*, 185 Vt. 606, 608 (quoting *Cent. Vt. Pub. Serv. Corp.*, 172 Vt. At 20).

Here, Mother’s neglect of AJ was concluded at the CHINS merits hearing on February 17, 2017. Mother had an attorney and a full opportunity to litigate the issue of her neglect. There is no reason that the Court should allow for a second hearing on the same issue. As the Vermont Supreme Court has held, collateral estoppel allows for final judgments to remain final, allows for parties to rely on judicial decisions, and decreases the chances of inconsistent adjudication. It avoids repetitive litigation and conserves the resources of courts and litigants. These are reasons for finding that collateral estoppel applies in this case.

For these reasons, the Court should find that collateral estoppel applies and the Court should hold that Mother’s neglect of AJ cannot be relitigated.

3. Mother Lost Custody.

On December 2, 2016, the Court transferred legal custody of AJ to DCF. (Exhibit H).

Pursuant to 33 V.S.A. § 5102(16)(A), Legal Custody is defined as:

"Legal custody" means the legal status created by order of the court under the authority of the juvenile judicial proceedings chapters which invests in a party to a juvenile proceeding or another person the following rights and responsibilities:

- (i) the right to routine daily care and control of the child and to determine where and with whom the child shall live;
- (ii) the authority to consent to major medical, psychiatric, and surgical treatment for a child;
- (iii) the responsibility to protect and supervise a child and to provide the child with food, shelter, education, and ordinary medical care;
- (iv) the authority to make decisions which concern the child and are of substantial legal significance, including the authority to consent to civil marriage and enlistment in the U.S. Armed Forces, and the authority to represent the child in legal actions.

Once the Court transferred legal custody of AJ to DCF, Mother only retained “residual parental rights.” 33 VSA 5102 16(B) provides: “If legal custody is transferred to a person other than a parent, the rights, duties, and responsibilities so transferred are subject to the residual parental rights of the parents.”

Pursuant to 33 VSA § 5102 16(B), since legal custody was transferred to DCF, Mother only retained “residual parental rights” which are defined at 33 VSA § 5102 (26) as follows:

“Residual parental rights and responsibilities” means those rights and responsibilities remaining with the parent after the transfer of legal custody of the child, including the right to reasonable contact with the child, the responsibility for support, and the right to consent to adoption.

As per Title 33, supra, once the Court transferred custody of AJ to DCF, Mother only had parent-child contact, obligations to pay support, and right to consent to adoption. Mother had no other legal rights with respect to AJ after custody was transferred. Therefore, once AJ went into DCF custody, she only had parent-child contact and no longer had any parental duties. Mother therefore lost her parental duties when custody was transferred to DCF on December 2, 2016 (Exhibit H).

4. Mother Never Resumed Her Parental Duties.

AJ remained in DCF custody until his death on July 5, 2017. Mother had parent-child contact only. Since AJ remained in DCF custody up until the time of his death, the Court can only conclude that Mother never resumed her parental duties.

Therefore, the Court must conclude that Mother did not “subsequently and continuously resume her parental duties” as the Statute requires.

5. Each of the elements of 14 VSA §1492(C)(4) Is Met.

Based on the arguments set for the above, K██████ H██████ has shown the following:

- a. Mother neglected AJ;

- b. Mother lost custody of AJ to DCF due to her neglect;
- c. Mother never resumed her parental duties prior to AJ's death.

6. Statutory Language is Clear and Unambiguous.

In State v. Love, 205 Vt. 418 (2017), the Vermont Supreme Court held: “When construing a statute, our paramount goal is to effectuate the intent of the Legislature.” (quoting State v. Thompson, 174 Vt. 172, 174 (2002)). We look first to the statutory language’s plain meaning and, if this language clearly expresses the legislative intent, we will enforce the statute without relying on statutory construction. (Id.)” Id. at 421.

Here, the words are clear. There is nothing ambiguous. The statute provides conditions where a parent is not allowed to collect wrongful death damages. One of those conditions, at issue here, includes a parent who loses custody of a child to DCF due to her neglect of her child, and the child dies while in DCF custody before the parent resumes her parental duties of the child. In those cases, the parent cannot collect wrongful death damages. The statute applies to Mother.

For these reasons, K██████ H██████ submits that Mother is not entitled to any portion of the wrongful death settlement as per 14 VSA §1492(C)(4).

II. Summary Judgment is Appropriate.

Summary Judgment may be granted only if, crediting, the non-moving party with the benefit of all reasonable doubts and inference, the case record presents no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Langrock Sperry & Wool, LLP v. Felis, 126 A.3d 509 (2015); Rule 56 V.R.C.P.

To survive a summary judgment motion, a nonmoving party bearing the burden of persuasion must come forward with evidence of a triable issue. Clayton v. Unsworth, 2010 VT 84 ¶ 16, 188 Vt. 432, 8 A.3d 1066.

In the present case, for the reasons set forth above, Mother, [REDACTED] cannot come forward with a triable issue. Based upon the affidavits, exhibits, and orders, the Court should conclude that the elements set forth in 14 VSA § 1492(c)(4) have been conclusively established and that Mother is not entitled to any portion of the wrongful death damages. No further testimony or evidence is necessary for the Court to conclude that 14 VSA § 1492(c)(4) applies in this case. Based upon the facts submitted and the case law provided, the Court should conclude that Mother is precluded from recovering any portion of the wrongful death damages.

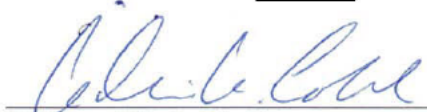
Conclusion

Based on the foregoing, K [REDACTED] respectfully requests that the Court grant K [REDACTED] H [REDACTED] Motion for Summary Judgment, enter judgment in his favor, and issue an Order granting K [REDACTED] H [REDACTED] the entire wrongful death damages amount.

Dated at St. Johnsbury, Vermont this 10th day of January, 2020.

K [REDACTED] H [REDACTED]

By:



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