STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
DOCKET NO: 446-8-19 Wncv

In re: Estate of A H )

**K H REPLY TO K L 'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND MOTION FOR DECLARATORY JUDGMENT**

NOW COMES K H by and through his attorney, William W. Cobb, and hereby replies to K L 's opposition to the motion for summary judgment and motion for declaratory judgment.

In this Reply, K H submits the following:

4. Mother's Argument That the Juvenile Records Are Inadmissible Must Fail. (Page 20)

   Legal Standard (Page 21)

   i. The Need to Keep Juvenile Records Confidential is to Protect the Juvenile. (Page 21)

   ii. The Right to Keeping Juvenile Records Confidential is a "Privilege" not an "Absolute Right." (Page 22)

   iii. The Privilege to Keep Juvenile Records Confidential Belongs to the Juvenile, Not Third Parties. (Page 23)

   iv. Privilege May be Waived. (Page 23)

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   vi. Juvenile Records May Be Used for Impeachment Purposes. (Page 27)

   vii. Wrongful Death Cases Involving a Deceased Juvenile Permit Discovery of the Juvenile Records by Proper Parties. (Page 28)

   viii. Juvenile Records are Discoverable in Wrongful Death Cases Where The Records are Relevant to the Civil Case, Where Juvenile is Deceased, and Where Protection is for the Juvenile. (Page 29)

   ix. Court May Inspect The Relevant Records *In Camera* and Then Decide Which Documents Should be Released. (Page 31)

   A. Mother Has No "Privilege" Rights Since She is a Third Party. (Page 31)

   B. Mother Waived any Rights She Had by Filing This Civil Action. (Page 31)

   C. The Juvenile Records, Including Court Orders, Are Relevant and Necessary for the Civil Action. (Page 32)

   D. The Juvenile Documents are Admissible for Impeachment Purposes. (Page 33)

   E. By Enacting 14 VSA § 1492, the Legislature Created a Statute Which Must Include the Production and Use of Juvenile Records. (Page 33)

   F. None of the Juvenile Records or Information is Actually Confidential. (Page 34)

## I. Introduction

### Procedural History

As previously stated in K[redacted]H[redacted]'s Motion for Summary Judgment, the parties are the biological parents of AJ, the 2-year-old boy, who died while in DCF custody on July 5, 2017. The parties opened an estate proceeding in Probate Court and provided notice that the parties, as the parents of AJ, were the interested parties in the estate, and that the parties were pursuing a wrongful death action pursuant to 14 VSA §1492(a). The parties thereafter mediated their case with the

insurance companies representing the foster family and DCF and reached a settlement. Despite reaching a settlement, the parties could not agree upon a division of the assets amongst themselves. Mother, K[redacted] L[redacted] ("Mother"), through her counsel, then filed a petition with the Civil Division pursuant to 14 VSA §1492(b) and (c) requesting that the Civil Division hear the evidence and determine how much of the settlement each party should receive.

14 VSA §1492(b) states:

> The court or jury before whom the issue is tried may give such damages as are just, with reference to the pecuniary injuries resulting from the death, to the spouse and next of kin, as the case may be. In the case where the decedent is a minor child, the term pecuniary injuries shall also include the loss of love and companionship of the child and for destruction of the parent-child relationship in an amount as under all the circumstances of the case, may be just.

14 VSA §1492(c) states:

> The amount recovered shall be for the benefit of the spouse and next of kin, as the case may be and shall be distributed by the personal representative as hereinafter provided. The distribution, whether of the proceeds of a settlement or of an action, shall be in proportion to the pecuniary injuries suffered, the proportions to be determined upon notice to all interested persons in such manner as the Superior Court, or in the event the court is not in session as Superior judge, shall deem proper and after a hearing at such time as the court or judge may direct, upon application made by the personal representative or by the spouse or any next of kin. The distribution of the proceeds of a settlement or action shall be subject to the following provisions: (with a list of 6 provision, 14 VSA §1492(c)(1-6))

At issue is 14 VSA §1492(c)(4), which is the 4th provision.

14 VSA §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.

Therefore, while the Civil Division generally would consider "equitable principals" to determine damages of pecuniary losses for each party based upon 14 VSA §1492(b) and (c),

in the event that one of the provisions of 14 VSA §1492(c)(1-6) applies, then the Court must consider whether one party or the other is precluded from recovery. As mentioned, 14 VSA §1492(c)(4) outlines one of the exceptions to recovery. Pursuant to 14 VSA §1492(c)(4) if a party (1) neglected a child; (2) lost custody to DCF; (3) and never subsequently and continuously resumed parental duties prior to the death of the child, then that parent is precluded from recovering any portion of the wrongful death settlement.

Father's Motion for Summary Judgment

In this case, Father has made such a claim against Mother that 14 VSA §1492(c)(4) applies and that Mother is precluded from recovering any portion of the wrongful death settlement. Father's Motion outlines the following: (1) that Mother neglected AJ; (2) that Mother cannot relitigate the issue of her neglect since she admitted her neglect at a [redacted] hearing on February 17, 2017 (In re: PJ, 185 Vt. 606 (2009); Trepanier v. Getting Organized, Inc., 155 Vt. 259 (1990)); (3) that Mother lost custody of AJ to DCF; and (4) that Mother never subsequently and continuously resumed her parental duties prior to AJ's death since he remained in DCF custody until his death.

As part of his motion, Father also submitted a Statement of Undisputed Material Facts that outlined the factual background of Mother's parenting of her two children. In the Statement of Undisputed Material Facts, Father states that Mother had a history of abusing and neglecting her two children and that both children were subsequently taken into DCF custody. Those cases involving the decedent, AJ, and his sister, were later consolidated in the Juvenile Court. [1] Father relied on documents that he had in his possession from his participation in the juvenile hearings. As part of his Motion for Summary Judgment Father filed the documents under seal. However,

[1] Docket Nos. 169-9-15 Wnjv/170-9-15 Wnjv

Father referenced the facts that are contained in the documents as part of his Statement of Undisputed Facts. The facts, as offered by Father, outline the history of abuse and neglect, and reference the various third parties that were part of the juvenile proceeding. See Kristopher H[redacted]'s Motion for Summary Judgment.

Mother's Opposition to Father's Motion for Summary Judgment and Motion for Declaratory Judgment

On February 11, 2020, Mother filed her opposition to Father's Motion for Summary Judgment. She makes the following arguments: (1) that the information from the juvenile hearings is inadmissible in this civil proceeding since the juvenile information is confidential information and the juvenile proceedings are closed proceedings; (2) that the Statement of Undisputed Material Facts, Motion for Summary Judgment and Motion for Declaratory Judgment are not based on the "personal knowledge" of K[redacted] H[redacted](3) that the Motion for Summary Judgment is based on inadmissible evidence; (4) that the undisputed facts are disputed, but that Mother has no obligation to admit or deny the Statement of Undisputed Facts since they reference confidential information from the juvenile proceedings; (5) that even if Father could produce admissible, undisputable facts he is not entitled to judgment as a matter of law since (a) it would not be equitable to grant summary judgment to Father and exclude Mother from receiving any portion of the proceeds, (b) that it was really Father who was abusive and neglectful, (c) that Father has not proven that "neglect" as stated in 14 VSA §1492(c)(4) is identical to an admission that a juvenile is a [redacted] and that a child found to be [redacted] is not necessarily neglected, (d) that Father should not prevail on his collateral estoppel arguments since State v. Ashley Nutbrown-Covey, 204 Vt. 363 (2017) shows that there are cases where collateral estoppel does not apply, and (e) that Father cannot speak of whether Mother resumed her parental duties of AJ because Father was incarcerated at

the time, and that, in any event, Mother had "adequately resumed her parental duties" prior to AJ's death. (See Opposition, pages 3-11)

Mother concludes by stating that Father has filed this motion in bad faith, that he was incarcerated for much of AJ's short life, that it is Father, and not Mother, who is subject to 14 VSA §1492(c)(4), that the settlement value was "based solely on the value of Mother K[redacted] L[redacted]'s grief and loss of her son," and that it would be inequitable to deny Mother recovery of the settlement money. (Id., page 11).

In her opposition to Father's Motion for Summary Judgment, Mother also provided a sworn affidavit. See Affidavit of K[redacted] L[redacted], attached to Opposition to Motion for Summary Judgment.

Mother did not answer Father's Statement of Undisputed Facts.

K[redacted] H[redacted] will address each of these arguments in turn.

## II. Argument

### 1. Father is Entitled to Judgment as a Matter of Law.

#### A. Father is Entitled to Default Judgment Since Mother Failed to Answer Father's Statement of Undisputed Facts and Those Facts are Now Deemed Admitted.

Father moves for judgment as a matter of law. In this case, Father filed and served his Motion for Summary Judgment and Statement of Undisputed Facts on January 11, 2020. Mother had 30 days to respond to Father's Motion (V.R.C.P. 56(c)(1) and (2)).

Pursuant to V.R.C.P. Rule 56(c)(2): "All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

On February 11, 2020, Mother filed her opposition to Father's Motion for Summary Judgment. However, she failed to respond to the Statement of Undisputed Material Facts. For those reasons, the facts in that Statement are deemed admitted. V.R.C.P. Rule 56(c)(2)

Pursuant to Father's Statement of Undisputed Material Facts, Mother admitted the following facts: that she neglected AJ: "[redacted] in November 2016 because mother was [redacted]" Id., No. 48; [redacted] of AJ in November 2016 [redacted]" Id., No. 49; that at the [redacted] 2017 [redacted]". . . She further [redacted]' Id., No. 52; that [redacted] while in [redacted] residence." Id., No. 56

Mother argues that Father's Statement of Undisputed Material Facts is offered without having personal knowledge of the facts. This argument is baseless. Father stands by his affidavit that the facts are made with personal knowledge. First, Father was a party to the [redacted] proceedings which had been consolidated. Although he was often incarcerated during this time, his attorney, Larry Myer, kept him apprised of all procedural developments. Second, contrary to Mother's assertions, Father participated in some, not all, of the proceedings by phone. It is worth noting that Father specifically chose not to appear by phone on [redacted] the day of the [redacted] hearing. That was because his attorney advised him that the [redacted] against Mother, and not Father. He was advised, therefore, that the proceedings did not concern him and he chose not to listen in.

Father was familiar with all of the facts in the Statement of Undisputed Material Facts. He referenced the sealed [redacted] documents for organizational purposes only. He had

possession of all the documents that were filed with this Court. During the [redacted] proceedings, Father was aware of the affidavits, the people involved, most of whom Father knew personally, and the allegations made by [redacted] against Mother as those claims related to AJ and her daughter.

Mother's claim that Father learned of the [redacted] information only through obtaining the [redacted] information through some back channel is without merit. Father was a party to the proceedings involving both [redacted] and was fully aware of the facts and statements in those proceedings.

By not answering the Statement of Undisputed Facts, Mother has admitted that she [redacted] and that she never subsequently and continuously resumed her parental duties at any time prior to his death.

For these reasons, this Court should grant Father's Motion for Summary Judgment.

**B. Even if the Facts are Not Deemed Admitted Due to Mother's Default, Mother, in her Affidavit in Support of Her Opposition, Admits the Facts that Support Father's Motion for Summary Judgment.**

However, even if the Court were not to consider Father's default arguments, i.e., that Mother's failure to answer the Statement of Undisputed Facts entitles Father to default judgment, Mother's own affidavit admits all of the essential elements of 14 VSA § 1492(c)(4).

First, her affidavit states that she [redacted] to her [redacted] and [redacted] but I continued to have contact with him daily." (Lamell Aff., par. 12)

Second, she admits that she only had parent-child contact: "I continued to have daily contact with AJ and he would stay overnight in our home in Bolton two to three times per week." (Id., par. 15).

Third, she admits that she never regained custody of AJ: "I worked very hard to regain custody of AJ. . ." Id., par. 14. She further admits that in May 11, 2017 she missed a [redacted] date that she believed involved returning [redacted] to her: "The Washington Family Court scheduled a hearing on [redacted] at which time the Court was going to return [redacted] of AJ back to me [redacted]" Id., par. 16. However, due to missing the court date, the matter was re-scheduled to July 11, 2017: "Sadly, there was a miscommunication regarding the time of the [redacted] and when I arrived at the [redacted] I was told the hearing had been held earlier in the day and that the [redacted] had been postponed until [redacted] 2017." Id., par. 17.

Fourth, she admits that AJ was still in [redacted]: "On July 5, 2017, while in the care of the [redacted]" Id., par. 19.

Based on her own admission, the Court can conclude that there is no genuine issue of fact requiring a trial and can enter judgement in favor of Father. Langrock Sperry & Wool, LLP v. Felis, 126 A.3d 509 (2015); Rule 56 V.R.C.P. ("Summary Judgement 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 moving party is entitled to judgment as a matter of law.") By admitting the [redacted] of AJ, Mother has stipulated to the essential elements of Father's collateral estoppel argument: That Mother: (1) [redacted] due to [redacted]; (3) and never subsequently and continuously resumed parental duties prior to AJ's [redacted]. Therefore, there is no evidence of a triable issue. Clayton v. Unsworth, 2010 VT 84.

Father's Motion for Summary Judgment requests judgment based upon collateral estoppel arguments. In re: PJ, 185 Vt. 606 (2009). By admitting to all of the essential facts in her

affidavit, the Court can conclude that each of the elements as set forth in In re: PJ, supra, and Trepanier v. Getting Organized, Inc., 155 Vt. 259 (1990) have been met.

For these reasons, Father's Motion for Summary Judgment should be granted as a matter of law.

**C. Mother's Arguments Against Collateral Estoppel Must Fail.**

Father's basis for the Motion for Summary Judgment is that collateral estoppel applies in this case. If this Court decides that collateral estoppel applies, then Father will show that the rest of Mother's opposition is moot since the remainder of her opposition concerns the type of evidence that should be deemed admissible and relevant at a trial, which can be decided upon at a later time. For example, Mother's arguments that any and all juvenile information is not admissible in this civil case is addressed more fully below. However, that issue is not dispositive to resolve the Motion for Summary Judgment, which is based upon Father's argument that collateral estoppel applies in this case.

In her brief, Mother makes three arguments against collateral estoppel: (1) Father has provided no support for his assumption that "neglect" in 14 VSA §1492(c)(4) is identical to an admission that a[redacted]" (Mother's Opp., page 9), and that it is merely Father's assumption that a child found to be [redacted] has been neglected. (Id.); (2) that State v. Ashley Nutbrown-Covey, 204 Vt. 363 (2017) shows that the family courts in a [redacted] case are more concerned about the welfare of the child and not solely on the behavior of the custodial parent (Id. at 10); (3) that since he was incarcerated, Father did not have first-hand knowledge as to whether Mother had resumed her parental duties of AJ; and (4) that, in any event, the insurance companies that settled the case were willing to consider

Mother's role as parent to AJ, and the fact that they paid money to settle the claim is evidence that she had resumed her parental duties.

Each of these arguments must fail.

**1. Mother's Challenge to Whether She "Neglected" AJ Must Fail Since Title 33 Defines Neglect and Mother's Actions Fit Squarely Within the Definition.**

First, in the [redacted] It is noteworthy that the only case Mother cites in her opposition to collateral estoppel is State v. Nutbrown-Covey, supra, which identifies a CHINS-B filing as a "child neglect case." As the Court stated in Nutbrown-Covey regarding the CHINS case: "The reason the Court did not make a specific finding about child abuse likely flows from the fact that the State's CHINS case for J.N. was premised on neglect (CHINS-B), not on abuse (CHINS-A)." Id. at 370.

However, showing that [redacted] by signing the [redacted] can be shown through the Title 33 definitions.

Title 33 of the Vermont Statutes defines what constitutes "child neglect." In its simplest form "child neglect" means the failure to provide a child with adequate food, clothing, shelter or health care. [2]

33 VSA §4912(1) provides that a "neglected" child is one who suffers "harm" by the acts or omissions of a parent. [3] "Harm" is defined by 33 VSA §4912(6)(B) as failing to supply the

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[2] 33 VSA § 4912(1), (6)

[3] 33 VSA § 4912(1) defines neglect as follows: "Abused or neglected child" means a child whose physical health, psychological growth and development, or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. . ."

child with adequate food, clothing, shelter, or health care. [4] In this case, Mother [redacted] [5] According to 33 VSA §4912, failing to supply adequate "shelter" to your child constitutes "harm" which means the parent has "neglected" the child. Further, Mother agreed that such [redacted] 33 VSA § 4912(14) defines "Risk of harm": "Risk of harm" means a significant danger that a child will suffer serious harm by other than accidental means, which harm would be likely to cause physical injury, or sexual abuse, including as a result of (listing A-F as possible factors). Relevant to this case is 33 VSA § 4912(14)(C): "failing to provide supervision or care appropriate for the child's age or development and, as a result, the child is at significant risk of serious physical injury."

Therefore in this case, not only did Mother [redacted]

Finally, when a child is "CHINS" it means a "Child in need of care or supervision (CHINS), which according to 33 VSA § 5102(3) means a child who:

(A) has been abandoned or abused. . .

**(B) is without proper parental care of subsistence, education, medical or other care necessary for his or her well-being;** (emphasis supplied)

(C) is without or beyond the control of his or her parent, guardian, or custodian; or

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[4] 33 VSA § 4912(6) defines "Harm". "Harm can occur by:
(A) Physical injury or emotional maltreatment.
(B) Failure to supply the child with adequate food, clothing, shelter, or health care.

[5] See [redacted] dated [redacted].

(D) is habitually and without justification truant from compulsory school attendance.

Here, [redacted]

pursuant to 33 VSA § 5102(3)(B)([redacted] which was

[redacted]

[redacted]

[redacted]

[redacted]. . .

[redacted] 33 VSA § 5102(3)(B). He was [redacted]

[redacted]

Since the terms and definitions for "child neglect" are defined in Title 33, Father submits that the term "neglect" is the same in both a [redacted] proceeding as well as 14 VSA §1492(c)(4). 14 VSA §1492(c)(4) does not provide another definition for neglect and so it is logical that the term "neglect" as used in Title 33 - since it is the only definition provided for regarding child neglect - is the one that the legislature has chosen to use for any case involving child neglect. Mother argues that the "neglect" in 14 VSA §1492(c)(4) may not be the same as the "neglect" in Title 33. However, the legislature has defined what is meant by "child neglect" in Title 33 and Title 14 does not state that the word neglect has any other meaning. Mother offers no alternative meaning for "neglect."

Further, the general feedback on Vermont's definition of "child neglect" is that it is too narrow, and that many cases of child neglect do not get reported and/or prosecuted because the definition for child neglect is not broad enough. See "Child Neglect May Be Underreported in Vermont, Advocacy Group Reports, VPR News, dated August 7, 2015. https://www.vpr.org/post/child-neglect-may-be-underreported-vermont-advocacy-group-reports#stream/0. If true, then any other definition of "neglect" would only be a broader definition of neglect. Any broader definition of neglect would not support Mother's argument since a broader definition would make it easier to find neglect.

Finally, Mother's own affidavit confirms that she [redacted] AJ. She admits that AJ went [redacted] (Lamell Aff., par. 12).

For these reasons, the Court should find that Mothe[redacted] was the basis for the [redacted]

**2. Mother's Citation of State v. Nutbrown-Covey, 204 Vt. 363 (2017) Strengthens Father's Argument and Undermines Her Own.**

The only case Mother cites in opposition to Father's collateral estoppel argument is State v. Nutbrown-Covey, supra. However, that case undermines Mother's argument. That case merely illustrates how collateral estoppel principals do not apply when the 5-part test of Trepanier v. Getting Organized, Inc., 155 Vt. 259 (1990) is not met. It does not show that the 5-part Trepanier test does not apply in this case.

State v. Nutbrown-Covey, supra, involved Ashley Nutbrown-Covey, a mother of three children (J.N., A.N. and A.C.). In 2011, she brought A.N. to the hospital for a broken leg. The hospital did not report the injury to DCF because it had no reason to believe that mother or another adult had caused the injury. Id. Three years later in 2014, the State charged mother with one count of first degree aggravated domestic assault (for the leg injury to A.N.) and three

misdemeanor counts (Counts 2-4) of child cruelty. Id. at 366. Later that same month, the State filed a petition in the family division alleging that J.N. was without proper parental care in violation of 33 VSA § 5102(3)(B). Id.

At a merits hearing in December of 2014, the court took evidence about mother's care of her children. The State had witnesses to discuss A.N.'s broken leg in 2011 and other instances of neglect as it related to the other children. At the conclusion of the hearing, the court found that there was "no evidence at all" related to [defendant's] care during [J.N's] life that in any way, shape or form" suggested that defendant "presented a risk of abuse or neglect." Id. The court did not, however, make specific findings about the alleged incidents of A.N. and A.C.. The court dismissed the CHINS petition and returned J.N. to defendant's care. Id.

In September 2015, mother then filed a motion to dismiss in the criminal division arguing lack of prima facie case. Id. at 367. She also argued that collateral estoppel barred the State from relitigating the question of whether she abused A.N. or A.C. After a hearing, the Court denied her motion finding that collateral estoppel did not apply. She appealed. Id.

The Supreme Court outlined the reasons that collateral estoppel did not apply: First, that the question of defendant's alleged abuse of A.N. and A.C. was never fully resolved in the CHINS proceeding, especially since the court had never made findings related to A.N. and A.C.; second, because the State did not have a fair opportunity to fully litigate that issue since the CHINS proceeding concerned only J.N.'s welfare. Id. [6]

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[6] The Court noted that the first element was satisfied since it was the State in both the CHINS and criminal case and the defendant was opposing the State in both cases. However, the second and third elements were not met. As for the second element, whether the issue in the present action was resolved by a final judgment on the merits in the earlier proceeding, and the third element, whether the issue was the same in both proceedings, the Court considered those issues together.

As for the second and third elements, the Court found that the CHINS case involving J.N. left the allegations involving A.N. unresolved since the family court in the juvenile case did not need to determine whether mother had abused A.N. in that case. The only issue for the court concerned the welfare of J.N. Id. at 370. For this reason, the issue in the present criminal case, whether mother intentionally or recklessly caused serious injury to

The Court found that the elements of Trepanier v. Getting Organized, Inc. 155 Vt. 259 (1990) were not met. As the Court noted, "cases of crossover estoppel – where a party to a civil action claims that an issue decided in the civil case is preclusive in a subsequent criminal case – are rare, but so long as the elements of issue preclusion are satisfied, we see no barrier to the application of the doctrine in crossover cases." (Cases omitted). Nutbrown-Covey, supra, at 367-368.

Nutbrown-Covey, does not undermine Father's collateral estoppel arguments. In Nutbrown-Covey the elements of the Trepanier were not met for a variety of reasons, including the fact that the issues litigated in the juvenile case (i.e., allegations that mother neglected one daughter, J.N.) were not the same issues in the criminal case (i.e., allegations that mother recklessly or intentionally caused serious bodily injury to another daughter, A.N.). Further, Nutbrown-Covey does not hold that a CHINS adjudication cannot be used as a basis for collateral estoppel involving another proceeding. The Vermont Supreme Court has already addressed that issue squarely in In re: PJ, 185 Vt. 606 (2009), which hold that a CHINS adjudication may be used for collateral estoppel purposes in another proceeding as long as the Trepanier elements are met.

In her opposition, Mother cites Nutbrown-Covey and argues that the Court in a [redacted] proceeding focuses on the best interests of the child and not necessarily on the bad acts of the

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A.N. when A.N. appeared at the hospital with a broken leg, was not the issue before the family court as to J.N.'s welfare and well-being in the CHINS proceeding. Therefore, "the question of defendant's abuse of A.N. and A.C. was not necessary to the CHINS neglect petition concerning J.N." Id. at 370.

The Court further noted the different laws that apply in a CHINS case and criminal case. It held: " 'We conclude that a CHINS order, where the child's interests are paramount, is not analogous to a criminal conviction.'" (citing In re: J.J.P., 168 Vt. 143, 147)(1998)). Put differently, a criminal case seeks to identify any misconduct on the part of a defendant; A CHINS case seeks to identify how to best protect the child, regardless of whether or not the child's parent has engaged in misconduct." Id. at 371. The Court found that the elements of collateral estoppel were not met and denied mother's motion to dismiss based upon collateral estoppel. Id.

parent. (Mother's Opp., page 10) That is true. As is more fully argued below, juvenile cases are aimed to help the juvenile and not third parties. However, Mother does not show how that fact is relevant to opposing Father's Motion for Summary Judgment. Father argues that the elements in In re: PJ, 185 Vt. 606 (2009) and Trepanier, supra, have been met, and State v. Nutbrown-Covey does not undermine that argument. It only confirms that collateral estoppel applies only when the Trepanier elements have been met.

In sum, Mother has not set forth any case law or authority to show that the Trepanier elements have not been met in this case.

**3. Mother's Argument That She Subsequently and Continuously Resumed Her Parental Duties of AJ Must Fail.**

Mother supports her argument that she subsequently and continuously resumed her parental duties of AJ by claiming that: (1) Father lacked first-hand knowledge of her parent-child contact with AJ prior to AJ's death (Mother's Opp., page 10); and (2) the fact that the insurance companies were willing to pay a settlement of the case shows that the insurance companies recognized Mother's claim to have resumed her parental duties. (Id.) Both arguments are meritless.

Whether Mother "subsequently and continuously resumed parental duties" of AJ is a legal issue that the Court can decide by reviewing the [redacted] records including the relevant orders. Mother lost her [redacted] "Legal Custody" is defined in 33 VSA § 5102(16)(A) which provided [redacted] continued

[7] 33 VSA §5102(16)(A): "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,

following Mother's [redacted] and Order entered on [redacted] until AJ's death in July of 2017. At no time did the Court [redacted] or otherwise. As argued in his brief, Father submits that once Mother lost her [redacted] as defined in 33 VSA § 5102(26), which 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 for adoption." Id. Therefore, Mother's "residual parental rights" alone cannot satisfy "resuming parental duties" since residual parental rights essentially provide only for [redacted]

The clear language of 14 VSA § 1492(c)(4) provides that a parent who loses custody of a child due to neglect and does not subsequently and continuously resume parental duties prior to the child's death is precluded from recovering a wrongful death settlement. If the legislature had intended that resuming "parent-child contact" or the rights as provided in "residual parental rights" were sufficient, it would have so provided. However, it did not. Therefore, a parent does not "resume parental duties" unless he or she has legal custody transferred back to him or her by Court order. Here, Mother never had [redacted]. For this reason, she cannot argue that she had "subsequently and continuously resumed parental duties."

In sum, the Court should find that Mother did not "subsequently and continuously resume parental duties" as a matter of law.

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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 US armed forces, and the authority to represent the child in legal actions.

Mother argues that Father did not have personal awareness of her parent-child contact with AJ. (Mother's Opp., page 10) However, for the reason stated above Father's personal awareness of Mother's parent-child contact of AJ is irrelevant. Father is not disputing that Mother had parent-child contact. However, contact alone is only part of having [redacted] rights" which means that she did not have any [redacted] whatsoever.

Finally, the fact that the insurance company paid money to both Mother and Father to settle the wrongful death case does not prove that Mother had resumed her parental duties. A determination of Mother's parental duties is a legal issue that this Court can determine by examining the orders that were in effect in the [redacted] Once examining those orders, which are part of Father's Motion for Summary Judgment, the Court can make a finding that Mother never resumed her parental duties prior to AJ's death.

**4. Mother's Argument That the [redacted] Are Inadmissible Must Fail.**

Mother argues that the [redacted] inadmissible because they are confidential. She argues that there should be an absolute right to keep all the evidence from the [redacted] proceedings – documents, facts, witness statements, witness names, and other related information - from this civil proceeding because of the confidentiality statute. (Mother's Opp., pages 3-11) Mother does not seek to merely limit the introduction of the evidence at trial. Rather, she is making the untenable argument that the information itself – Mother's [redacted] witness statements, testimony by parties, facts related to the allegations – is exempt from even being mentioned in the civil action – through discovery or otherwise - because of confidentiality.

Father submits that the [redacted] information is not exempt from this civil case since the information and documents are relevant and admissible. Further, Father submits that Mother's arguments are more properly addressed as a Motion in Limine, where Mother seeks to keep

certain information from a trial even if it is relevant. As for relevancy, Mother must concede that the information from the [redacted] cases is relevant. Afterall, the facts and circumstances regarding the allegations of [redacted] are arguably relevant to the parties' "pecuniary losses" since such losses are measured, at least in part, by the "loss of love and companionship of the child" and for "destruction of the parent-child relationship" in an amount as "under all the circumstances of the case, may be just." 14 VSA § 1492(b)(emphasis supplied) As for relevancy, the Court could not determine the pecuniary losses as set forth in 14 VSA § 1492(b) if the parties could not present evidence regarding all the facts and circumstances of the case, including the [redacted] for being a [redacted] that she in fact [redacted] her children.

Father submits that the Court should consider all of the relevant facts and circumstances. The issue therefore is whether the [redacted] (Dockets No. [redacted]) can be used in this civil case. Mother argues that they are exempt. Father submits that the [redacted] are confidential, but that they are relevant and admissible in this proceeding for the reasons set forth below.

**Legal Standard**

Although confidentiality generally applies to [redacted] proceedings since [redacted] proceedings are closed proceedings, there are exceptions which apply in this case. Since Vermont does not have extensive case law on this topic, an overview of the legal standard is set forth below.

**i. The Need to Keep [redacted] Records Confidential is to Protect the [redacted].**

It is axiomatic that every state has enacted statutes which provide for confidentiality in juvenile proceedings. Vermont also has statutes which aim to protect juveniles and to keep such juvenile records and files confidential and not open to the public. 33 VSA §§ 5110, 5117. As the Vermont Supreme Court has held, the purpose of confidentiality is to protect the juvenile and to ensure that the juvenile does not suffer prejudice by having the proceedings open to the public. See State v. Madison, 163 Vt. 390, 395 (1995)("The purpose for confidentiality of juvenile records is protection of the child from the prejudice generated by public scrutiny."). Other jurisdictions support keeping juvenile cases closed and confidential to protect the juvenile. Davis v. Alaska, 415 U.S. 308, 319(1974)("We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender."); Smith v. Harold's Supermarket, Inc., 685 S.W.2d 859 (Mo.Ct. App. 1985)("It cannot be disputed that the overall purpose and intent of [the confidentiality statute] is to protect and safeguard the best interests of the juvenile, and from such a purpose and intent our state at large derives a benefit and its best interests are served."); Herget v. Circuit Court for Waukesha County, 84 Wis.2d 435 (1978)("Confidentiality is essential to the goal of rehabilitation, which is in turn the major purpose of the separate juvenile justice system.")

**ii. The Right to Keeping Juvenile Records Confidential is a "Privilege" not an "Absolute Right."**

Courts that have addressed the issue about whether juvenile records may be discoverable in a civil proceeding, have concluded that such a right to keeping juvenile records confidential is based upon "privilege" and not an "absolute right." State ex rel. Rowland v. O'Toole, 884 S.W.2d 100 (1994); State ex rel. Herget v. Circuit Court for Waukesha County, 84 Wis.2d 435, 449 (1978)("Although the juvenile records which are the subject of [the Statute] are privileged

records by virtue of [the Statute], they are not absolutely privileged and hence are discoverable in limited circumstances."); In re: William H., 88 Conn. App. 511, 519 (2005)(juvenile records not absolutely privileged); Doe v. D'Angelo, 154 A.D.3d 1300, 1301 (2017)(NY Fourth Department).

**iii. The Privilege to Keep Juvenile Records Confidential Belongs to the Juvenile, Not Third Parties.**

However, since confidentiality statutes are intended to protect the juvenile, the right to keeping juvenile records confidential is a privilege afforded the juvenile, and not third parties. Smith v. Harold's Supermarket, Inc., 685 S.W.2d 859 (Mo.Ct. App. 1985)(confidentiality statute's protections are privileges exclusively accorded the juvenile); State ex rel. Rowland v. O'Toole, 884 S.W.2d 100 (1994)("Thus it is clear the privilege is that of the juvenile plaintiff and not of the plaintiff parents.")

**iv. Privilege May be Waived.**

Further, courts hold that this privilege may be waived. See, e.g., In re: William H., 88 Conn. App. 511, 519 (2005)("Our Supreme Court has recognized that the provisions of the [confidentiality statute] can be waived.") or due to his own actions by filing a civil suit which places his juvenile record at issue); State ex rel. Rowland v. O' Toole, supra (juvenile plaintiff in underlying action waived Judicial Code's privilege against use of juvenile court reports and records by bringing civil action which placed his juvenile arrest and juvenile court proceedings at issue); Doe v. D'Angelo, 154 A.D.3d 1300, 1301 (2017)(NY Fourth Department)(where court held that juvenile waived his right to keeping his juvenile records sealed where, having been sued by a party for personal injuries, he filed a cross claim against a school district seeking indemnification).

In a Missouri case, State ex rel. Rowland v. O'Toole, supra, the issue before the Court was whether to permit disclosure of juvenile records during the discovery phase of the case where the defendants claimed that the documents were relevant, and where the plaintiff claimed that while they might be relevant, they were confidential and that he was invoking his privilege to keep them confidential. In that case, the plaintiff was a juvenile who claimed that another person had falsely accused the juvenile of burglarizing a home. Plaintiff juvenile had gone to juvenile court and after a hearing the case had been dismissed. Plaintiff juvenile then filed a civil action against another juvenile, who had made the false report, and his family seeking damages for being, inter alia, falsely arrested and assaulted due to the improper identification. In response to the civil action, the defendants requested a copy of the juvenile records to which plaintiff juvenile had been a party. Id. The Court ultimately concluded that the records were relevant and that the juvenile waived any privilege he had in maintaining confidentiality with the juvenile records by filing the civil action. The Court first held that the privilege was limited to plaintiff juvenile only and not to his parents:

> Use of [the confidentiality statute] are privileges exclusively accorded the juvenile. (Citations omitted). The privilege "does not extend to any other person or proceeding which is neither occasioned by or brought against the juvenile." Thus it is clear the privilege is that of the juvenile plaintiff and not of the juvenile parents. Id. at 102.

The Court further held that the privilege extended only to any juvenile statements made against himself, and that third parties had no privilege:

> The statutory protection applies only to the use of a child's statements and court records and reports against the child. Statement made by others in a juvenile court proceeding and court records and reports may be used against others. (Citations omitted) Thus, those juvenile court records and reports which do not relate to the juvenile's own statements against himself are not subject to the privilege. Id. at 102-103.

The Court concluded that the juvenile alone had the privilege to keep his files confidential. However, the juvenile had waived his privilege by filing the civil action:

> If, however, a juvenile places his juvenile arrest and juvenile court proceedings in issue by voluntarily filing suit against the victims and complaining witnesses in that case, the question becomes whether the juvenile has waived his privilege. It is well-established that a patient waives the physician-patient privilege when that patient files a lawsuit putting the patient's physical condition in issue. Likewise, the accountant-client and attorney-client privileges may be waived where the client places the subject matter of the privileged communication in issue. The rationale of these cases is that permitting a plaintiff to use the privilege to conceal until trial facts relating to the very issue the plaintiff had originated for submission to judicial inquiry would permit the plaintiff to use the privilege as "a shield and a dagger at one in the same time" (which we do not believe the legislature intended.).(citations omitted). Id.

Therefore, the juvenile records, if relevant, were admissible:

> For the same reasons we do not believe the legislature intended to allow a juvenile to place his juvenile arrest and detention in issue in a civil case and then prevent discovery of the records pertaining to those events by invoking the privilege created by the statute. A juvenile's right of confidentiality as to juvenile court records is a "qualified" and not an "absolute" privilege. A statutory privilege relating to confidentiality of juvenile delinquency proceedings, as well as constitutional privileges generally, may be waived. People v. Johnson, 90 Misc. 2d 777 (N.Y.Sup.Ct. 1977). By voluntarily filing this civil suit the juvenile plaintiff waived the protection of the statute. A waiver under these circumstances does not thwart the overall purpose an intent of [the Statute]. The records are properly discoverable in the civil action to the extent they are relevant. Id.

### v. Courts Can Strike the Privilege, Even If Asserted, By Necessity.

There are also variety of instances where the privilege can be overcome by necessity, and where a person's juvenile records are made available even over the person's objection. See State v. Madison, 163 Vt. 390 (1995)(Court may review a defendant's juvenile record for purposes of bail review over defendant's objection to keep his juvenile records confidential); State ex rel. Herget v. Circuit Court for Waukesha County, 84 Wis.2d 435 (1978).

In State ex rel. Herget v. Circuit Court for Waukesha County, 84 Wis.2d 435 (1978) a Wisconsin case, the Supreme Court had to address whether disclosure of a juvenile's court record should be permitted where the juvenile had committed acts of vandalism. In that case, the juvenile's acts of vandalism had been addressed in the juvenile court. However, the victims of his vandalism commenced a civil action against the juvenile for his intentional torts, and the juvenile's parents for their negligent supervision of the juvenile. As the civil action progressed, the victims requested release of the juvenile records and the ability to conduct discovery related to their civil claims against the juvenile and his parents. The juvenile objected, arguing that the information concerning a crime allegedly committed by a juvenile is privileged withing the meaning of the state statutes and thus not discoverable. Id. At 438. He argued "that he cannot be ordered to disclose any information relating to the vandalism alleged in the plaintiff's complaint because any such information would duplicate his testimony in the juvenile court proceeding." Id. at 443-444.

The Court acknowledged the importance of having juvenile records kept confidential:

> Confidentiality is essential to the goal of rehabilitation, which is in turn the major purpose of the separate juvenile justice system. In theory, the role of the juvenile court is not to determine guilt or to assign fault, but to diagnose the cause of the child's problems and help resolve those problems. The juvenile court operates on a 'family' rather than a 'due process model.' Confidentiality is promised to encourage the juvenile, parents, social workers and others to furnish information which they might not otherwise disclose in an admittedly adversary or open proceeding. Confidentiality also reduces the stigma to the youth resulting from the misdeed, an arrest record and a juvenile court adjudication. Id. at 451.

The Court responded that the purpose of confidentiality in a juvenile case is not to create an obstacle for parties in a civil case who are seeking damages against a juvenile for his tortious acts where the conduct was also part of a juvenile proceeding. Id. At 444 ("The Children's Code was not intended to thwart the processing of a civil claim arising out of conduct which was also

made the subject of a juvenile proceeding.") The Court went on to note that the Supreme Court had previously in another case (Sandford v. State, 76 Wis. 2d 72 (1977)) permitted a witness to testify at trial about a defendant who had previously committed an act that had been part of a juvenile proceeding. Id. ("This Court rejected the contention that [the Statute] restrains a witness from testifying at trial as to an alleged prior act of the defendant committed while the defendant was a juvenile, if that act gave rise to a juvenile court proceeding.")

The Court ultimately decided that notwithstanding the statutes that allow for confidentiality of juvenile records, the circumstances warranted disclosure: "Although the juvenile records which are the subject of [the Statute] are privileged records by virtue of [the Statute], they are not absolutely privileged and hence are discoverable in limited circumstances." Id., at 449.

The Court concluded: "We hold that the circuit court is justified in ordering the discovery of all or any part of. . . the records only when the court has reviewed the records in camera and has made a determination that the need for confidentiality is outweighed by the exigencies of the circumstances." Id. At 452.

**vi. Juvenile Records May Be Used for Impeachment Purposes.**

Juvenile records may also be made available to adverse parties in a civil or criminal hearing to allow the adverse party to use the records for possible impeachment purposes. Davis v. Alaska, 415 US. 308 (1974); Ward v. Goodwin, 345 S.W.2d 215 (1961); State v. Russell, 625 S.W.2d 138 (Mo. Banc 1981).

In Davis v. Alaska, supra, the U.S. Supreme Court had to consider whether a juvenile record should be disclosed as part of criminal matter, where the juvenile, now an adult, was testifying at a trial as a witness against the defendant who had been charged with robbery. At

issue was whether the 6th Amendment Confrontational Clause would allow the defense attorney to question the witness about his juvenile record for impeachment purposes. Id. The Trial Court did not permit the juvenile record to be used. Id. After the defendant was convicted of the crime, he appealed, arguing that his 6th Amendment rights were violated by not being allowed to question the witness about possible bias since the trial court had denied the defense attorney the right to access the witness's juvenile records. Id.

On appeal, the Supreme Court overturned the verdict and held that the Trial Court violated the defendant's right to confront witnesses: "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." Id. at 320. It further added that the State essentially waived this right to keeping the record confidential by calling the witness to the stand: "The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records." Id.

Therefore, when a witness is testifying at a trial, his juvenile records are deemed available for impeachment purposes.

### vii. Wrongful Death Cases Involving a [redacted] Permit Discovery of the[redacted] by Proper Parties.

Wrongful death cases involving juveniles permit the juvenile documents to be deemed discoverable and disclosed. Daniels v. National Fire Insurance Company of Hartford, 394 So. 2d 683 (1981)(Court of Appeal of Louisiana); Smith v. Harold's Supermarket, Inc., 685 S.W.2d 859 (Mo. Ct. App. 1985),

In Daniels v. National Fire Insurance Company of Hartford, supra, the Court held that a party in a wrongful death action is entitled to transcripts of juvenile adjudication hearing which arose out of the wrongful death. Id.

In Daniels, the plaintiff, a father, was seeking damages for the wrongful death of his child. The wrongful death involved acts committed by a juvenile who had participated in a juvenile hearing, and the matter had been adjudicated in the juvenile court. Plaintiff father requested a copy of the juvenile adjudication hearing transcript. The Civil Court denied the request citing confidentiality of juvenile proceedings. On appeal, the Court of Appeals held that the father was a "proper" party to make the request for the transcript even though he was not present at the juvenile hearing:

> The legislative limit upon admission protects the juvenile from the eyes of persons whose only interest is curiosity, but not persons whose interests are "proper." A parent whose child has been killed, accidentally or intentionally, has a proper interest, if anyone does, in observing the adjudication hearing. That parent equally has the right, in a civil action arising out of the death of the child, to impeach a witness's testimony that conflicts with that witness's testimony in the juvenile proceeding. One hardly need point out that a civil trial witness, juvenile or not, is solemnly bound to tell the truth including truth that was shielded from public view in the juvenile case. The shield of confidentiality was not designed and cannot be permitted to fraudulently defeat civil reparation of juvenile wrong. The juvenile could therefore not successfully object to the introduction of his or her prior inconsistent statement, whether in the form of an extract from the transcript of the juvenile court testimony or in the form of testimony by plaintiff who heard the juvenile court testimony. Much less could an adult who testified at the juvenile court proceeding claim any confidentiality under the statute to defeat introduction of his or her prior inconsistent statement." Id. at 683-684.

**viii. [redacted]Records are Discoverable in Wrongful Death Cases Where The Records are Relevant to the Civil Case, Where Juvenile is Deceased, and Where Protection is for the Juvenile.**

In Smith v. Harold's Supermarket, Inc., 685 S.W.2d 859 (Mo. Ct. App. 1985), the Missouri Court of Appeals considered whether juvenile records of a decedent should be admitted

at trial in a civil case where the pecuniary losses of the decedent were at issue, particularly with respect to his expected earnings potential. Id. At the trial, the parents of the decedent sought damages for wrongful death of their son. Id. at 861. They called an expert to testify about the future earning potential of their son. Id.. Defendants moved to have the decedent's juvenile record admitted into evidence so that they could show that the decedent had been in trouble for most of his life and had not worked much. Id. The parents objected to the introduction of the juvenile records claiming confidentiality. The Court admitted the records stating that they were relevant and that the parents had no privilege of confidentiality since the confidentiality provision was for the juvenile and not third parties: "It is evident to this court that the prohibition against the use of juvenile court reports is for the *exclusive* protection of the juvenile, and does not extend to any other person or proceeding which is neither occasioned by or brought against the juvenile." Id. at 864.

The Court further acknowledged defendant's arguments that plaintiffs had waived any alleged privilege under the statute or any applicability of the statute, because plaintiff, both by her pleadings and her evidence, placed in issue the value of the decedent's services.

> From this defendants declare, 'It has and often been held in this state that if one party has the right to or does inquire into a certain area or present evidence of certain facts at trial, the other party is entitled to inquire into the same area and develop those facts as might be beneficial to his side of the case, regardless of whether or not in the first instances the first party was immune from having the evidence presented.' Defendants then cite to this court several cases involving the waiver of the physician-patient privilege, and ask this court to adopt the rationale therein by analogy in the instant case. This court agrees with defendants' contention. Id. at 865.

In conclusion, the Court held the protection of the confidentiality statute "affords exclusive protection and is hence a privilege exclusively granted to the juvenile." Id. at 861.

### ix. Court May Inspect The Relevant Records *In Camera* and Then Decide Which Documents Should be Released.

In Grantz v. Discovery for Youth, 2005 WL 406211 (2005), the Ohio Court of Appeals decided on a three-part test for a judge to decide after an in camera review whether juvenile records should be disclosed in a case where a juvenile, while at a state living facility, sexually assaulted one of his tutors. The Court stated that an in camera review of the documents should take place to determine: (1) whether the records were necessary and relevant to the pending action; (2) whether good cause had been shown by the person seeking disclosure; and (3) whether the admission outweighed the statutory confidentiality considerations."

Here, if necessary, the Court could inspect the [redacted] records *in camera* and then decide which documents should be admitted for discovery or to the Civil Division for a hearing.

### A. Mother Has No "Privilege" Rights Since She is a Third Party.

First, any privilege towards keeping juvenile records confidential may only be asserted by the juvenile and not third parties (Smith v. Harold's Supermarket, Inc., 685 S.W.2d 859 (Mo.Ct. App. 1985)). Therefore, Mother, as a third party, has no standing to assert any such privilege.

### B. Mother Waived any Rights She Had by Filing This Civil Action.

Second, even if she had privilege, which she does not, Mother waived such privilege by filing this civil action which put the issue of her [redacted] at issue. Id.

Here, Mother took an offensive position by filing the civil action which requires the trial court to consider the relevant information regarding Mother's parenting of her two children, and AJ in particular. State ex rel. Rowland v. O'Toole, 884 S.W.2d 100, 103 (1994)(". . . permitting a plaintiff to use the privilege to conceal until trial facts relating to the very issue the plaintiff had

originated for submission to judicial inquiry would permit the plaintiff to use the privilege as "a shield and a dagger at one in the same time")(citation omitted)

**C. The [redacted], Are Relevant and Necessary for the Civil Action.**

The [redacted] records are necessary and relevant in this case since both 14 VSA § 1492(a) and (b) and 14 VSA § 1492(C)(4) the issues to be decided in this case, put both Father and Mother's parenting of AJ and their relationship with him at issue. It is up to the court to decide which documents should be admitted after reviewing all [redacted] documents *in camera*. Grantz v. Discovery for Youth, 2005 WL 406211 (2005),(Ohio Court of Appeals)

It should be noted that if this case came to a trial, the Court would need to take evidence and consider 14 VSA § 1492(b) the statutory language which states that pecuniary losses are to be awarded in an amount "as under all the circumstance of the case, may be just." Obviously, the facts contained and litigated at the [redacted] hearing would be necessary and relevant since the Civil Division would need to consider "all the circumstances" of the case to render a just decision.

What is clear is that AJ's life – and the care he was provided by his parents, as well as his relationship with his parents, during the 2 ½ years of his life - is relevant to this action. In turn, the factual record that was adjudicated in the [redacted] court is relevant since it goes to the heart of the case, i.e., the facts that support awarding a percentage of the proceeds to each party is based upon, to a large extent, the facts that were litigated in the [redacted] cases. The first [redacted] case was opened in September 2015 and then subsequently dismissed in early 2016. The second [redacted] action was commenced in November 2016 and continued until AJ's death on July 5, 2017. The allegations contained in the [redacted],

[redacted], are relevant and necessary for the civil action.

**D. The [redacted] Documents are Admissible for Impeachment Purposes.**

At the very least, it is clear that the law provides the records to be available for impeachment purposes. Davis v. Alaska, 415 U.S. 308 (1974); Ward v. Goodwin, 345 S.W.2d 215 (1961); State v. Russell, 625 S.W.2d 138 (Mo. Banc 1981)

**E. By Enacting 14 VSA § 1492, the Legislature Created a Statute Which Must Include the Production and Use of Juvenile Records.**

14 VSA § 1492(C)(4) would be meaningless if the parties could not access the [redacted] records since the issues to be decided in this civil case are based upon many of the same issues that were decided in the [redacted].

By enacting 14 VSA § 1492 – and 1492 (c)(4) - the legislature clearly intended such [redacted] records to be part of a civil action where a parent's neglect is at issue. If such [redacted] documents and information were not admissible or discoverable in this civil case, then 14 VSA § 1492(c)(4) would be unenforceable. This is true since almost every case involving 14 VSA § 1492(c)(4) involves a situation where a parent has lost custody to DCF. If the juvenile records could be excluded from any civil action involving enforcement of 14 VSA § 1492(c)(4), then there could be no enforcement of the statute since anyone could defend themselves by claiming that the [redacted] are confidential and cannot be disclosed.

Further, if Mother's argument is taken to its extreme, that all juvenile information may not be considered by the Civil Division, then parties could not even use prior juvenile orders to argue that collateral estoppel applies in a civil case. However, the use of juvenile records – and orders - for such proceedings is universally acknowledged. See e.g., In re: PJ, 185 Vt. 606

(2009)(discussing use of CHINS findings and Orders in later proceedings for purposes of Collateral Estoppel).

Therefore, the use of [redacted] and information is discoverable and admissible pursuant to the legislature's enactment of 14 VSA § 1492(c)(4).

**F. None of the [redacted] Records or Information is Actually Confidential.**

Further, the information contained in Father's civil action was fully known to him. Father and Mother are parties in the civil action and were the parties in the [redacted] cases. As stated, the [redacted]. Therefore, all information related to both [redacted] was provided to Father at the time of the [redacted] proceedings. Father therefore was aware of and/or had personal knowledge of all the facts contained in any filings that he made. Nothing set forth in his filings was from information that he only learned through the Court documents themselves. Mother's abuse and neglect of her children was an issue between the parties while the [redacted] Division. The sum and substance of the [redacted] is the same as Father's own memory of the events.

**G. The Civil Action Prevents the Information From Remaining Private or Confidential.**

However, a trial in the civil action will include the same witnesses and parties – and the same factual allegations - that were litigated in the [redacted] case. Father expects to call many of the same witnesses in the civil action who appeared in the family action. Mother may do the same. As stated above, developing the factual record of AJ's short life is critical so that the Civil Division has a full and complete understanding of not only AJ's life, but of the care provided by each of his two parents during his life as each party makes respective arguments for an appropriate percentage of the wrongful death proceeds.

**H. Father Took Reasonable Steps to Safeguard the [redacted] Records.**

Notwithstanding the argument that Mother waived confidentiality by filing this action, Father took reasonable steps to maintain the confidentiality of the records themselves. Upon filing his motion in the Civil Division, Father filed the motion with all juvenile records "sealed" and unavailable for public inspection.

**I. The Statute – 33 VSA § 5117 - Provides for Disclosure.**

The Statute 33 VSA § 5117, which governs the records of juvenile judicial proceedings, sets the terms of disclosing the records. According to the Statute, a number of parties are permitted "inspection" of the records, including the courts (33 VSA § 5117(b)(1)(A)), certain officers (33 VSA § 5117(b)(1)(B)), court personnel (33 VSA § 5117(b)(1)(D)), the child (33 VSA § 5117(b)(1)(E), as well as the "child's parents." (Id.)

Further, the Family Division may designate any other person who has a need to know. 33 VSA § 5117(b)(1)(F) states: "any other person who has a need to know may be designated by order of the Family Division of the Superior Court." Id.

As for other means of disclosing the information, the Statute begins:

"Except as otherwise provided . . ." 33 VSA § 5117(a). This general catchall phrase leaves the door open for a court to allow juvenile documents to be disclosed and released under certain circumstances. Such circumstances would be too numerous for the legislature to state in the Statute which is why it begins the Statute with this phrase.

Here, the Statute provides inspection of the records to both Mother and Father. (33 VSA § 5117(b)(1)(E). It further provides that both parents could be "designated" on a need to know basis. 33 VSA § 5117(b)(1)(F). Finally, either side could argue that full disclosure is warranted under the general catchall opening phrase of the Statute: "Except as otherwise provided. . ."

Father submits that our laws provide for disclosure, and release of all information, where both parties have waived any right to confidentiality by, inter alia, submitting this case to the Civil Division.

For these reasons the Vermont Statute provides for records to be disclosed in this case.

**5. Mother's Remaining Arguments Are Without Merit.**

**A. Mother's Argument that the Motion for Summary Judgement is Based Upon Inadmissible Evidence is Without Merit.**

As stated above, the [redacted] records are all admissible since (1) Father has personal knowledge of the facts; (2) Mother admits to the facts in her Affidavit; (3) Mother has no privilege toward keeping them confidential; (4) even if she did have such a privilege she waived it by filing this civil action; and (5) the records are relevant as they go directly to the main issues in this case, i.e., whether Mother was a [redacted] and pecuniary losses.

**B. Mother Must Answer the Statement of Undisputed Material Facts.**

As argued above, the information from the juvenile cases is discoverable. Mother has failed to answer the Statement of Undisputed Facts without any justification or legal basis to do so.

**C. Mother's Argument That it Would Not Be Equitable to Grant Summary Judgment is Without Merit.**

If the elements of 14 VSA 1492(c)(4) are met, then Mother's right to recover is denied as a matter of law.

**D. Mother Offers No Evidence to Support Her Claim That it was Father, and not Mother, Who was Abusive and Neglectful Toward AJ, and That 14 VSA § 1492(C)(4) Should Apply to Father, not Mother.**

Mother's argument that Father neglected AJ and [redacted] is simply

unsupported by any evidence in the record. There is not a single statement made by any [redacted] in any [redacted] that Father ever abused or neglected AJ. Further, there is no order from any Court, or any agreement in writing, showing that Father [redacted] That Father was incarcerated is not being challenged. But the allegations of [redacted] and [redacted] were at all times directed at Mother, not Father. Further, the [redacted]

Since Father was incarcerated he admittedly did not have custody of AJ in November 2016. But that does not mean that the elements of 14 VSA § 1492(c)(4) apply to him. They simply cannot unless all the elements are met. Since Father never lost custody due to child neglect, the statute cannot be applied to Father.

**E. Mother's Claims of Bad Faith Filing Are Meritless.**

Mother claims that Father's Motion for Summary Judgment is a bad faith filing. It is difficult to see the logic. Mother argues that the parties appeared together at mediation to resolve the case. After reaching a settlement, Mother now states that the value of the settlement was "solely based on Mother's grief and loss." (Mother's Opp, page 11.) If that was Mother's position, it [redacted]. Father expected the parties to have good faith settlement discussions. Mother's position in her opposition clarifies that in her mind, she was entitled to all of it. The word "solely" does not leave much room for anyone else. It certainly did not leave much for Father when the parties were [redacted] the case in an equitable manner after agreeing upon a total settlement amount.

Father has filed the Motion for Summary Judgment arguing that 14 VSA § 1492(c)(4) applies. Father filed his motion after Mother filed the civil action herself. Mother was aware of the statute prior to her filing. She knew that the statute permitted Father to file such a Motion

since the parties were [redacted] amongst themselves. Those decisions were Mother's alone to make. Having made those decisions herself, she cannot now claim that Father has engaged in unfair surprise. Mother references the status conference on January 7, 2020, and how the parties discussed a discovery schedule where each side was to provide interrogatory responses to the other side within 30 days. (Mother's Opposition, page 2). Mother continues about unfair surprise: "A few days later Kristopher Henry served his Motion for Summary Judgment and Declaratory Judgment without notice." (Id.)(emphasis supplied) Either Mother did not fully appreciate what 14 VSA § 1492(c)(4) stood for, or Mother did not fully understand that in a civil case that she has filed, the other side has the ability to enforce statutes that are contrary to her. Either way, Father is at a loss as to how he has engaged in bad faith.

**F. Mother's Claims of Unethical Conduct Have No Merit.**

Mother submits that there are ethical violations by referencing confidential information in the Motion for Summary Judgment. However, as already argued, the information is no longer confidential due to both parties' waiving their rights to confidentiality – by Mother filing the civil action, and by Father responding.

Mother offers a case involving a professional responsibility board decision. However, that case is distinguishable. No party had waived confidentiality in that case. Further, since confidentiality was not waived, it appears that the trial judge had not been afforded an opportunity in advance of the hearing to consider whether the juvenile documents should be used for impeachment purposes. Davis v. Alaska, 415 U.S. 308 (1974); Ward v. Goodwin, 345 S.W.2d 215 (1961); State v. Russell, 625 S.W.2d 138 (Mo. Banc 1981) Again, where confidentiality is not waived, the trial judge must have an opportunity to consider which juvenile

documents are relevant and admissible, if any, prior to a hearing. Grantz v. Discovery for Youth, 2005 WL 406211 (2005)(Ohio Court of Appeals)

In this case, confidentiality has been waived. Therefore, disclosure of the information is proper.

**G. Mother's Requested Relief is Unsupported by Authority, Statute, or Case Law.**

Mother not only opposes the Motion for Summary Judgment but she asks for essentially a protective order asking that the Court allow her to not respond to (1) Father's Statement of Undisputed Material Facts, (2) Father's Requests for Admission, and (3) Father's Requests for Interrogatories.

Mother offers no case law or authority supporting this requested relief. The Statement of Undisputed Material Facts and Requests for Admission require Mother to respond within 30 days or, those facts are deemed admitted. V.R.C.P. Rules 36, 56. Mother did not file a motion to stay, a motion to enlarge time, or a motion for protective order. Mother did not communicate with counsel about an extension of time. Rather, Mother has simply ignored the Rules of Civil Procedure and decided on her own to not respond to any of the discovery requests without any legal basis to do so.

For the reasons stated previously, the facts contained in the Statement of Undisputed Facts and the Requests for Admission should be deemed admitted.

Mother's requested relief should be denied.

## III. Conclusion

Based upon the reasons and legal arguments set forth above, this Court should grant

K[redacted] H[redacted] Motion for Summary Judgment and Motion for Declaratory Judgment in full and deny K[redacted] L[redacted] any and all requested relief.

For the above-stated reasons, K[redacted] [redacted] replies to K[redacted] L[redacted] Opposition and moves this Court.

(1) to grant K[redacted] H[redacted] the relief he requests in his Motion for Summary Judgment in its entirety;

(2) to grant K[redacted] H[redacted] s Motion for Declaratory Judgment;

(3) To deny K[redacted] L[redacted] any and all requested relief;

(4) To admit all facts contained in K[redacted] H[redacted] s Statement of Undisputed Material Facts;

(5) For any other relief that this court deems just and proper.

Dated at St. Johnsbury, Vermont this 18th day of February, 2020.

K[redacted] H[redacted]

By: _____

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