State of New Hampshire
Supreme Court

NO. 2017-0630

2018 TERM

APRIL SESSION

In the Matter of
Eva Oliver and Thomas Oliver

RULE 7 APPEAL OF FINAL DECISION OF THE
PORTSMOUTH FAMILY COURT

BRIEF OF RESPONDENT/APPELLEE, THOMAS OLIVER

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I. Background

Eva Oliver and Thomas Oliver[1], formerly of Chester,[2] were married in 2000, had one child together in 2003, and were divorced in 2010. DECREE (Oct. 15, 2010) (omitted from appendix). After the divorce, Thomas lived in nearby Hampstead.

In 2011, when the child was in fourth grade, Eva moved with the child to Portsmouth. Pursuant to the parenting plan, the child's residence and school district thus became Portsmouth, which Eva regards as the child's "hometown." The move generated on-going transportation disputes. PARENTING PLAN (Nov. 15, 2010) (omitted from appendix); EVA'S MOTION FOR RECONSIDERATION (regarding parenting plan) (Mar. 5, 2014) (omitted from appendix); ORDER (May 31, 2017) (omitted from appendix). In 2016 at Eva's request, the litigation was transferred to the Portsmouth Family Court. ORDER (Apr. 20, 2016) (omitted from appendix); ORDER (May 31, 2017).

Eva works as a foreign-language teacher in the Hampton Falls School District, while Thomas is a commercial airline pilot. EVA'S MOTION FOR CHANGE OF VENUE (Feb. 25, 2016) (omitted from appendix); PARENTING PLAN (Apr. 25, 2014), *Eva's Appx.* at 1. The child has some mild social and learning issues, management of which are aided by consistency, and which have been appropriately addressed by the Portsmouth schools, such that the child has become successful academically, socially, and in extracurricular arts and sports. MOTION TO MAINTAIN SCHOOL PLACEMENT ¶¶ 12-13 (Aug. 16, 2017), *Eva's Appx*. at 12; GAL REPORT (May 10, 2013), *Addendum* at 26.

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[1]Because of shared surname, the parties are referred to herein by their first names; no disrespect is intended.

[2]All towns and cities named herein are in New Hampshire.

In 2014, as the child was entering teen years, the parties' parenting plan was updated. While the child's educational residence remained with Eva, many issues were revised, including transportation arrangements, visitation and holiday schedules, and relocation provisions. Regarding relocation, the 2014 revised parenting plan specified, in three seemingly contradictory paragraphs:

> ¶1 The relocation of a children's residence in which they live at least 150 days per year is governed by RSA 461-A:12 as follows:
>
> ¶2 Either parent may move the child's residence if it results in the parents living closer or if it will not affect the child's school enrollment. The relocating parent shall keep the other parent informed of any new address of the child either in advance of the child moving to the new address with the relocating parent, or as close to the same time as the move as possible.
>
> ¶3 For other relocations which are not closer to the other parent or that affect the child's school enrollment, the relocating parent shall give at least 60 days notice to the other parent, unless there are factors that would make less notice reasonable. Notice shall include the proposed date of relocation and the proposed new address of the residence.
>
> ¶4 At the request of either parent, the court shall hold a hearing on the relocation issue.

PARENTING PLAN (Apr. 25, 2014) ¶ F, *Eva's Appx*. at 1, 9-10 (paragraph numbering added).

II. Child Starts High School

In September 2017, the child was expected to matriculate as a freshman at Portsmouth High School. Although Eva continued for a while to maintain her Portsmouth apartment to provide comfort and continuity for the child, EVA'S OBJECTION TO MOTION TO MODIFY & VACATE ¶¶ 31-32 (Jan. 25, 2018) (omitted from appendix), at some point before Summer 2017, Eva moved with the child to Lee, New Hampshire. Eva conceded, and it is not disputed, that Eva emailed Thomas, notifying of her move, on June 27, 2017. *Transcript* at 4. It is also undisputed that while the distance from Hampstead to Lee is closer than Hampstead to Portsmouth, a move by Eva to Lee would involve a change in the child's school district.

On August 16, 2017, Thomas filed an emergency *ex parte* motion requesting the court:

> a. Modify … the Parenting Plan to designate the child's legal residence for school purposes be with Thomas Oliver;
>
> b. Order Eva … register [the child] in the Portsmouth High School;
>
> c. Order the parties to share transportation to and from school.

EX PARTE MOTION TO MAINTAIN SCHOOL PLACEMENT (Aug. 16, 2017), *Eva's Appx*. at 12.

Thomas's *ex parte* motion reviewed the child's educational history, noted the child "has expressed a desire to remain in the Portsmouth School District for high school," apprised that Thomas is "ready, willing and able to immediately provide a residence in Portsmouth for the benefit of his [child]," pledged that Thomas would "immediately relocate to Portsmouth … so that [the child] can continue to attend the Portsmouth School District for high school," and proposed a solution to transportation issues. *Id.*

During the early morning of the day he filed his *ex parte* motion, Thomas's lawyer also provided Eva, *pro se*, telephone notice of the filing. *Id.*; AFFIDAVIT OF RECEIPT OF SERVICE (Aug. 16, 2017) (omitted from appendix). Eva appeared at the family court that morning, and

filed an objection.

Eva's objection alleged that neither parent would be a Portsmouth resident, claimed that she had notified Thomas of her intention to move "about 60 days ago," noted that her relocation to Lee moved her closer to Hampstead, and declared that her move had already occurred and that the child had already been registered in the new school district. OBJECTION TO MOTION TO MAINTAIN SCHOOL PLACEMENT (Aug. 16, 2017), *Eva's Appx*. at 16.

By luck the court was able to fit a five-minute hearing into its morning calendar. ORDER ON RECONSIDERATION (Sept. 26, 2017), *Addendum* at 25. It did not hear sworn evidence, but both parties were present and the court ruled from the bench based on their written submissions, and also issued a written order. ORDER ON *EX PARTE* MOTION (Aug. 16, 2017), *Addendum* at 19; *Transcript* at 4-5.

The Portsmouth Family Court (*John T. Pendleton*, J.) reviewed the relocation provisions. It noted that Eva "has been in the process of relocating for some time at this stage," but that 60 days had not yet passed from the time she notified Thomas of the move. The court also recognized that any legal-resident issue would be resolved by Thomas's immediate relocation to Portsmouth. The court commented that the problems Eva identified were self-caused – she moved without seeking permission of Thomas or the court, without requesting amendment of the parenting plan, without providing much notice, but with knowledge that her actions would likely cause additional litigation. ORDER ON *EX PARTE* MOTION (Aug. 16, 2017), *Addendum* at 19; *Transcript* at 4-5.

The court granted Thomas's motion. *Transcript* at 4. It ruled that the child could stay in the Portsmouth School District, with the Parenting Plan altered accordingly, provided that Thomas establish residence in Portsmouth, which he did. ORDER ON *EX PARTE* MOTION (Aug.

16, 2017); *Addendum* at 19; *Transcript* at 4.

During the hearing the court told Eva, "You can't relocate without court permission.… [Y]ou changed schools without getting court approval within 60 days, so you don't get to relocate." *Transcript* at 4, 5. In its written order, the court found:

> Moving without permission and within the 60 day time limit violates the terms of the Parenting Plan.… If [Thomas] failed to communicate on the issue, it was [Eva's] job if she wished to start the move before the 60 day time period had ended to file and request permission.

ORDER ON *EX PARTE* MOTION (Aug. 16, 2017), *Addendum* at 19.

Eva requested reconsideration, to which Thomas objected. MOTION TO RECONSIDER & CLARIFY (Aug. 28, 2017), *Eva's Appx*. at 19; OBJECTION TO MOTION TO RECONSIDER & CLARIFY (Sept. 5, 2017), *Addendum* at 22. The court denied reconsideration, noting that a further hearing would be unnecessary. ORDER ON MOTION TO RECONSIDER (Sept. 26, 2017), *Addendum* at 25.

SUMMARY OF ARGUMENT

Thomas sets forth the three overlapping and seemingly contradictory relocation provisions in the parties' parenting plan. He analyzes them separately, notes they must nonetheless be construed together, proposes a harmonious construction, and stresses that no provision can be disregarded. Under the provisions, Thomas was entitled to notice of Eva's move at least 60 days before she moved, but at best Eva provided less than 60 days notice after her move was already an accomplished fact. Thomas thus argues that while the family court may have committed a technical error, it was correct in holding that Eva violated the terms of the relocation provisions. He contends the family court committed no error by maintaining the child's hometown school district where the child has been successful, especially when Thomas was able to avoid any legal impediments by establishing his own residence in the child's familiar hometown. Therefore this court's appropriate action is to affirm.

ARGUMENT

I. Three Relocation Provisions Construed Together

The parties in this case are victims of unfortunate drafting. As noted, there are three seemingly contradictory relocation provisions in the parenting plan:

> ¶1 The relocation of a children's residence in which they live at least 150 days per year is governed by RSA 461-A:12[3] as follows:
>
> ¶2 Either parent may move the child's residence if it results in the parents living closer or if it will not affect the child's school enrollment. The relocating parent shall keep the other parent informed of any new address of the child either in advance of the child moving to the new address with the relocating parent, or as close to the same time as the move as possible.
>
> ¶3 For other relocations which are not closer to the other parent or that affect the child's school enrollment, the relocating parent shall give at least 60 days notice to the other parent, unless there are factors that would make less notice reasonable. Notice shall include the proposed date of relocation and the proposed new address of the residence.

PARENTING PLAN (Apr. 25, 2014) ¶ F, *Eva's Appx*. at 1, 9-10 (paragraph numbering added).

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[3]New Hampshire's relocation statute, RSA 461-A:12, provides:

I. This section shall apply if the existing parenting plan, order on parental rights and responsibilities, or other enforceable agreement between the parties does not expressly govern the relocation issue. This section shall not apply if the relocation results in the residence being closer to the other parent or to any location within the child's current school district.

II. This section shall apply to the relocation of any residence in which the child resides at least 150 days a year.

III. Prior to relocating, the parent shall provide reasonable notice to the other parent. For purposes of this section, 60 days notice shall be presumed to be reasonable unless other factors are found to be present.

IV. At the request of either parent, the court shall hold a hearing on the relocation issue.

V. The parent seeking permission to relocate bears the initial burden of demonstrating, by a preponderance of the evidence, that:

(a) The relocation is for a legitimate purpose; and

(b) The proposed location is reasonable in light of that purpose.

VI. If the burden of proof established in paragraph V is met, the burden shifts to the other parent to prove, by a preponderance of the evidence, that the proposed relocation is not in the best interest of the child.

Regardless of the construction of the three paragraphs, it is apparent they control four possible scenarios:

① Relocation closer, no change of school district;

② Relocation farther, no change of school district;

③ Relocation closer, change of school district;

④ Relocation farther, change of school district.

		SCHOOL DISTRICT	
		No Change	Change
DISTANCE	Closer	Scenario ①	Scenario ③
	Farther	Scenario ②	Scenario ④

Eva moved closer, but to a different school district. Thus, this case solely concerns scenario ③.

A. If Any Provision Alone Controlled

For purposes of analysis, it is useful to suppose how each provision would operate if the provision stood alone.

1. First Paragraph Alone

The first paragraph says relocation is governed by the relocation statute, RSA 461-A:12. The statute has stringent requirements, demanding the relocating parent justify the new location and the reason for going there, with a burden-shifting arrangement for proof of the child's best interest. *In the Matter of Heinrich*, 160 N.H. 650, 654 (2010).

The statute provides, however, that it "shall apply if the existing parenting plan … does not expressly govern the relocation issue," and "shall not apply if the relocation results in the residence being closer to the other parent or to any location within the child's current school district." RSA 461-A:12, I; *Heinrich*, 160 N.H. at 654.

As this case involves scenario ③, if the statutory paragraph alone were to control, it would appear that Eva could relocate without permission or notification, because she moved closer to Thomas. But the Parenting Plan here *does* expressly govern the relocation issue. Thus, in this

case, the Parenting Plan institutes statutory notice and permission only with respect to a scenario ④ move, which would be one that is both farther and out of the school district, *e.g.*, an out-of-state relocation.

Curiously, the first paragraph ends with "as follows:," but the paragraphs that follow do not mirror the statute.

2. Second Paragraph Alone

The second paragraph applies "if it results in the parents living closer or if it will not affect the child's school enrollment." Thus it applies to scenarios ①, ②, and ③.

The second paragraph allows that "[e]ither parent may move the child's residence," and that the relocating parent need only "keep the other parent informed of any new address … either in advance of the child moving to the new address … or as close to the same time as the move as possible."

Given that this case concerns scenario ③, if the second paragraph alone were to control, Eva could initially move with minimal notice to Thomas, allowing Thomas to then request a hearing to challenge it.

And that is Eva's argument. In her brief, Eva altogether ignores the first paragraph which cites the statute. She relies solely on the second paragraph, claiming she can move without prior permission so long as she tells Thomas her new address around the time of the move. She claims the third paragraph has no function because it is truncated by the second. She claims no principled justification for this construction, however, and it is not a plausible statement of the parties' or court's intentions when the parenting plan was implemented.

3. Third Paragraph Alone

The third paragraph says it applies to "other relocations," which appears to distinguish it from the second paragraph, or both the first and second paragraphs. But it then defines "other relocations" as those "which are not closer to the other parent or that affect the child's school enrollment." Thus, both despite and in accord with the "other relocation" preface, the third paragraph specifies it applies to scenarios ②, ③, and ④.

The third paragraph requires that "the relocating parent shall give at least 60 days notice to the other parent, unless there are factors that would make less notice reasonable." Because the notice is of "*proposed* date of relocation" and "*proposed* new address," notice is supposed to be before the move.

Because this case involves scenario ③, if the third paragraph alone were to control, Eva would be bound to the 60-day pre-move notification requirement.

B. Must Construe Provisions Together

It is apparent that the three relocation provisions overlap in their requirements, and also apply to different scenarios. There is no known useful parol evidence of the parties' intentions. Although the three provisions are not amenable to ready harmonization, they must nonetheless sound in unison. *In the Matter of Sheys*, 168 N.H. 35, 39-40 (2015) ("In construing a court order, we look to the plain meaning of the words used in the document. We construe subsidiary clauses so as not to conflict with the primary purpose of the trial court's decree. As a general matter, a court decree or judgment is to be construed with reference to the issues it was meant to decide.") (citations omitted); *In the Matter of Aldrich*, 156 N.H. 33, 35 (2007) ("We do not construe statutes in isolation; instead, we attempt to do so in harmony with the overall statutory scheme. When interpreting two or more statutes that deal with a similar subject matter, we construe them so

that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes."); *MacFarlane v. Rich*, 132 N.H. 608, 612 (1989) ("[W]here [antenuptial] agreement is ambiguous, and susceptible to different interpretations, a court may search for the interpretation which best reflects the parties' intention.").

C. Construing Relocation Provisions Together

Because of the specificity of the second and third paragraphs, it is probably reasonable to understand that the parties did not intend the statute-citing first paragraph to control except with regard to something akin to an out-of-state move.

As to the second and third paragraphs, they appear to focus on two separate, but related, concerns for more local moves.

The concern mainly addressed by the second paragraph is *permission* to move. The second paragraph begins by saying the relocating parent "may move," provided notifications are made. The notification is lax (relative to the statute and the third paragraph), dictating only that the relocating parent keep the stationary parent informed of the new address around the time of the move. The second paragraph allows that, if the relocating party moves locally – closer or in the same school district – the stationary party gets no prior voice or veto regarding whether the move is justified or reasonable, though can challenge it after receiving notice.

The concern mainly addressed by the third paragraph is both broader and weaker than permission to move. Rather than permission, it addresses *notice* of a purely local move, in which the stationary parent otherwise has no pre-move say in whether the move is justified or reasonable.

In other words, the second paragraph focuses on whether a move is allowed without *prior permission*; the third paragraph focuses on whether a move is allowed without *advance notice*.

Harmonizing the three paragraphs in this way is sensible, giving the stationary parent notice their child will change schools, even in a very local move. It gives the stationary parent an opportunity to assess their child's needs, determine whether they are being met in the existing school, ascertain if they can be met in the new school, and possibly seek the opinion of the child.

Sixty days, whether by statute or parenting plan, is a reasonable interval in which to do those things, and to take court action if necessary. Thomas filed within 50 days of receiving notice, a period of time deemed reasonable by the terms of the Parenting Plan. Within that 50 days, Thomas not only made inquiries and decisions concerning the child and the school, but also made arrangements to move his residence.

Moreover, even the most permissive provision – paragraph 2 on which Eva relies – provides that the notice should be "in advance" of the move. The "about 60 days ago" which Eva claims, should have been *before* Eva moved; Eva gave notice *after* she moved.

D. Effect Given to all Three Relocation Provisions

Even if the provisions cannot be harmonized, effect must be given to all three. *Thiem v. Thomas*, 119 N.H. 598, 602-03 (1979) ("This court must, wherever possible, adopt the interpretation of an ambiguous clause that will be in harmony with the remainder of the document, so that all provisions will have meaning and effect."). Despite Eva's claim that the third paragraph can be eliminated from the parenting plan entirely, there is no textual basis for that.

The third paragraph requires the relocating party "shall give at least 60 days notice to the other parent, unless there are factors that would make less notice reasonable." PARENTING PLAN (Apr. 25, 2014) ¶ F. Eva has offered no excuse for not giving 60 days notice; the evidence suggests she could have provided more notice had she wished, and the court found she remained silent while knowing it would become a point of dispute.

II. Thomas Entitled to Notification 60 Days Before Relocation

Because Eva and Thomas are in scenario ③, Thomas was entitled to 60-day notice. But Eva violated the notice provision.

Only 50 days passed between June 27, when Eva provided notice, to August 16, when Thomas took filed in court. It was the cusp of the new school year, and an auspicious time for the child entering high school. It was apparent to the court that Eva's move had been in process for some time, notice was not given until the move was *fait accompli,* and notice was not given until after Eva had already enrolled the child in a new school.

Eva's late notice undermined the purpose of the third-paragraph notice provision. Thomas was aware his child had some special social and academic needs that were best addressed by consistency. He was satisfied the Portsmouth School District had been appropriately addressing those needs since the child was in fourth grade, having witnessed the child beginning to overcome problems, as manifested by the child's blossoming social, scholastic, and sports success. Thomas knew the child was entering the challenging new phase of high school, and was legitimately concerned that at such a transition it would not be in the child's best interest to change schools. His position as an airline pilot, along with an opportune moment in his personal situation, made it possible for him to move his residence to preserve the school district in the best interest of his child.

Although not deftly stated in its order, the family court harmonized the three relocation provisions in the manner suggested here, holding Eva responsible for not adequately notifying Thomas of her plans. The court appropriately chastised Eva for withholding information, and for having already unilaterally changed the child's school. The court was within its discretion to allow the child to stay in her hometown school, especially when Thomas's willingness to change his residence removed any legal impediment.

III. Court Properly Modified Parenting Plan to Address Residence and School

Eva alleges that the court did not have authority to modify the parenting plan to enable the child to remain in the Portsmouth School District. For several reasons, her contention is in error.

First, despite Eva's claims, Thomas's *ex parte* motion explicitly requested the court "[m]odify … the Parenting Plan to designate the child's legal residence for school purposes be with Thomas Oliver," as he relocated his own residence to Portsmouth for the child's benefit. *EX PARTE* MOTION TO MAINTAIN SCHOOL PLACEMENT (Aug. 16, 2017), prayer a., *Eva's Appx*. at 12, 15. Thomas's motion also avowed "[i]t would be in [the child's] best interests to remain in the Portsmouth School District," listed specific supporting facts regarding the child's needs and the Portsmouth school's satisfaction of them, and proposed solutions to transportation-sharing.

Second, nothing in the law makes the child's legal residence sacrosanct. For parenting plans, it is a practical matter, to enable compliance with compulsory public education. RSA 193:1 ("[C]hild … shall … attend the public school to which the child is assigned in the child's resident district."); RSA 461-A:4, II ("parenting plan may include provisions relative to … [l]egal residence of a child for school attendance"). Legal residence does not confer any known status or financial benefit on the parent whose residence is deemed the child's residence. *C.f.*, *Concord Group Ins. Co. v. Sleeper*, 135 N.H. 67 (1991) (child's residence for determining insurance coverage).

Third, the family court has continuing authority over the best interest of the child. *In the Matter of Martin*, 160 N.H. 645, 647 (2010).

Fourth, and perhaps most important, while the court did not explicitly reach the best-interest issue, it acted in the best interest of the child. The Portsmouth School District has

successfully accommodated the child's issues, the child has found curricular and extracurricular success in Portsmouth schools, consistency and stability has been a part of those successes, and Eva conceded that Portsmouth is the child's "hometown."

Given that Thomas had the flexibility to relocate his residence so the child could stay in Portsmouth, requiring the child to change schools would have been contrary to the best-interest standard by which the family court must be guided, and to which this court gives deference. *Martin*, 160 N.H. 645, 647 (2010) ("When determining matters of child custody, a trial court's overriding concern is the best interest of the child. In doing so, the trial court has wide discretion, and we will not overturn its determination unless there has been an unsustainable exercise of discretion."). Modifying the parenting plan to make Thomas's residence the child's residence was the least disruptive way to continue the child's education in Portsmouth schools.

It must be conceded that the court's ruling probably contains a technical error. The court ruled against Eva on the understanding that the Parenting Plan barred her from moving without its permission. ORDER ON *EX PARTE* MOTION (Aug. 16, 2017), *Addendum* at 19; *Transcript* at 4, 5. As noted, the three paragraphs are somewhat inconsistent, but appear to bar her from moving without *notice*, not *permission*.

Even if the specific grounds on which the court ruled were technically in error, had the court substituted the word "notice" for "permission," there would be no difference in analysis and outcome – Eva still violated the Parenting Plan, Thomas would still have established a residence in Portsmouth, and the child would still be attending Portsmouth High School. "[W]here the trial court reaches the correct result on mistaken grounds, [this court] will affirm if valid alternative grounds support the decision." *Doyle v. New Hampshire Dep't of Res. & Econ. Dev.*, 163 N.H. 215, 222 (2012); *see also Handley v. Town of Hooksett*, 147 N.H. 184, 189-90 (2001) ("[W]e

concur with the trial court's result, albeit for different reasons. This court will sustain the decision of the trial court if there are valid alternative grounds to support it.").

Accordingly, this court should affirm the ruling below, and allow the child to continue successful education in the Portsmouth School District.

IV. No Need for Additional Hearing

Eva suggests that Thomas's Motion to Maintain School Placement was somehow deficient because it did not request a hearing, *Eva's Brf*. at 16, presumably pursuant to the fourth paragraph of the Parenting Plan's relocation provisions. Thomas did not request a hearing, and does not now, because, as the court noted, it would be superfluous. Beyond the date Eva notified Thomas of her move, which Eva announced was June 27, 2017, there is no other material fact on which the issues in this matter turn.

V. Proper Remedy is to Affirm That Child Remain in Portsmouth School District

In her brief, Eva suggests that this court should "reverse the … order which mandates that the minor child attend school in the Portsmouth school district and names [Thomas] as the parent whose address controls school registration." *Eva's Brf*. at 16.

Even if Eva is correct that the second paragraph controls and the third paragraph should be truncated altogether, reversal is not the appropriate remedy. At most, this court might order correction of the family court's mistaken grounds of decision, and possibly order a hearing on best interest. But given that this court can correct mistaken grounds, that the family court implicitly found Portsmouth High School is in the child's best interest, and that no additional fact is needed for decision, no further remedy is necessary. Reversal is unjustified and misdirected for the error alleged here.

CONCLUSION

The family court's technical error, if corrected, would clarify the grounds for decision, but would work no practical change in analysis or outcome. Accordingly, this court should affirm.

REQUEST FOR ORAL ARGUMENT

Oral argument may be beneficial to ensure clarity regarding overlapping relocation provisions.

Respectfully submitted,

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Dated: April 23, 2018

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief.

I further certify that on April 23, 2018, copies of this brief will be forwarded to Maureen A. Howard, Esq.

I futher certify that this brief complies with the type-volume limitations contained in Proposed Supplemental E-Filing Rule 16(11), that it was counted using WordPerfect version X6, and that it contains no more than 4,574 words, exclusive of those portions which are exempted.

Dated: April 23, 2018

Joshua L. Gordon, Esq.