State of New Hampshire
Supreme Court

NO. 2009-0520

2010 TERM

FEBRUARY SESSION

In the Matter of Roberta L. (Pierce) Scott

and

James B. Pierce

RULE 7 APPEAL OF FINAL DECISION OF
HILLSBOROUGH COUNTY (NORTH) SUPERIOR COURT

BRIEF OF RESPONDENT/APPELLEE JAMES B. PIERCE

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Current Controversy

James B. Pierce and Roberta L. Pierce (now Scott) were married in 1982 and divorced in 1989, both in Massachusetts. They had two children, Brian and Melissa, who are now both past the age of majority. Mr. Pierce and Ms. Scott have been in court several times post-divorce. The current proceeding concerns termination of support Mr. Pierce was paying for the now-emancipated children, and also involves Ms. Scott's claim that Mr. Pierce owes her arrearages for past support and educational expenses.

The Hillsborough County Superior Court (*Bruce F. Dalpra*, M.; *Larry M. Smukler*, J.) found that the amount of support Mr. Pierce over-paid while the children were in college, and the amount of arrearage Ms. Scott now claims, are such that "equity and justice require that no further payments must be made" by either party. ORDER (May 21, 2009), *Ms.Scott's Brf.* at 32.[1]

Determination of the current controversy turns largely on when and under what conditions child support ends, and where jurisdiction lies to make the decision. In the two decades since the parties were divorced, this has changed – the statutes controlling it have been amended, the parties themselves have several times modified the emancipation clause contained in their original divorce agreement, and it has been addressed by several court orders in two states.

[1]The record in this case is spread across three documents. The orders annexed to Ms. Scott's brief are cited to "*Ms.Scott's Brf.*" The portions of the record contained in the appendix to Ms. Scott's brief are cited to "*Ms.Scott's Appx*." The portions of the record appended to this brief are cited to "*Mr.Pierce's Brf.*"

II. 1989 Agreement

The parties agreed to joint legal custody of the children, who would live primarily with Ms. Scott; Mr. Pierce would pay child support. Four portions of the divorce agreement are important here – the emancipation clause, the education-expenses clause, the choice-of-law clause, and the merger clause.

The emancipation clause provided that child support would end at the earliest of: turning 18, marriage, death, military service, no longer living with a parent, or no longer being in school. If the child were in school, emancipation would occur at age 21 regardless. AGREEMENT OF SEPARATION, SUPPORT, AND DIVISION OF PROPERTY (hereinafter "DIVORCE AGREEMENT") (April 3, 1989), *Ms.Scott's Appx*. at 2, 8.

The Agreement contained an education-expenses clause, which provided that "the children should receive the best college education available to them in light of their aptitudes and interests," and that "the choice of educational institution … shall be made on the basis of joint consultation with due regard for the children's aptitudes, interests and desires." The Agreement required that "[o]ne year before a child is scheduled to attend college, the parties shall meet and discuss the financial responsibility each of them shall bear for the cost of college." DIVORCE AGREEMENT, *Ms.Scott's Appx*. at 13.

The Agreement's choice-of-law clause provided that "[a]ll matters affecting the interpretation of this Agreement and the rights of the parties hereto shall be governed by the laws of the Commonwealth of Massachusetts." DIVORCE AGREEMENT, *Ms.Scott's Appx*. at 15.

Finally, the Agreement specified merger.[2] It provided that it "shall be merged in and become a part of [the] Judgment of Divorce." DIVORCE AGREEMENT, *Ms.Scott's Appx*. at 14. When the Massachusetts court approved the Agreement, it specified that the Agreement "shall survive and have independent legal significance, except for provisions relating to the children which provisions merge in this Judgment." JUDGMENT OF DIVORCE NISI, *Ms.Scott's Appx*. at 1.

III. 1997 Stipulation

Ms. Scott re-married and her new husband got a job in California, prompting the parties to renegotiate the terms of custody and child support. In 1997 they entered a Stipulation which maintained legal and physical custody, and specified long-distance visitation arrangements. The Stipulation allowed Mr. Pierce to pay slightly lower child support, but established a $40 weekly payment dubbed "Father's Travel Escrow." It was for Mr. Pierce to travel to California to see the children, and if unexpended by March 30 of each year, the money was to be forwarded to Ms. Scott for deposit into a UTMA account for college savings. STIPULATION OF THE PARTIES (hereinafter "1997 STIPULATION") (April 4, 1997), *Ms.Scott's Appx*. at 19, 23.

The Stipulation amended when and under what conditions child support would end: turning 21, death, becoming independent of parental support, entering the military, living away from the mother, or having full-time permanent employment. It also provided that if the child started college promptly after high school, emancipation would not occur as long as the child remained in school or turned 23, whichever occurred first. 1997 STIPULATION, *Ms.Scott's Appx*. at 25-26.

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[2] "Merger," nearly meaningless in New Hampshire, has considerable significance in Massachusetts law, as discussed *infra*.

The Stipulation demanded that "[t]he parties will confer with each other on an ongoing basis with respect to all matters pertaining to the Children's … education," and that "[e]ach shall consult with the other as promptly as practical in all important matters involving the Children." 1997 STIPULATION, *Ms.Scott's Appx*. at 24.

The Stipulation was approved by the Massachusetts court.

IV. 2003 Modification

By 2002 Ms. Scott had relocated to California and Mr. Pierce had moved to New Hampshire. The first child was a college junior, and the second a highschool senior headed to college.

In 2002 Ms. Scott registered the Massachusetts decree in New Hampshire at the Hillsborough County Superior Court. PETITION TO REGISTER FOREIGN DECREE (Nov. 6, 2002), *Mr.Pierce's Brf.* at 36. She also sought to modify the child support amount, and alleged that Mr. Pierce had not paid the first child's college expenses nor maintained the escrow travel account. PETITION FOR CHILD SUPPORT, COLLEGE PAYMENTS AND EXPENSES, ARREARAGE FOR NON-PAYMENT OF EXPENSES, CONTEMPT AND OTHER RELIEF (Aug. 6, 2002), *Ms.Scott's Appx*. at 27. Mr. Pierce answered that Ms. Scott had not adequately consulted him regarding college costs. ANSWER (Apr. 3, 2003), *Mr.Pierce's Brf*. at 38.

After a hearing the court declined to rule on whose fault it was that Mr. Pierce had not had more contact with the children. ORDER ON PENDING MATTERS (Oct. 8, 2003), *Ms.Scott's Appx*. at 33, 36. The court ordered Mr. Pierce to pay in installments an arrearage of $9,360 that should have been deposited into the escrow travel account. *Id*; ORDER ON MOTION FOR RECONSIDERATION (Dec. 30, 2003), *Ms.Scott's Appx*. at 57, 59. The court compared the parties' earnings, established Mr.

Pierce's income for child support purposes at $32,908, and commensurately increased his child support obligation to $187 per week. ORDER ON PENDING MATTERS, *Ms.Scott's Appx*. at 38.

The court found that although Ms. Scott did not sufficiently include Mr. Pierce in decisions affecting college costs, it required him to pay $3,000 per year toward the older child's education. *Id.*, *Ms.Scott's Appx*. at 39-40. The court cautioned Ms. Scott to involve Mr. Pierce in the second child's college plans. *Id.*, *Ms.Scott's Appx*. at 40. Although it recognized the history of the parties' emancipation arrangements, the court nowhere in its narrative unambiguously set forth the timing and conditions of when child support would terminate.

In addition to its narrative, the court issued a Uniform Support Order, attached to which was the required Standing Order. UNIFORM SUPPORT ORDER (referred to herein as USO) (Oct. 8, 2003), *Mr.Pierce's Brf.* at 30; UNIFORM SUPPORT ORDER - STANDING ORDER, *Mr.Pierce's Brf.* at 34. The USO accurately ordered weekly payments to Ms. Scott of $147, and weekly deposits into the escrow travel account of $40, for a total of $187 per week child support obligation. It also ordered payment of arrearages for the college fund.

The Standing Order attached to the USO recites that it "is a part of all Uniform Support Orders." STANDING ORDER ("notice" paragraph). It demands that it "shall be given full effect as order of the Court." *Id.* The Standing Order specifies that "Child support shall terminate when the youngest child terminates his/her high school education or reaches the age of 18 years, whichever is later; gets married; or becomes a member of the armed forces." STANDING ORDER ¶ SO-4A, *Mr.Pierce's Brf.* at 38. Finally, it directs that any "variation" between the Standing Order and the USO must be entered in the appropriate place on the USO. STANDING ORDER ("notice" paragraph). Significantly, there is no such variation entered on the USO. UNIFORM SUPPORT ORDER ¶19,

Mr.Pierce's Brf. at 31.

The consequence of this is that the narrative order together with the attached USO appear to replace the earlier emancipation conditions with the unambiguous support termination provisions of the USO – "when the youngest child terminates his/her high school education or reaches the age of 18 years, whichever is later."

V. 2009 Termination

In 2004 and then again in 2008 the Commonwealth of Massachusetts repeatedly withdrew from Mr. Pierce's bank account many thousands of dollars for child support. Mr. Pierce repeatedly attempted to halt the withdrawals through the Massachusetts Department of Revenue, but was unsuccessful. *Trn*. at 5-6, 10-11; RESPONDENT'S MEMORANDUM OF LAW (Mar. 31, 2009) (not in appendix); RESPONDENT'S PROPOSED ORDER (Feb. 24, 2009) (not in appendix).

To rectify that, in 2008 Mr. Pierce filed for termination of child support in New Hampshire, which commenced the proceeding now on appeal. PETITION FOR MODIFICATION - CHILD SUPPORT (June 24, 2008), *Ms.Scott's Appx*. at 60. By that time, both children were finished with college.

Ms. Scott answered the petition, counter-claiming that Mr. Pierce was in contempt and requesting payment of arrearages. Ms. Scott alleged a total of about $35,000, plus interest, plus "a reasonable contribution for college expenses incurred" for the second child. ANSWER TO PETITION FOR MODIFICATION AND CROSS-MOTION FOR CONTEMPT AND ARREARAGES FOR CHILD SUPPORT, COLLEGE PAYMENTS AND EXPENSES AND MEDICAL INSURANCE ¶¶ A-E (Nov. 14, 2008), *Ms.Scott's Appx*. at 63.

Seeing that Ms. Scott had upped the ante, Mr. Pierce was compelled to reply. REPLICATION

TO ANSWER AND CROSS PETITION FOR CONTEMPT AND MOTION FOR LATE ENTRY (Dec. 31, 2008), *Ms.Scott's Appx*. at 68. He noted that according to the USO, child support had ended when the youngest child turned 18 and was not in high school, that the USO supercedes any prior support order, that he tried to terminate payments through the Massachusetts Department of Revenue, that he had nonetheless continued paying child support through May 2008 when he filed his petition for termination, and that his resulting overpayment amounted to over $33,000. REPLICATION ¶¶ 1-5. He suggested this amount should be a set-off for any arrearages. Mr. Pierce denied liability for the second child's college expenses because Ms. Scott had not included him in decisions affecting costs, and because New Hampshire law now bars courts from ordering such payments. *Id.* ¶¶ 6-9; RESPONDENT'S PROPOSED ORDER (Feb. 24, 2009) (not in appendix).

Ms. Scott objected on both procedural and substantive grounds. PETITIONER'S RESPONSE TO REPLICATION TO ANSWER AND CROSS-PETITION FOR CONTEMPT, OBJECTION TO MOTION FOR LATE ENTRY, AND MOTION TO DISMISS AND/OR STRIKE (Jan. 9, 2009), *Ms.Scott's Appx*. at 72. Both sides filed memoranda of law; Ms. Scott also made a request for findings and rulings which the court declined to address.

After a hearing, at which both sides were represented, the court issued an order. It held that New Hampshire and not Massachusetts law applies, and that New Hampshire law deprives the court of jurisdiction to order parents to contribute to an adult child's college expenses. Reconsideration was denied and Ms. Scott appealed.

SUMMARY OF ARGUMENT

Mr. Pierce first argues that the 2003 Uniform Support Order and its attached Standing Order clearly and unequivocally modified earlier orders and became the operative order regarding the time and conditions of when child support would end.

He then notes that the Uniform Interstate Family Support Act provides for modification by a new state of an initial state's support order under certain conditions, which were met here. He argues that under the act, New Hampshire became the state whose law must be followed by virtue of the New Hampshire court's 2003 modification, to which Ms. Scott took no exception. Thus the recent 2009 order is merely a modification of an earlier New Hampshire order.

Mr. Pierce then describes the doctrines of merger and incorporation, and explains that the agreements of the parties, because they involve the rights of children, were merged into court orders, and thus became inherently modifiable, and not separately enforceable. This includes agreements regarding education expenses, support, and choice of law regarding the children.

Mr. Pierce concludes by noting that the amount of arrearages he allegedly owed was roughly balanced by the amount he overpaid in support. The court was thus correct in finding that "equity and justice require that no further payments must be made" by either party.

ARGUMENT

I. Mr. Pierce's Child Support Obligation has Been Paid

A. Uniform Support Order Defines When Child Support Ends

The 2003 Uniform Support Order provides a definitive and unambiguous statement of when child support ends: "Child support shall terminate when the youngest child terminates his/her high school education or reaches the age of 18 years, whichever is later; gets married; or becomes a member of the armed forces." UNIFORM SUPPORT ORDER - STANDING ORDER ¶ SO-4A, *Mr.Pierce's Brf.* at 34. There is no "variation" in the USO purporting to detract from the definitive and unambiguous statement, *see* UNIFORM SUPPORT ORDER ¶19, *Mr.Pierce's Brf.* at 31, nor any later document that could be construed to amend or limit it. The USO demands that it "shall be given full effect as order of the Court," *id.* ("notice" paragraph), and it is reasonable that it be understood as such.

USOs can modify earlier child support orders. *In re State and Estate of Crabtree*, 155 N.H. 565, 567 (2007) ("the trial court approved uniform support orders modifying Crabtree's support obligations"). That the USO is a standardized form or that the operative language is in a standing order does not lessen its impact as a court order. *In re Gordon*, 147 N.H. 693 (2002) ("The uniform support order, in turn, is a standardized form."); *In re Costa*, 156 N.H. 323 (2007) ("provided that the accounts have not been utilized in violation of the standing order, there is no contempt"); *In re WMUR Channel 9*, 148 N.H. 644 (2002) (standing orders regarding cameras in courtrooms).

B. Narrative Order Does Not Contravene the Uniform Support Order

The narrative portion of the 2003 order provides support for both children. ORDER ON PENDING MATTERS, *Ms.Scott's Appx*. at 38-39. It can therefore be supposed that an inference can be drawn regarding the time of emancipation. But the narrative nowhere directly addresses termination of child support, nor sets forth conditions contradicting the direct language of its attached USO. Moreover, at the time of the 2003 order the younger child was just 17 – making weak any claim of a clear inference.

Thus the logical reading of the documents together is that the earlier agreements were superceded, and that "[c]hild support shall terminate when the youngest child terminates his/her high school education or reaches the age of 18 years, whichever is later." UNIFORM SUPPORT ORDER - STANDING ORDER ¶ SO-4A, *Mr.Pierce's Brf.* at 34.

Ms. Scott did not appeal the 2003 order, or even request consideration on the issue she belatedly presents here. MOTION FOR RECONSIDERATION (Nov. 11, 2003), *Ms.Scott's Appx*. at 55. She thus waived any claim that the USO means something other than its plain text suggests. She also acquiesced in the order, making it binding on her. *Arnold v. City of Manchester*, 119 N.H. 859, 864 (1979). The issue is also res judicata. *Sleeper v. Hoban Family Partnership*, 157 N.H. 530 (2008) ("Res judicata precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action").

C. Findings of Fact are Mere Inference, Buried, and Not Incorporated by Reference

Ms. Scott argues that her requests for findings of fact granted along with the 2003 order supercede the USO. Each of the findings she cites (numbers 6, 7, and 12), however, contain significant ambiguities. Each refers to what the parties' earlier agreements contained, but does not specify what is to occur going forward. Number 6 begins: "That the court finds that the parties entered into an agreement and stipulation" providing thus-and-so, and was granted by the court with the proviso "as to part of the agreement." ORDER ON PENDING MATTERS § 5, *Ms.Scott's Appx*. at 41. Both numbers 7 and 12 explicitly reference the previous agreement.

To the extent these findings of fact raise an inference of an ambiguity, it is merely that – an inference. They do not contravene the clear and definitive language of the USO which states, first, that "[c]hild support shall terminate when the youngest child terminates his/her high school education or reaches the age of 18 years, whichever is later"; and second, that the USO "shall be given full effect as order of the Court."

Moreover, the law is established that findings of fact should not be confused with, and do not constitute, orders of the court.

> The distinction between a judgment and mere findings of fact is well understood in our law. Such findings may, in the proper case, furnish the basis upon which a judgment may be rendered, but do not in themselves constitute an adjudication of rights. Again, the judgment must be definitive. It must purport to be the actual and absolute sentence of the law, as distinct from a mere finding that one of the parties is entitled to a judgment, or from a direction to the effect that a judgment may be entered.

American Motorists Ins. Co. v. Central Garage, 86 N.H. 362 (1933) (quotation and citation omitted). Rather, the purpose of a court making findings of fact is to "provide a basis for presenting this court

the questions of law arising on the facts found by the trial court." *Geiss v. Bourassa*, 140 N.H. 629, 632 (1996).

Finally, the findings of fact are buried. They were not attached to the order as was the USO, nor does the court order contain a statement that Ms. Scott's pleading was to be incorporated by reference. Incorporation by reference for such a purpose is commonly done by courts in New Hampshire, *Hughes v. Speaker of the New Hampshire House of Representatives*, 152 N.H. 276 (2005) ("We incorporate by reference the more detailed history set forth in Baines."); *State v. Dahood*, 148 N.H. 723 (2002) ("we incorporate by reference the underlying facts detailed in our earlier opinion"); *DeMauro v. DeMauro*, 147 N.H. 478 (2002) "we incorporate by reference the facts detailed in DeMauro I"), and by private parties in various contexts. *In re Estate of King*, 149 N.H. 226 (2003) (rules for incorporating documents by reference in wills); *Chadwick v. CSI, Ltd.*, 137 N.H. 515 (1993) (incorporation of standards by reference in construction contract); *Farm Bureau Mut. Auto. Ins. Co. v. Garland*, 100 N.H. 351 (1956) (incorporation of statute by reference in insurance policy); *Burke v. Pierro*, __ N.H. ___ (decided Dec. 16, 2009) (non-incorporation of development scheme in deed); *State Farm Ins. Co. v. Bruns*, 156 N.H. 708 (2008) (incorporation of earlier allegations by reference in pleadings); *Cannata v. Town of Deerfield*, 132 N.H. 235 (1989) (same).

D. Court's Interpretation of its Own Orders is Given Deference

The ultimate result below was that Mr. Pierce is all paid up. The court ruled that "any alleged arrearage is significantly less than the amount of child support [already] paid," and that "equity and justice require that no further payments must be made." ORDER (May 21, 2009), *Ms.Scott's Brf.* at 32. By ordering no further payments, the court found that Mr. Pierce's understanding of the prior

orders was reasonable.

A court's reading of its own orders is accorded deference on appeal. *Bell v. Liberty Mut. Ins. Co.*, 146 N.H. 190, 195 (2001) ("the interpretation thus placed by the … court upon its own order raises no question of law for us to consider") (quoting *Lear v. Brodeur*, 84 N.H. 549, 550 (1931)). The order now on appeal is the lower court's 2009 interpretation of its own 2003 order. This Court should defer and not disturb the ruling.

II. UIFSA Gives New Hampshire Courts Authority to Modify Massachusetts Orders

In her brief Ms. Scott identified several discrete provisions of the New Hampshire Uniform Interstate Family Support Act, RSA 546-B, but ignored the context of its national uniform statutory scheme. She has mischaracterized it and developed an argument not sustained by the statute.

A. Uniform Interstate Family Support Act

The Uniform Interstate Family Support Act (UIFSA) was promulgated in the late 1990s by a national drafting committee, and under pressure of federal law, has been adopted in all American jurisdictions. *See* UIFSA, *Prefatory Note*, 9-IB U.L.A. 159 (2006); *Wilkie v. Silva*, 141 N.H. 461 (1996); 28 U.S.C. § 1738B. New Hampshire's version became effective in 1998.

Under previous law there were often competing orders from different states, making enforcement difficult. Thus the UIFSA introduced the concept of "continuing exclusive jurisdiction." "As far as possible, under UIFSA the principle of continuing exclusive jurisdiction aims to recognize that only one valid support order may be effective at any one time." UIFSA, *Prefatory Note § II.B.3.*, 9-IB U.L.A. at 163.

B. Registration for Enforcement Versus Registration for Modification

The UIFSA defines the "issuing state," as the "state in which a tribunal issues a support order," RSA 546-B:1, IX, and the "responding state" as the "state in which a proceeding is filed." RSA 546-B:1, XVI. An order of the issuing state may be registered in the responding state either for *enforcement* or for *modification*.

1. Registration for Enforcement

When an order of the issuing state is registered for *enforcement* in the responding state, the responding state has a duty to enforce it, in accord with the substantive law of the issuing state.[3] RSA 546-B:38 through RSA 546-B:42. This is the core policy of the UIFSA – making sure that other states will enforce existing child support orders. UIFSA, *Prefatory Note § II.C.2.*, 9-IB U.L.A. at 164; *see e.g.*, *Robdau v. Commonwealth, Virginia Dept. Social Serv.*, 543 S.E.2d 602 (Va.App. 2001) (applying New York law when Virginia sought enforcement of New York order); *State ex rel. Harnes v. Lawrence*, 538 S.E.2d 223 (N.C.App. 2000) (applying New Jersey law to enforcement by North Carolina court of New Jersey order).

2. Registration for Modification

When an order of the issuing state is registered for *modification*, however, the responding state then acquires the "continuing exclusive jurisdiction," RSA 546-B:7, which gives it authority to modify the order. RSA 546-B:47 through RSA 546-B:49.

3. When Issuing State Loses Nexus to Family

An order can be registered for modification only when the issuing state loses its connection with the family – that is,"[a]s long as [the issuing] state remains the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued." RSA 546-B:7, I(a). "The Child Support Act allows modification of a child support order by another State only if the

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[3]The responding state still applies its own law regarding procedure and enforcement. RSA 546-B:14; UIFSA § 303 *Comment*, 9-IB U.L.A. at 208. "In sum, the local tribunal applies its own familiar procedures to enforce a support order, but it is clearly enforcing an order of another State and not an order of the forum." UIFSA § 604 *Comment*, 9-IB U.L.A. at 246.

original issuing State loses continued, exclusive jurisdiction." *Wilkie v. Silva*, 141 N.H. 461, 463 (1996).

> [I]f all the relevant persons – the obligor, the individual obligee, and the child – have permanently left the issuing State, the issuing State no longer has an appropriate nexus with the parties or child to justify the exercise of jurisdiction to modify its child-support order.

UIFSA § 205 *Comment*, 9-IB U.L.A. at 194, citing *In re Marriage of Erickson*, 991 P.2d 123 (Wash.App. 2000); *Groseth v. Groseth*, 600 N.W.2d 159 (Neb. 1999).

4. When New State Gains Nexus to Family

Likewise, a new state can gain the "continuing exclusive jurisdiction," RSA 546-B:7, to modify the order only when it has sufficient nexus with the parties. What constitutes sufficient nexus is defined by the statute.

(1) The child, the individual obligee, and the obligor do not reside in the issuing state;

(2) A petitioner who is a nonresident of this state seeks modification; and

(3) The respondent is subject to the personal jurisdiction of the tribunal of this state.

RSA 546-B:49, I(a). In addition, once a child support order has been modified by a responding state, the responding state becomes the one with continuing exclusive jurisdiction, to which other states must then give deference in their enforcement. RSA 546-B:49, IV ("On issuance of an order modifying a child support order issued in another state, a tribunal of this state becomes the tribunal of continuing, exclusive jurisdiction."). In summary:

> Under UIFSA, the only tribunal that can modify a support order is the one having continuing, exclusive jurisdiction over the support issues. As an initial matter, this is the tribunal that first acquires personal and subject matter jurisdiction over the parties and the support obligation. If modification of the order by the issuing tribunal is no longer appropriate, another tribunal may become vested with the continuing exclusive jurisdiction necessary to modify the order. Primarily this occurs when

> neither the individual parties nor the child reside in the issuing state.… Only then may another tribunal with personal jurisdiction over the parties assume continuing, exclusive jurisdiction and have jurisdiction to modify the order.

UIFSA, *Prefatory Note § II.D.2.*, 9-IB U.L.A. at 165 (citations omitted).

5. Whose Law Applies to Modification

When the new state modifies, it must pay some deference to the law of the original state. 546-B:49, III. But once modification in the new state has been done, the substantive law of the new state takes over. RSA 546-B:49, II. "[W]hen the forum has assumed modification jurisdiction because the issuing State has lost continuing, exclusive jurisdiction, the proceedings will generally follow local law with regard to modification of child-support orders." UIFSA § 611 *Comment*, 9-IB U.L.A. at 258. The statute provides that registration of a foreign order for purposes of modification makes the order "subject to the same requirements, procedures, and *defenses* that apply" to a modification of a New Hampshire order. RSA 546-B:49, II (emphasis added). Upon Ms. Scott alleging arrearages, Ms. Pierce was thus allowed to defend on the grounds that he had already paid.

Even if New Hampshire was compelled to follow Massachusetts law with regard to duration of child support, as Ms. Scott argues, the New Hampshire modification of the Massachusetts order occurred in 2003 when the New Hampshire court issued its Uniform Support Order and Standing Order. At that point New Hampshire became the "issuing state." Ms. Scott acquiesced in the 2003 order, did not appeal it, and thus cannot attack it now.

C. New Hampshire has Become the State with Continuing Exclusive Jurisdiction and may Modify in Accord with New Hampshire law

1. Massachusetts Lost Continuing Exclusive Jurisdiction

Massachusetts was the issuing state. Ms. Scott and the children are now residents of California (and for a time the eldest child may have been resident of Vermont); none have resided in Massachusetts since 1997. Mr. Peirce is no longer a resident of Massachusetts either. Thus Massachusetts has lost its eligibility to be the state with continuing exclusive jurisdiction, and is no longer is available to modify the child support orders. *Holloway v. Holloway*, 827 N.Y.S.2d 729, 731 (N.Y.A.D. 2006) (New York "lost continuing, exclusive jurisdiction to modify the child support provisions when both parties and the children all moved out of state").

2. New Hampshire Gained Continuing Exclusive Jurisdiction

As noted, there are three conditions necessary for a new state to modify a child support order of another state:

(1) The child, the individual obligee, and the obligor do not reside in the issuing state;

(2) A petitioner who is a nonresident of this state seeks modification; and

(3) The respondent is subject to the personal jurisdiction of the tribunal of this state.

RSA 546-B:49, I(a).

Conditions (1) and (3) are satisfied because nobody any longer lives in Massachusetts, and Mr. Pierce, the respondent, lives in New Hampshire.

3. Ms. Scott Registered for Modification in New Hampshire

Condition (2) is satisfied because when Ms. Scott registered the Massachusetts order in New Hampshire in 2002, she sought modification. Her pleading sought enforcement, but she also prayed

"that the court enter an order for the defendant to pay his fair share of the college education for each child." PETITION FOR CHILD SUPPORT, COLLEGE PAYMENTS AND EXPENSES, ARREARAGE FOR NON-PAYMENT OF EXPENSES, CONTEMPT AND OTHER RELIEF ¶ 2.e. (Aug. 6, 2002), *Ms.Scott's Appx*. at 31.

Before that, no existing order provided for payment of education expense. The parties' prior agreements promised only to *talk about* college costs. The 1989 Settlement provided "[o]ne year before a child is scheduled to attend college, the parties shall meet and discuss the financial responsibility each of them shall bear for the cost of college." DIVORCE AGREEMENT, *Ms.Scott's Appx*. at 13. The 1997 Stipulation provided that "[t]he parties will confer with each other on an ongoing basis with respect to all matters pertaining to the Children's … education." 1997 STIPULATION, *Ms.Scott's Appx*. at 24.

Thus Ms. Scott herself in 2002 asked the New Hampshire court for modification. By doing so she gave New Hampshire jurisdiction to modify the Massachusetts orders.

4. New Hampshire Modified in 2003

In 2003, as a result of Ms. Scott's petition, the court explicitly modified the earlier Massachusetts orders. ORDER ON PENDING MATTERS (Oct. 8, 2003), *Ms.Scott's Appx*. at 33. In a section of its decision entitled "Modification of Child Support," the court ordered a specific amount of child support. *Id.* at ¶ 3, *Ms.Scott's Appx*. at 37. In the next section, entitled "College Contribution," the court – as requested by Ms. Scott in her prayer for relief – ordered Ms. Pierce to pay a particular amount of education expenses. *Id.* at ¶ 4, *Ms.Scott's Appx*. at 39. And as discussed *supra*, in the Uniform Support Order and Standing Orders attached to the decision, the court modified the timing and conditions of emancipation. UNIFORM SUPPORT ORDER - STANDING ORDER

¶ SO-4A, *Mr.Pierce's Brf.* at 34.

Ms. Scott did not appeal the 2003 decision. If she had a complaint then about the authority of the court to modify, she long ago missed the time to address it. It is thus waived. A party who acquiesces to a court order by not taking exception by whatever procedures are available is deemed to have waived objection. *Arnold v. City of Manchester*, 119 N.H. 859, 864 (1979). The question of whether New Hampshire may now modify is also res judicata. *Sleeper v. Hoban Family Partnership*, 157 N.H. 530 (2008) ("Res judicata precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action").

Accordingly, Ms. Scott's present complaint – that the New Hampshire court unlawfully modified her agreement – cannot be sustained. Moreover, because New Hampshire in 2003 modified the other state's order, the substantive law of New Hampshire thereafter applied. Thus, when in 2009 the court applied New Hampshire law, it acted in accord with the statute.

5. New Hampshire Law Applies to Modification

Because modification was already done by a New Hampshire court in 2003, New Hampshire effectively became the issuing state, and thus New Hampshire law applies to the modification. Moreover, the statue preserves the obligor's right to assert defenses in the responding state. Thus, whatever position New Hampshire occupies, Mr. Pierce could defend against a claim of arrearages on the grounds that he had already paid.

But even if Ms. Scott is correct in suggesting that New Hampshire can modify only those aspects of the Massachusetts order that Massachusetts itself could modify, RSA 546-B:49, III, Massachusetts law allows the court to modify the duration of child support. The Massachusetts

statute cited by Ms. Scott provides that the court "*may* make appropriate orders of maintenance, support and education of any child" between ages 18 and 21 who is dependent upon the obligee, and "*may* make appropriate orders of maintenance, support and education for any child" between ages 21 and 23 if the child is in college. MASS.GEN.LAWS ch. 28, § 208 (emphasis added). The Massachusetts statute gives a court permission to order support beyond age 18, but does not mandate it. Thus support and educational expenses are not among the aspects of the child support order that cannot be modified under Massachusetts law. Because they are modifiable in Massachusetts, they are also modifiable in New Hampshire.

Finally, even if New Hampshire were compelled to follow some Massachusetts law that mandates the duration of child support, as Ms. Scott argues, the New Hampshire modification of the Massachusetts order occurred in 2003 when the New Hampshire court issued its Uniform Support Order and Standing Order. At that point New Hampshire became the "issuing state." Ms. Scott acquiesced in the 2003 order, did not appeal it, and thus cannot attack it now.

None of the out-of-state cases cited by Ms. Scott apply here for two reasons. First, they all involve the simple fact-pattern of a responding state modifying the order of an issuing state. None contain the procedural complication present here – the responding state long ago becoming the new issuing state, which Ms. Scott did not appeal in 2003. Second, the cases she cites construe out-of-state emancipation statues that are mandatory, not permissive like Massachusetts.

Thus in the current proceeding, the court had authority to equitably set-off the competing and nearly-equal claims made by both parties.

III. Agreements of the Parties are no Longer Specifically Enforceable

Ms. Scott claims the court erred by not enforcing various provisions of the Settlement Agreement the parties entered in 1989 when they were divorced and the Stipulation they entered in 1997 when Ms. Scott moved to California. Her claims ignore the doctrines of merger and incorporation, which are of significant import in Massachusetts divorce law.

When parties reach an agreement in pending litigation, it is submitted to the court for approval. Once approved, the question then becomes whether the agreement is separately enforceable – that is, whether a party may bring an action for or otherwise insist on enforcement of the contract – or whether it is an order of the court that is inherently modifiable and therefore not necessarily enforceable on the precise terms to which the parties agreed.

A. Merger and Incorporation in New Hampshire and Massachusetts

In both New Hampshire and Massachusetts, a divorce stipulation is binding on the parties unless it is merged with and incorporated into a subsequent divorce or other family law decree. In both states, if a stipulation is "merged," it becomes modifiable by a court, and therefore cannot be independently enforced. *Norberg v. Norberg*, 135 N.H. 620 (1992); *Knox v. Remick*, 358 N.E.2d 432, 434 (Mass.1976). When stipulations are merged into a decree, they are "entitled to consideration in the formulation of the decree, even though they are not binding on the court." *Narins v. Narins*, 116 N.H. 200, 201 (1976).

A non-merged stipulation, however, is subject to enforcement like any contract. In *Knox v. Remick*, 358 N.E.2d 432, 435 (Mass.1976), the Massachusetts Supreme Judicial Court wrote, "where a husband has obtained a reduction in his support obligation under a court order, the wife is entitled to recover in a contract action any difference between the amount he contracted to pay and the

amount the judge has ordered him to pay." In *Culhane v. Culhane*, 119 N.H. 389, 393 (1979), this Court approvingly quoted that same passage in *Knox v. Remick*.

New Hampshire and Massachusetts law do differ, however.

The first difference lies in how stipulations get merged. In New Hampshire, merger is automatic at the time the court approves the agreement. *Norberg v. Norberg*, 135 N.H. 620, 624 (1992) ("regardless of the language in the stipulation, the court retains the power to modify orders concerning alimony upon a proper showing of changed circumstances"); *Desaulnier v. Desaulnier*, 97 N.H. 171, 172 (1951) ("Although the legal separation granted the wife was entered pursuant to the stipulation of the parties …, the resulting decree was nevertheless the conclusion of the court and not merely a private agreement between the parties."). In Massachusetts, however, merger occurs only if the parties or the court explicitly merge the stipulation into a decree. *Moore v. Moore*, 448 N.E.2d 1255, 1257 (Mass.1983) ("The Commonwealth's strong policy has favored survival of separation agreements, even when such an intent of the parties is merely implied.").

The second difference between New Hampshire and Massachusetts is that in New Hampshire an independently enforceable agreement is a rarity. Massachusetts, however, strongly favors the survival of divorce agreements. Thus, in Massachusetts:

> as a general rule, unless the parties expressly provide otherwise, their separation agreement will be held to survive a subsequent divorce decree incorporating by reference the terms of the agreement.

Surabian v. Surabian, 285 N.E.2d 909 n. 4 (Mass.1972); *see also*, *Moore v. Moore*, 448 N.E.2d at 1257. Massachusetts courts routinely enforce separation agreements when they are intended to survive a related divorce decree. *See e.g., Stansel v. Stansel*, 432 N.E.2d 691 (Mass.1982).

B. Child Support Inherently Modifiable Because State has Independent Duties

In both states there is an exception.

A stipulation concerning support of children, even in Massachusetts, "stands on a different footing" from a stipulation on other matters, and is automatically merged – and thus addressable by the court – because it involves the rights of third persons to whom the State has independent duties. *Knox v. Remick*, 358 N.E.2d at 432; *Ames v. Perry*, 547 N.E.2d 309 (Mass.1989); *Ryan v. Ryan*, 358 N.E.2d 431 (Mass.1976). "Hence orders for child support are modifiable by a court." *Culhane v. Culhane*, 119 N.H. 389 (1979).

C. Court Within its Authority to Modify Orders Related to Children

The parties' 1989 Agreement provides that it "shall be merged in an become a part of [the] Judgment of Divorce," DIVORCE AGREEMENT, *Ms.Scott's Appx*. at 14, and the order approving it provides that it "shall survive and have independent legal significance, except for provisions relating to the children which provisions merge in this Judgment." JUDGMENT OF DIVORCE NISI, *Ms.Scott's Appx*. at 1. Both the Agreement and the order were in accord with Massachusetts law, which, as noted, automatically merges child support stipulations. In addition to that merger in Massachusetts, it again occurred in New Hampshire in 2003 when, on Ms. Scott's request, the New Hampshire court modified the earlier orders.

Thus, whether explicitly or by operation of law, the parties' agreement regarding "provisions relating to the children" were merged into the decree and are therefore inherently modifiable. The initial court was not bound by them, and the lower court in this case was not either. The various agreements of the parties for which Ms. Scott now seeks specific enforcement – support, conditions of support termination, choice of law, etc. – because they involve the rights of children, are

modifiable by a court. Accordingly, the court here was within its authority when it issued orders regarding the children, and nothing in the pre-merger agreements is capable of specific enforcement.

IV. Court Properly Balanced Obligations of the Parties and Ordered no Payment by Either

Ms. Scott claims that the court lacked authority to recompense Mr. Pierce for his past overpayment of child support. For several reasons this claim fails.

First, New Hampshire's child support statute specifically authorizes the court, when there has been an overpayment of child support, to bring all accounts up to date. RSA 458-C:7, III.

Second, the statute regarding retroactivity of child support termination, RSA 458-C:7, II, is either irrelevant or was satisfied because termination of the support obligation occurred by operation of law, RSA 458:35-c (1992); *see In re Johnson*, 158 N.H. 555 (2009), to which Ms. Scott is deemed to have notice. Because the children had the benefit of the support to which they are entitled, there was no harm to any party. *In re Carr*, 156 N.H. 498, 503 (2007).

Third, if Ms. Scott really believed that the child support obligation extended past the time specified in the USO, she was free to seek it long ago. Likewise, the time for Ms. Scott to seek contributions to the second child's education was before the child matriculated, not now after she has graduated. Ms. Scott is barred by laches from asserting these claims now. Moreover, laches is an equitable doctrine, and the court did equity here by balancing the roughly equal amount of arrearages and overpayment, which resulted in no payment by either party. *In re Giacomini*, 150 N.H. 498 (2004).

Finally, Ms. Scott's claim that Mr. Pierce should have paid for college expenses also cannot be sustained. At most the parties agreed to meet and talk about payment; there was never any agreement to pay. To the extent that the court earlier had ordered payment, courts have authority to modify their own orders. *In re Stapleton*, __ N.H. __ (decided Jan. 29, 2010). Moreover, the court lacked jurisdiction to order payment of college expenses. *In re Goulart*, 158 N.H. 328 (2009).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court below.

Respectfully submitted,

James B. Pierce
By his Attorney,

Law Office of Joshua L. Gordon

Dated: February 24, 2010

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for James Pierce requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case are novel in this jurisdiction.

I hereby certify that on February 24, 2010, copies of the foregoing will be forwarded to Andrea Q. Labonte, Esq.

Dated: February 24, 2010

Joshua L. Gordon, Esq.