

State of New Hampshire Supreme Court

IN THE MATTER OF
EVA OLIVER
and
THOMAS OLIVER

N.H. Sup.Ct. No. 2017-0630

MOTION FOR LEAVE TO FILE RESPONSE TO REPLY BRIEF

NOW COMES Thomas Oliver, by and through his attorney, Joshua L. Gordon, and requests leave to file a response to Eva Oliver's reply brief.

As grounds it is stated:

1. Eva Oliver, the appellant, filed her opening brief in March 2018. Thomas Oliver, the appellee, filed his opposing brief in April 2018. On May 15, 2018, Eva Oliver filed an amended reply brief, which raised new issues, prompting this request for leave to file a response.

I. Law Regarding Reply Briefs and Responses

2. This court has made clear that it will "decline to consider any new arguments raised by [a party] in [a] reply brief that are not responsive to the [other party's] brief." *Harrington v. Metropolis Prop. Mgmt. Grp., Inc.*, 162 N.H. 476, 481 (2011). The court explained:

We think it only reasonable to require that a reply brief may only be employed to reply to the opposing party's brief, and not to raise entirely new issues. If we held otherwise, we would be faced with either of two equally unacceptable results: the opposing party's inability to respond in writing to the new issues raised by the reply brief, or the submission of a series of reply briefs until oral argument date as the parties scramble to respond to a sequence of *de novo* arguments and issues. In addition, a response to a new issue in a reply brief renders the original brief's filing deadline meaningless.

Panas v. Harakis, 129 N.H. 591, 617-18 (1987).

3. This court's rules specify that "[n]o response to a reply brief may be filed except by permission of the court received in advance." SUP.CT.R. 16(7). Thomas Oliver requests leave to file a response to Eva Oliver's reply brief, for the reasons set forth herein.

II. "Enrollment" Versus "District"

4. In her reply brief, Eva points out that the parties' parenting plan uses the word "enrollment" rather than "district." Eva claims that because the child had recently finished middle school, and was poised to enter high school, "enrollment" would have changed" regardless, and therefore suggests that the relocation paragraphs do not apply. RPLY.BRF. at 1.

5. This issue was not preserved below, nor raised in Eva's opening brief. Moreover, while New Hampshire school law uses the word "enrollment" several times, notably in regard to school attendance, RSA 193:3, and school suspension, RSA 193:13, there is no statutory definition of "enrollment," and Eva does not offer one. However defined, Eva's move did affect where the child would be enrolled in school, and therefore her argument does not advance her position.

III. Informing

6. In her reply brief, Eva notes that Thomas did not inform her that he was getting divorced from his second wife, or that he was selling his Hampstead house. RPLY.BRF. at 2. This matter was not mentioned below, nor in Eva's opening brief. Moreover, there is no requirement that Thomas tell Eva about events in his personal life.

7. Regarding his move from Hampstead to Portsmouth, there was no occasion for Thomas to tell Eva; the move was the result of an offer made in his *ex parte* motion, upon which the court looked favorably, *Trn.* at 4 ("THE COURT: Mr. Oliver, you – as indicated, you were willing to do in your pleading, immediately relocate to Portsmouth."), which he consummated after the hearing.

IV. Harmonization

8. In her reply brief, Eva appears to argue that conflicting or ambiguous provisions in court orders can be truncated, or that having said something twice means a court can ignore something else said only once. RPLY.BRF. at 4, 5, 8. These propositions were not alleged below, not raised in Eva's opening brief, and contrary to settled law regarding construction of documents.

V. "Other Relocations"

9. In her reply brief, Eva argues that her position turns on the word "other" contained in the third relocation paragraph. RPLY.BRF. at 6-7 ("For *other* relocations which are not closer to the other parent *or* that affect the child's school enrollment ...") (emphasis added).

10. This argument was not raised below. While mentioned in her opening brief, it was a conclusory claim, located in a parenthetical, lacking any explanation or citation. OPENING BRF. at 6 ("The Petitioner did not need to reach the second prong of Section F (for "other" relocations) because her move fell well within the first prong of permitted relocations."). See *Appeal of New Hampshire Elec. Coop., Inc.*, 170 N.H. 66, 83 (2017) (passing reference in brief does not preserve appellate issue).

11. Moreover, apart from Eva's first-time explanation in her reply brief, the argument is defeated by the subsequent language of the paragraph. To support her position, the word "or" (emphasized in the quotation above) would have to be an "and."

VI. Facts Not in The Record

12. In her reply brief, Eva alleges that Thomas relied, in his brief, on facts that are not in the record. RPLY.BRF. at 1, 2. Because Eva does not specify what those alleged facts are, it is not clear how to respond. Nonetheless, it appears from Eva's reply brief that she understands Thomas to have claimed in his brief that he arranged his move from Hampstead to Portsmouth sometime in the summer, before the hearing. The record does not support that understanding. Rather, as

noted, Thomas offered in his *ex parte* pleading to move to Portsmouth, which offer the court accepted as a condition of its order.

13. Moreover, it is Eva who avers non-record facts. In her reply brief, she claims to have notified Thomas of her move on June 15, 2017. RPLY.BRF. at 1. The transcript of the hearing makes clear, twice in Eva’s own words, that the notification was two weeks later, on June 27:

THE PETITIONER: I gave him the notice on 6/27/2017 when I found out –

THE COURT: So it hasn’t been 60 days, correct?

MS. DIMEO¹: Correct.

THE COURT: Okay.

THE PETITIONER: Okay.

Trn. at 4. Eva repeated the assertion later in the hearing. *Trn.* at 5-6 (“THE PETITIONER: [D]oes the 60 days begin from 6/27 if we count that as the date of notification?”).

VII. Other Issues

14. If Thomas were granted leave to file a response to Eva’s reply brief, he would also mention two additional items raised for the first time in Eva’s reply brief. First, Eva says that the parenting plan is silent regarding when a party can request a hearing. RPLY.BRF. at 9. Thomas would respond that the matter is not relevant to this case.² Second, Eva claims that Thomas did not request that the court rule on the best interest of the child. RPLY.BRF. at 9. Thomas would reiterate that his *ex parte* motion noted that “[i]t would be in [the child’s] best interests to remain in the Portsmouth School District,” *Ex Parte Motion* at ¶ 22, EVA’S APPX. at 14, and that he also listed specific supporting facts regarding the child’s needs and interests. *Id.* at 12-14.

VIII. Remedy

15. Because Eva’s reply brief is almost entirely comprised of first-time arguments, this court

¹Patricia L. DiMeo, Esq., was Thomas’s attorney at the hearing.

²Eva requested a further hearing in her pleadings below, and initially appealed an issue regarding the sufficiency of a hearing in her notice of appeal in this court, but did not press the issue in her brief.

should disregard the reply brief in its entirety.

16. In the alternative, Thomas requests leave to file a response to Eva's reply brief, for the purpose of addressing the matters noted herein. Had Eva made the arguments in her opening brief that she made in her reply brief, Thomas would have addressed them in his opposing brief, and no response to a reply brief would be necessary. Because she did not, however, and because there is insufficient time in an oral argument to address them, a response to Eva's reply brief is necessary. *Panas*, 129 N.H. at 617-18. Thomas would expect to stay within the 10 page limit normally allowed for a reply brief. Finally, because this court has already scheduled oral argument in this case for June 19, 2018, Thomas requests that the oral argument be delayed to provide time for him to prepare the response he seeks leave to file.

WHEREFORE, Thomas Oliver respectfully requests this honorable court strike Eva Oliver's reply brief in its entirety, or in the alternative, grant leave for Thomas Oliver to file a response to Eva's reply brief, and to reschedule oral argument accordingly.

Respectfully submitted
for Thomas Oliver
by his attorney,

Dated: May 23, 2018

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I hereby certify on this 23rd day of May 2018, a copy of the foregoing is being forwarded to Maureen A. Howard, Esq.

Dated: May 23, 2018

Joshua L. Gordon, Esq.