

STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2006-0740

2007 Term
JANUARY SESSION

IN THE MATTER OF JILL IRVING AND BRADLEY LORD

RULE 7 APPEAL FROM FINAL DECISION OF
PORTSMOUTH FAMILY DIVISION

BRIEF OF RESPONDENT/APPELLANT, BRADLEY LORD

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QUESTIONS PRESENTED

1. The New Hampshire's divorce statute requires the Court to specify reasons for making its alimony award. Beyond a cursory order, the Court did not specify reasons for its alimony award to Respondent. Whether the Court erred by failing to specify reasons for its alimony award? See *Appx.* at 34, 52 and 146, *N.O.A.* at 3.
2. The New Hampshire's divorce statute allows for payment of alimony to a party in need who "is unable to be self-supporting through appropriate employment at a standard of living that meets reasonable needs." Bradley Lord requested alimony based upon his need of \$1,000.00 per month. Whether the Court abused its discretion by ordering alimony of only \$800.00 per month, for a period of only

four months, followed by reduction of alimony by \$200.00 every three months until the sum of zero was obtained, significantly less than Respondent's need? See *Appx.* at 34, 52 and 146, *N.O.A.* at 3.

3. The New Hampshire's divorce statute allows for modification of alimony "upon motion." Bradley Lord requested alimony for three years unless earlier renewed or terminated pursuant to motion of either party. Whether the Court abused its discretion by ordering alimony for a period of only thirteen months, inclusive of a staggered reduction of alimony by \$200.00 every three months until the sum of zero was obtained, far shorter than the anticipated and requested duration of Respondent need? S See *Appx.* at 34, 52 and 146, *N.O.A.* at 3 and 4.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Bradley Lord and Jill Irving were married in 1994 and separated twelve years later in February 2006, when Jill filed a libel for divorce. The contested issues in their case included whether a divorce or decree of legal separation should be granted, alimony, responsibility for providing Bradley Lord's health insurance and other matters such as Respondent's request to equalize their bank accounts. The parties entered a stipulation dividing most of their property. After a two hour final hearing, the Family Division Court granted Jill Irving a divorce on the grounds of irreconcilable differences, approved the parties' Final Partial Stipulation, awarded each party the balance of the bank accounts then in their possession, and awarded Bradley Lord alimony. Although the Master's recommended order, as approved by the Family Division, refers in paragraph 2 A to an equal distribution of the marital estate, in fact, the order provided

for a slightly unequal division of property in favor of the Petitioner, due to the Court's failure to equalize the parties' bank accounts as of the date of the final hearing. This appeal concerns alimony only.

At the Final Hearing, Respondent-Appellant, Bradley Lord requested a \$1,000.00 per month order of alimony for a three-year period, subject to review upon motion of either party. *Appx.* at 34, 141 and 146. The Portsmouth Family Division's September 1, 2006 Final Decree Of Divorce (*recommended by Master, Harriet Fishman, Esq. and approved by Lucinda V. Sadler, Presiding Justice*) provided instead in pertinent part that "The Petitioner shall pay the Respondent the sum of \$800.00 per month through December 31, 2006; then, the alimony obligation shall be reduced by \$200.00 every three (3) months until the sum of zero is reached." *Decree at ¶ 3, Appx.* at 23. This appeal followed, staying the final alimony order.

Immediately after the parties' separation in February and again in May 2006, the Respondent was hospitalized at the Portsmouth Pavilion on account of severe depression, anxiety and suicidal ideation, forcing a continuance of the initially scheduled temporary hearing. During the summer leading up to the final hearing, Respondent had continuing problems with depression relating to his wife leaving him, his back bothering him, the divorce proceedings, having his lease ending and being uncertain about what kind of living situation he could afford. *Respondent Exh. C, Appx.* at 69. His attending psychiatrist, Dr. Beaudett, had the impression that the Respondent was having difficulty supporting himself and seemed overwhelmed by a number of life

stresses. *Respondent Exh. C, Appx. at 74.* Dr. Beaudett diagnosed Mr. Lord as suffering from Axis I: major depression, single episode severe, Axis II: deferred – schizoid and dependent features and Axis III: back pain, Axis IV: severe. *Trn. at 62, Appx. at 137, Respondent Exh. C, Appx. at 74.* After his second release from the Pavilion, Mr. Lord began seeing a therapist, Mr. McCormack, from whom he continued to receive counseling through the date of the final hearing and beyond. He further continued to take prescription medications including an anti-depressant, Celexa, an anti-anxiety medication, Atavan, and Naprosyn for back pain *Trn. at 47, Appx. at 122.*

Further, at the time of the final hearing, Respondent testified to physical work restrictions on account of his back pain including avoiding heavy lifting and repeated bending since 1998. *Trn. at 47, Appx. at 122 and Respondent Exh. A, D, Appx. at 58 and 74.*

The Petitioner is a college graduate. The Respondent had difficulty in school but managed to graduate from high school. *Trn. at 30, Appx. at 105.* The Petitioner is employed as a team leader in an information technology company, McKesson Corporation, earning an annual income of approximately \$80,000 per year at the time of the parties' final hearing. *Trn. at 30, Appx. at 105, Respondent's Exh. E at 49.* The Respondent has worked as a part-time New Hampshire second shift toll-taker at the Hampton toll plaza since 2001. He earns an annual income of approximately \$13,000 per year. *Trn. at 18, 24, 30 and 44, Appx. at 93, 99 and 119.*

Both parties testified to nontraditional roles within their marriage wherein the Respondent was in the role of the homemaker, taking care of everything in their house, and the Petitioner was in the role of the primary income earner. *Trn.* at 30 - 31 and 40, *Appx.* at 105 – 106 and 115. Respondent's testimony was that, when the parties first moved in together, he worked two jobs. *Trn.* at 30, *Appx.* at 105. His wife complained that they "weren't spending enough time together, and that she wanted to do more things together as a couple. So I reduced my hours at the gas station. My employer, my boss, a very good man, was understanding and allowed me to reduce my hours, not just once, but twice." *Trn.* at 42, *Appx.* at 117.

Following a 1998 back injury, the Respondent was restricted to bed rest for approximately 6 months, went through two cortisone injections and finally had surgery for an L-5 S-1 herniated disc, following which he was unemployed for approximately two (2) years. *Trn.* at 16 and 34, *Appx.* at 91 and 109. Between 2001 and 2006, the Respondent worked as a night shift toll-taker, at first restricted to twenty-nine hours per week by the State (*Trn.* at 19), and later (after the introduction of E-Z Pass) reduced to more sporadic and varying hours averaging approximately twenty-one hours a week. *Trn.* at 24 and 44, *Appx.* at 99 and 119.

The parties never enjoyed an extravagant lifestyle but had no difficulty satisfying their basic needs with ample reserve (approximately \$30,000 in cash savings at separation) for extras, such as a timeshare in Florida. *Trn.* at 8 –10, *Appx.* at 83 – 85. Petitioner conceded that Respondent was dependent on her in any number of ways,

including her being the primary breadwinner. *Trn.* at 32, *Appx.* at 107. The parties have no children.

At the time of their divorce, the Petitioner was thirty-six (36) and the Respondent thirty-nine (39) years of age. Although capable of employment, Respondent was restricted from performing physically demanding work that he had performed in the past, on account of physical work restrictions. And, he was further limited in terms of the alternative work he could likely obtain and perform, on account of his mental condition.

SUMMARY OF ARGUMENT

1. The statute, RSA 458:19, requires the Court, when making an alimony award, consider all of the circumstances of the parties, including those listed in the statute and, whatever the grounds for the amount of alimony, specify them in writing. Respondent argues that because the Trial Court made no such findings in the present case, the Court's order is insufficient as a matter of law.

2. Second, Respondent argues the amount of the Court ordered monthly alimony is insufficient to allow him the standard of living to which he had been accustomed during the marriage, despite his wife's ample means to provide him with financial support. Further he contends the Court abused its discretion in making such an insubstantial award, which doesn't allow Respondent to meet his basic financial needs.

3. Third, Respondent notes the uncontroverted medical evidence and testimony that he is unable to be self supporting through appropriate employment at a standard of living that meets his reasonable needs, because of the combination of his emotional collapse, physical work restrictions, and limited education, work experience and skills. He argues that the Court's alimony order constitutes an abuse of discretion because it ignores the evidence. Further, the order is clearly inadequate in duration to allow him sufficient time to become self-sufficient.

ARGUMENT

I. COURT DID NOT SPECIFY THE REASONS FOR ITS ALIMONY AWARD

In order to award alimony, the Trial Court must make written findings, in accordance with the statute. The Court must determine that: (a) the party in need lacks sufficient means of support to meet his needs, (b) that the paying party is able to afford alimony while also supporting herself, and (c) that the recipient is incapable of self-support through appropriate employment that meets his reasonable needs. RSA 458: 19, I (a, b & c). The three requirements are connected in the statute by the word “and,” indicating that all three conditions must be met. Thus, it can be reasonably inferred from the Family Division’s award of alimony to Respondent that the Court found that the Respondent met his burden of proving the pertinent statutory elements warranting an alimony award.

The Court is further required, however, to specify written reasons for the granting or denial of any motion for an alimony award. RSA 458:19, VI.

The only written reasons the Court made relative to alimony in the present case are found at paragraph 2 C of the Final Decree wherein the lower Court found that, “.... an alimony order shall issue. However, this award will reflect an incremental monthly reduction to a date when such payment shall terminate.” *Decree ¶2C, Appx. at 23.*

While the Trial Court has broad discretion to determine the amount of an award of alimony, the Court is required, when making such a determination, to consider all of

the circumstances of the parties listed in the statute. In “New Hampshire, alimony is now gender-neutral and is governed by RSA 458:19 ...”. *Douglas, 3 New Hampshire Practice: Family Law, 3d. Ed., § 18.02*. The Court is not allowed to consider the requesting parties sex when considering a request for alimony. It would be a denial of equal protection to deny a husband alimony, if under reverse circumstances, the Court would authorize alimony for a wife. RSA 458:19, IV (b) requires that, “In determining the amount of alimony, the Court shall consider the length of marriage; age, health, social or economic status, occupation, amount and source of income, the property awarded under RSA 458:16-a, vocational skills, employability, estate, liabilities, and needs of the parties; the opportunity for each for future acquisition of assets and income; the fault of either party as defined in RSA 458:16-a, II (I); and the federal tax consequences of the order.” RSA 458:19 IV (b) (Emphasis added.) Whatever the grounds for the amount of alimony, the Court is required to specify them in writing. RSA 458:19, VI.

In Bradley Lord’s case, the Court did not make such a set of written findings. In its decree, the Court merely stated that an alimony order shall issue, and specified the amount and term. *Decree* at ¶ 2C & 3, *Appx.* at 23. In its order as to duration, the Court stated, in totality: “...this award will reflect an incremental monthly reduction to a date when such payment shall terminate. The Petitioner shall pay the Respondent the sum of \$800.00 per month through December 31, 2006; then, the alimony obligation shall be reduced by \$200.00 every three (3) months until the sum of zero is reached. *Decree* at ¶ 3, *Appx.* at 23. There are no reasons given for the staggered reductions in alimony every three months. Nor was there any evidence presented that would justify such an

order.

The purpose of the requirement for written findings is so that the litigants and the appellate Court can ascertain the reasons for the trial Court's order. *Magrath v. Magrath*, 136 N.H. 757, 763 (1993) (construing similar written reasons language in RSA 458:16-(a)). In *Hoffman v. Hoffman*, 143 N.H. 514, 518-19 (1999), for example, the trial Court wrote at length concerning the circumstances of the parties and setting forth the reasons for the award of alimony, including the plaintiff's ability to obtain gainful employment; that the Hoffman's marriage was a relatively long term relationship (twelve years of marriage, just as in the present case) and that the award of alimony was necessary to provide for the reasonable needs of the plaintiff, taking into account the style of living to which the parties had become accustomed during the marriage. In *Hoffman*, the Supreme Court noted in particular that, even with this alimony award, the plaintiff's total monthly income was approximately \$3,895.00, whereas the defendant's total monthly income (after subtracting the alimony payment) was approximately \$5,589.00 – far less disparity than the disparate incomes in the present case.

In the instant case, assuming for the sake of argument, that the parties' wages after the final hearing remained static, which they of course will not, Respondent's predictable total monthly income (after adding the final alimony payment) would be approximately \$1,900.00 for four months, then reduced to \$1,700.00 for three months, then reduced to \$1,500.00 for three months, then reduced to \$1,300.00 for three months,

then reduced to his current average monthly earnings of \$1,100.00 per month (a \$1,000.00 per month less than his need). Petitioner's predictable total monthly income (after adding the final alimony award) would be approximately \$5,867.00 plus benefits for four months, then increased to \$6,067.00 for three months, then increased to \$6,276.00 for three months, then increased to \$6,467.00 for three months, then increased to her current average monthly earnings of \$6,667.00 per month, roughly six times Respondent's wages.

In Bradley Lord's case, the reasons for such an alimony award are unascertainable from the Court's terse conclusory order.

Further, Respondent respectfully submits that the Master, by failing to consider all of the circumstances of the parties, overlooked the equities of the case. For example, the Trial Court's order contains no discussion of Respondent's ability to obtain alternative or supplemental employment or any consideration of his inability to perform physically demanding work on account of his back pain, or his limitations in terms of the alternative work he could likely obtain and perform, on account of his ongoing depression and anxiety.

There was no acknowledgement by the Family Division of the evidence before the Court of Respondent's unsuccessful efforts to obtain full-time employment with the State of New Hampshire over several months prior to the final hearing, nor any recognition of the difficulty of supplementing his income with a second part-time

position, while working as a night toll-taker for the State. Nor was there any evidence presented from which the Trial Court could find that the Respondent could become sufficiently employed, as the Order implies, so as to be able support himself at a lifestyle commensurate with that the parties enjoyed during their marriage in four (4) months time or even thirteen (13) months.

One can only infer that the Trial Court's order is apparently based upon the general notion that alimony has rehabilitative goals. The staggered reductions contained in the Court's order and ultimate termination of Respondent's alimony award in thirteen months time are completely arbitrary, however, since the Court also failed to make its order contingent upon Respondent obtaining alternative, supplemental or full-time employment, completing a training or educational course or any other event for that matter such as remarriage, cohabitation or an increase in assets.

The record supports the Respondent's modest request for a \$1,000.00 per month order of alimony for a three-year period, subject to review upon motion of either party, as there was ample evidence before the Trial Court as to both his need and that his history of severe depression and suicidality in particular required ongoing medical treatment. There was no evidence that either Mr. Lord's ongoing physical restrictions or his impaired mental health were temporary conditions likely to significantly improve during the short term of the alimony award and certainly not in four months time. Nor can there be any serious doubt as to Petitioner's ability to pay the alimony requested while meeting her own reasonable needs, where she had been paying temporary

alimony of \$800.00 per month, yet had no significant decrease in her cash savings from the time of the temporary hearing through the date of the final hearing. See *Respondent's Exh. K, Appx.* at 50.

Notwithstanding the relevant circumstances of this case discussed herein, including the Respondent's severe depression, suicidality and anxiety, the Trial Court failed to acknowledge or analyze these relevant factors and ordered both a reduction and termination of the Respondent's alimony after thirteen months.

When faced with circumstances such as these, the Trial Court should not be permitted simply to ignore them, by sweeping them away with the mistaken notion that alimony is only rehabilitative.

I. COURT'S ALIMONY AWARD IS IN AN AMOUNT INSUFFICIENT TO MEET RESPONDENT'S NEEDS

When calculating the amount of the alimony award, in addition to the statutory factors described in RSA 458:19, IV (b), which the Court is required to consider, the Court may also consider the non-economic contribution of each party to the family unit. See RSA 458:19, IV(d) (Supp. 2001). In the present case, there is no indication that the Court considered any of the factors required by statute other than the length of the parties' marriage, the disparity of income, the Petitioner's ability to pay and the Respondent's need for alimony (given the Court's passing reference to those key words) when calculating the amount of Respondent's alimony award. None of the other statutory factors are even mentioned in the Trial Court's Decree, such as the parties'

respective ages, health, occupations, sources of income, vocational skills, employability, estate, liabilities, and needs of the parties; the opportunity for each for future acquisition of assets and income or the Respondent's non-economic contributions to the family unit.

Further, the Court does not appear to have given any consideration to its nearly equal property award under RSA 458:16-a (quite favorable to Petitioner given the parties' disparate incomes), when considering in what amount to award alimony, and, conversely, did not consider its insubstantial alimony award, when fashioning its property award.

While the primary purpose of alimony is rehabilitative and designed to encourage the recipient to establish an independent source of income, that is based upon a theory that has no application to the facts of this case – that modern spouses are equally able to function in the job market and to provide for their own financial needs. Rehabilitative goals are not the only purpose of alimony. Alimony is also an "adjustment" of property rights. *Douglas*, 3 *New Hampshire Practice: Family Law*, 3d. Ed., § 18.02 citing *Stritch v. Stritch*, 106 N.H. 409 (1965).

This Court has also held that the rehabilitative principle is not controlling where the supported spouse suffers from ill health and is not capable of establishing his own source of income. See *In the Matter of Fowler*, 145 N.H. 516 (2000) and *Henry v. Henry*, 129 N.H. 159, 162, 525 A.2d 267, 269 (1987). In addition, the Court has found

rehabilitative awards inadequate where supported spouses in long-term marriages lack the requisite job skills to independently obtain the standard of living established during the marriage. See *Healey v. Healey*, 117 N.H. 618, 620-21, 376 A.2d 140, 142-43 (1977) (rejecting husband's argument to terminate alimony where former wife's independent source of income did not provide the same standard of living established during marriage).

Certainly, it is absolutely clear, under the facts of the present case, that Bradley Lord's independent source of income as a toll-taker does not provide the standard of living established during the marriage and that he lacked the requisite job skills to independently approximate that standard of living.

Under the facts of this case, it is apparent from a fair reading of the record that the Trial Court did abuse its discretion in making an insubstantial award, which does not permit Respondent to meet his basic monthly expenses.

The Respondent has a very modest job history, and it is unlikely that he will obtain a job, which will allow him to maintain independently a standard of living comparable to that enjoyed during his marriage.

At the time of the final hearing, the Respondent had exclusive responsibility for the parties' former apartment, which rented for \$800.00 per month. He was receiving \$800.00 per month in temporary alimony. He testified to an income of \$1,100.00 a month and expenses of \$2,099.00 despite living frugally, resulting in a need of \$1,000.00

per month. He further testified that if he had not been receiving temporary alimony of \$800.00 per month, he would have been homeless. *Trn.* at 48 –49, *Appx.* at 123 - 125.

Even combining his temporary alimony with his earned income, Respondent had been unable to earn sufficient income to meet his monthly expenses, as evidenced by the decrease in his savings from approximately \$15, 000.00 to \$9,530.00 during the pendency of the case.

Respondent respectfully submits that the Trial Court erred by ordering alimony of only \$800.00 per month, for a period of only four months, followed by reduction of alimony by \$200.00 every three months until the sum of zero was obtained. Where the Respondent's need was \$1,000.00 per month, the \$800.00 per month alimony awarded was sufficient to only cover only the Respondents barest necessities and only then for four months duration, despite the fact that the Petitioner easily had the ability to pay the alimony requested. See *Murphy v. Murphy*, 116 N.H. 672, 366 A.2d 479, 482 (1976) (holding the amount of alimony awarded must be sufficient to cover the [supported spouse's] needs, within the limits of the [payor spouse's] ability to pay; it should not be limited to satisfaction of the [supported spouse's] barest necessities only, but should take into account the standard of living established during the marriage and the financial status of the parties.)

The Trial Court's failure to properly consider or thoroughly analyze the Respondent's need, by failing to consider the future effect of Respondent's negative

cash flow under such an award, would likely have the future effect of also completely negating the Court's so called equal property award to Respondent.

III. COURT'S ALIMONY AWARD IS FOR AN INSUFFICIENT DURATION

The length of the alimony award in this case and its staggered reduction constitutes an abuse of discretion, which should not stand. Our statute provides that alimony may be awarded for the indefinite period of time, requested by Respondent. *In the Matter of Fowler*, 145 N.H. 516, 519 (2000) citing *Hoffman v. Hoffman*, 143 N.H. 514, 517, 727 A.2d 1003, 1006 (1999); see RSA 458:19, I. The alimony award at issue is not only presently insufficient in amount to allow the Respondent the standard of living to which he was accustomed in his marriage, but also most inadequate in duration. The short duration does not allow the respondent to become self-sufficient, before the award is first reduced, then terminated.

Again, although capable of employment, Respondent was restricted from performing physically demanding work that he had performed in the past, such as landscaping, on account of his physical work restrictions and further limited in terms of the alternative work he could likely obtain and perform, on account of his mental illness.

Respondent acknowledged that he had applied for eight full-time jobs with the State of New Hampshire over several months prior to the final hearing, but that his prospects for obtaining such a position were not good. He conceded that he might be able to supplement his income by obtaining additional part-time work to supplement

his night job, but that his depression did not help his prospects for obtaining employment with a different employer (*Trn.* at 47, *Appx.* at 122) and the type of work he could obtain without retraining (such as his past work as a gas station attendant) would be unlikely to pay a sufficient amount for him to meet his needs. *Trn.* at 60 – 61, *Appx.* at 135 - 136.

The Respondent is entitled to a more equitable alimony award, both in amount and duration, taking into account all of the parties' circumstances including, the length of the parties' marriage (over a twelve year marriage), the Respondent's back injury; his unemployment for over two years; his restrictions from performing heavy lifting or frequent bending; his part-time unskilled work during the last five years of the marriage; his lack of education and market skills necessary for future self-sufficiency, his severe depression and back pain, all of which continues to require medical treatment and prescription medications.

In *Henry v. Henry*, 129 N.H. 159 (1987) the Supreme Court found that the Master's recommendation to terminate plaintiff's alimony amounted to an abuse of discretion, where master overlooked the equities of the case by failing to consider all of the circumstances of the parties. The Court in *Henry* found the idea of a wife establishing a separate source of income more appropriately applied to those cases in which the alimony recipient is of sound body and capable of establishing his or her own income. Similarly, the idea of a husband establishing a separate source of income is more appropriately applied to those cases in which the alimony recipient is not suffering

from depression, anxiety and suicidality. Depression is not a choice and should not be treated as such.

Given all of the above, respectfully, the Respondent submits that the Family Division Court abused its discretion by leaving the Respondent at risk of homelessness, while the Petitioner continues to enjoy a lifestyle comparable to the one the parties had during their marriage.

CONCLUSION

Given all of the above, Bradley Lord respectfully requests this Court reverse the alimony award imposed by the Family Division court both in terms of the amount and duration of the award and remand this case with instructions for further proceedings and a decision made in the light of all of the relevant circumstances of this case so that the alimony order is in compliance with RSA 458:19.

Respectfully submitted,
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By his Attorney,
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Dated: January 16, 2007

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REQUEST FOR ORAL ARGUMENT

Counsel for Bradley Lord requests that Attorney Timothy S. Wheelock be allowed fifteen minutes for oral argument.

Dated: January 16, 2007

Timothy S. Wheelock, Esq.

CERTIFICATION

I hereby certify that on January 16, 2007, I forwarded by first class mail or hand delivered two copies of the foregoing Brief of Appellant to Alexander G. Nossiff, Esq., counsel for Appellee, Jill Irving.

Dated: January 16, 2007

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