

STATE OF NEW HAMPSHIRE
SUPREME COURT

2004 TERM
OCTOBER SESSION

IN THE MATTER OF

RITA I. ENGLISH

and

KEVIN L. ENGLISH

NO. 2004-____

NOTICE OF APPEAL OF RESPONDENT, KEVIN L. ENGLISH
Pursuant to Supreme Court Rule 7

By: TIMOTHY S. WHEELLOCK, Esq.
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Bar No. 2723

**NEW HAMPSHIRE SUPREME COURT
RULE 7 NOTICE OF MANDATORY APPEAL**

This form should be used for an appeal from a final decision on the merits issued by a superior court, district court, probate court or family division court except for a decision from (1) a post-conviction review proceeding; (2) a proceeding involving the collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; or (6) a probation revocation proceeding.

1. COMPLETE CASE TITLE AND DOCKET NUMBERS IN TRIAL COURT

In the Matter of Rita I. English and Kevin L. English
Docket #: 2004-M-0004

2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISIONS(S)

Judicial Branch – Family Division at Portsmouth

Master: Harriet J. Fishman
Presiding Justice: Patricia L. DiMeo

3A. NAME AND ADDRESS OF APPEALING PARTY, IF REPRESENTING SELF, PROVIDE TELEPHONE NUMBER

Kevin L. English
131 North End Boulevard
P.O. Box 5108
Salisbury, MA 01952

3B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF APPEALING PARTY'S COUNSEL

Timothy S. Wheelock, Esq.
414 State Street, Suite 2
Portsmouth, NH 03801
Tel: (603) 431-3430

4A. NAME AND ADDRESS OF OPPOSING PARTY

Rita I. English
3854 Galley Court, Apt. 203
Kissimmee, FL 34741

4B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF OPPOSING PARTY'S COUNSEL

Faye R. Goldberg, Esq.
Cassassa And Ryan
459 Lafayette Road
Hampton, NH 03842
Tel: (603) 926-6336

5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT

None.

6. DATE OF CLERK'S NOTICE OF DECISION OR SENTENCING. ATTACH COPY OF NOTICE AND DECISION

09/22/04

DATE OF CLERK'S NOTICE OF DECISION ON POST-TRIAL MOTION, IF ANY, ATTACH COPY OF NOTICE AND DECISION.

7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS

N/A

8. APPELLATE DEFENDER REQUESTED?

IF SO, CITE STATUTE OR OTHER LEGAL AUTHORITY UPON WHICH CRIMINAL LIABILITY WAS BASED AND ATTACH FINANCIAL AFFIDAVIT (OCC FORM 4)

N/A

9. IS ANY PART OF CASE CONFIDENTIAL? IF SO, IDENTIFY WHICH PART AND CITE AUTHORITY FOR CONFIDENTIALITY. SEE SUPREME COURT RULE 12.

There is no known basis for confidentiality.

10. IF ANY PARTY IS A CORPORATION, LIST THE NAMES OF PARENTS, SUBSIDIARIES AND AFFILIATES.

N/A

11. DO YOU KNOW OF ANY REASON WHY ONE OR MORE OF THE SUPREME COURT JUSTICES WOULD BE DISQUALIFIED FROM THIS CASE?

No.

IF YOUR ANSWER IS YES, YOU MUST FILE A MOTION FOR RECUSAL IN ACCORDANCE WITH SUPREME COURT RULE 21A.

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY FOR THIS APPEAL?

Yes.

IF YOUR ANSWER IS YES, YOU MUST COMPLETE THE TRANSCRIPT ORDER FORM ON PAGE 4 OF THIS FORM

13. LIST SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE SUPREME COURT RULE 16(3)(B).

1. Whether the Court erred as a matter of law, when addressing the division of the parties' pensions and other tax-deferred assets, by including as property subject to division by the Court, the current value of the marital portion of petitioner's Social Security benefits, in pay status, and the current value of the marital portion of respondent's estimated future Social Security benefits.

2. Whether the Court erred, when it found that the agreed upon value of the marital portion of the respondent's estimated future Social Security benefits were agreed upon, after the respondent testified he didn't believe he would receive his currently estimated Social Security benefits when he reached retirement age, testimony that was supported by a disclaimer from the Commissioner of the Social Security Administration contained within his annual estimated benefits statement.

3. Whether the Court erred, when dividing the parties' pensions and other tax-deferred assets, by awarding petitioner, her two pensions and an IRA annuity in their entirety (less only the value of a survivor benefit awarded to respondent) and fifty percent (50%) of the current value of respondent's 403B plan, without any offsetting credit to respondent for the value marital portion of one of petitioner's pension plans.

4. Whether the Court erred, when dividing the parties' pensions and other tax-deferred assets, by awarding petitioner, her two pensions and IRA annuity in their entirety (less the value of the survivor benefit) and fifty percent (50%) of respondent's 403B plan, without any offsetting credit to respondent for any portion of petitioner's IRA annuity.

5. Whether the Court erred, when dividing the parties' marital property, by first awarding petitioner, her two pensions and IRA annuity in their entirety (less the value of the survivor benefit) and fifty percent (50%) of respondent's 403B plan, without any offsetting credit to respondent for any portion of petitioner's pension plans or IRA annuity, then awarding petitioner one-half of the proceeds from the sale of the parties' real estate, without any consideration or credit to respondent for the value of the real estate and savings he owned prior to the marriage.

6. Whether the Court erred when it concluded that the petitioner was employed by Bay State Gas and contributing to a Bay State Gas 401k plan (subsequently rolled over into an IRA) for six years prior to the parties' marriage.

7. Whether the Court's conclusion that the parties had already used the marital portion of Petitioner's IRA annuity was speculative, so as to constitute an unsustainable exercise of discretion, where there was no evidence introduced either establishing the value of the 401K (rolled over in 1996 to petitioner's IRA plan) prior to the marriage or attributing any increase in the value of the 401K/IRA to any contributions to the retirement account prior to the parties' marriage in 1986 verses contributions and appreciation in value which occurred after 1986.

8. Whether the Court erred by crediting the petitioner's testimony over that of the respondent concerning the reasons for petitioner's withdrawals from her IRA annuity and by granting petitioner's request for finding of fact #15 (alleging that from 1996 through 2000, she withdrew from her IRA and contributed to the parties expenses \$48,320) where, petitioner's testimony on direct in support of the request was that the increase in the value of her 401k and IRA was sufficient for her to take out \$48,000 for expenses for building that home and on cross, "I don't recall doing that", in response to inquiry concerning her withdrawal of \$19,700 in 2000 alone – testimony lacking in credibility given the fact that the parties built their Northwood home close to nine years prior to the beginning of the first IRA withdrawals.

9. Whether the Court erred by not considering its' alimony award as an adjustment of property rights.

10. Whether the Court erred by not considering or addressing its' property award in favor of Petitioner, when considering whether or not to award alimony, and, conversely, by not considering and addressing its' alimony award, when

considering its' remaining property award.

11. Whether the Court failed to properly address or erred in addressing the appropriate statutory factors in determining the petitioner's need for alimony by failing to address and consider the value of the property rights awarded to petitioner in the divorce and how that award would likely impact the petitioner's need, when considering whether or not to award alimony.

12. Whether the Court erred in addressing the appropriate statutory factors in determining the petitioner's need for alimony by not addressing or requiring petitioner, who is seventy-five (75) years of age, to prove or offer any evidence she is currently unable to support herself through appropriate employment considering petitioner earned approximately \$10,400 per year working part-time for the last three years prior to the parties separation in December, 2003 and did not claim she had any physical or mental impairment that would prevent her from currently performing similar part-time work.

13. Whether the Court failed to properly address or erred in exercising its' discretion to award petitioner alimony, by ignoring petitioner's repeated concealment of her last three years of earned income, from Respondent, his counsel, the Court and presumably even her own counsel, throughout the course of her divorce, in her interrogatory answers, in her financial affidavits, on direct examination and even in response to a direct inquiry by the Court, until confronted with evidence of her hidden income during cross-examination.

14. Whether the Court failed to properly address or erred by not addressing in its' property award, petitioner's repeated concealment of her last three years of earned income, throughout the course of her divorce, in her interrogatory answers, in her financial affidavits, on direct examination and even in response to a direct inquiry by the Court, to Respondent, his counsel, the Court, and presumably even her own counsel, until confronted with evidence of her hidden income during cross-examination.

15. Whether the Court failed to properly address or erred in addressing the appropriate statutory factors in determining the petitioner's need for support in the form of an order maintain, at his expense, dental insurance through his employer for the benefit of the Petitioner until her death or remarriage, by not considering the Court's alimony award and by not requiring petitioner, prior to awarding such additional support, submit evidence that dental insurance was not available to her individually at a rate commensurate with that which respondent currently pays for our petitioner's dental coverage.

16. Whether the Court failed to properly address or erred in addressing the

respondent's ability to pay alimony by failing to appropriately consider respondent's testimony that he couldn't afford to pay petitioner the alimony awarded and make any 403B contributions despite granting respondent's request to find he was contributing \$217.45 per week towards his 403B plan, with the assent of petitioner, during the parties marriage in order to achieve his goal of retiring at age 67 and ceased any 403B contributions following and because of the Court's temporary alimony award.

17. Whether the Court failed to properly consider or address or erred in considering the respondent's ability to pay alimony by failing to appropriately consider and address that his net income at the time of his final divorce hearing, including his average overtime, was inadequate to meet his Court ordered alimony and his own necessary monthly expenses, thus resulting in Respondent having a negative cash flow under the Court's property and alimony award.

18. Whether the Court failed to properly consider or address or erred in considering the respondent's ability to pay alimony by failing to consider that the future effect of transferring the majority of the parties' current assets to petitioner and awarding her the alimony and other support awarded, would, given Respondent's negative cash flow under such an award, have the future effect of transferring to petitioner, not only a portion of Respondent's income, but also a portion of Respondent's assets for so long as the alimony order remains in effect and Respondent has a negative cash flow

14. CERTIFICATIONS

I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

Appealing Party or Counsel

I hereby certify that on or before the date below, copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

Date

Appealing Party or Counsel

TRANSCRIPT ORDER FORM

INSTRUCTIONS:

1. If a transcript is necessary for your appeal, you must complete this form.
2. List each portion of the proceedings that must be transcribed for appeal, e.g., entire trial (see Superior Court Administrative Rule 3-1), motion to suppress hearing, jury charge, etc., and provide information requested.
3. Determine the amount of deposit required for each portion of the proceedings and the total deposit required for all portions listed. Do not send the deposit to the Supreme Court. You will receive an order from the Supreme Court notifying you of the deadline for paying the deposit amount to the trial court. Failure to pay the deposit by the deadline may result in the dismissal of your appeal.

LIST EACH PORTION OF CASE PROCEEDINGS TO BE TRANSCRIBED.						
DATE OF PROCEEDING	TYPE OF PROCEEDING	LENGTH OF PROCEEDING	NAME OF JUDGE(S)	NAME OF COURT REPORTER (IF PROCEEDING WAS RECORDED SO INDICATE:	PORTIONS PREVIOUSLY PREPARED	DEPOSIT (SEE SCHEDULE BELOW)
09/14/04	Final Divorce Hearing	1 day	Judge Sharon DeVries	Lilly Deeb	None	\$900.00
DO NOT SEND DEPOSIT AT THIS TIME.						TOTAL DEPOSIT \$900.00

SCHEDULES OF DEPOSITS

<u>Length of Proceeding</u>	<u>Deposit Amount</u>
Hearing or trial of one hour or less	\$175
Hearing or trial up to ½ day	\$450
Hearing or trial of more than ½ day	\$900/day
Previously prepared portions	Number of pages x \$.50 per page per copy If additional copies are needed

NOTE: The deposit is an estimate of the transcript cost. After the transcript has been completed, you may be required to pay an additional amount if the final cost of the transcript exceeds the deposit. Any amount paid as a deposit in excess of the final cost will be refunded. The transcript will not be released to the parties until the final cost of the transcript is paid in full.

**For portions of the transcript that have been previously prepared, indicate number of copies that were prepared.