State of New Hampshire
Supreme Court

NO. 2008-0777

2009 TERM

APRIL SESSION

In the Matter of Virginia Burr and Robert Burr, Sr.

RULE 7 APPEAL OF FINAL DECISION OF
CONCORD FAMILY DIVISION COURT

BRIEF OF RESPONDENT/APPELLANT ROBERT BURR SR.

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QUESTION PRESENTED

1. Did the court err in implementing a decree which, due to circumstances beyond Robert Burr's control, did not effectuate an equitable distribution of property and was impossible for Mr. Burr to comply with, and by not formulating a decree that took into account these circumstances?

   Preserved: Transcript, *passim*, and post-trial motions included in appendix.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Divorce and Decree

Robert Burr is an 80-year old man diagnosed with dementia and other progressing cognitive impairments. Virginia (Ginny) Burr is two years younger, now living in an adult community in Bow, New Hampshire. They were married for 27 years before Ginny filed for divorce in 2007 based on irreconcilable differences. The parties stipulated to most issues, but left for the court the disposition of the marital home in Loudon, New Hampshire, which Robert owned before the marriage.

Robert and Ginny stipulated, and the court (*Susan B. Carbon*, J.) decreed, that "each will be entitled to 50% of the equity of the marital home." FINAL ORDER ON PETITION FOR DIVORCE (Nov. 28, 2007), *appx.* at 1, 2. Both hired experts regarding the amount of equity. The court found Ginny's was more qualified, and pegged the market-price of the house at $225,000, rather than the significantly lower figure urged by Robert based on his expert's appraisal. *Id.* The court further decreed that "the equity to which [Ginny] is entitled is $112,500.00. [Robert] shall have 90 days within which to make arrangements to transfer that sum to [Ginny]." *Id.*, *appx.* at 3. The court did not provide for any contingencies, such as the possibility of selling the home, sharing transaction costs, or other matters.

Even though Robert believed the court over-valued the martial house by many thousands of dollars and that if a sale took place for less it would result in an inequitable property distribution, because such matters are within the discretion of the trial court, no appeal was taken. RESPONDENT'S MOTION TO RECONSIDER FINAL ORDER ON PETITION FOR DIVORCE AND SUPPLEMENTAL ORDER (Dec. 14, 2007), *appx.* at 4.

During the divorce proceedings the parties had mutually explored several financial vehicles for realizing Ginny's equity, including standard and reverse mortgages, but none were available on satisfactory terms given Robert's age and health. *See e.g.*, RESPONDENT'S MOTION TO RECONSIDER FINAL ORDER ON PETITION FOR DIVORCE AND SUPPLEMENTAL ORDER (Dec. 14, 2007), *appx.* at 4; OBJECTION TO RESPONDENT'S MOTION TO RECONSIDER FINAL ORDER AND SUPPLEMENTAL ORDER (Dec. 21, 2007), *appx.* at 9.

The divorce went to final judgment on January 31, 2008. NOTICE OF DECISION (Jan. 3, 2008), *appx.* at 12.

That winter was marked by heavy snow in Loudon, collapsing the roofs of two long-neglected out-buildings – a shed and small barn – on the property. *See* COLOR PHOTOGRAPHS, *Respondent's Exhibit.*[1] Also, Robert's mental health worsened, forcing him to move out. He now lives with his adult son, the Fire Chief of Loudon, and the former marital home stands unoccupied. *Trn*. at 15-16.

[1]A motion to transmit these photographs from the Concord Family Division to the New Hampshire Supreme Court was filed on April 10, 2009.

II. Contempt: First Post-Divorce Order

Immediately after the expiration of the 90-day period specified in the decree, Ginny filed for contempt, alleging that Robert had not paid the fixed dollar figure of $112,500 within 90 days, and that he failed to adequately maintain the property. PETITION FOR CONTEMPT (May 14, 2008), *appx.* at 13. Robert denied he was in contempt. He detailed his non-qualification for financing vehicles to pay Ginny due to his age, health, income, and other factors, pointed out the futility of further financing efforts, suggested that his advancing mental disabilities heightened the difficulty of compliance, and noted the pre-existing poor condition of the out-buildings and the weather which was responsible for their final deterioration. ANSWER TO PETITION FOR CONTEMPT (June 11, 2008), *appx.* at 15.

The court (*Susan B. Carbon*, J.) held a hearing on the contempt motion, during which these matters were discussed in greater detail by attorneys for both parties. Ginny alleged that buyers' interest in the house was diminished by its condition, *Trn.* at 7-10, which Robert showed was merely a continuation of the lack of maintenance during the marriage and ultimately the fault of the weather. *Trn.* at 16-18. Ginny alleged the premises had been abandoned, but Robert noted his continuing declining health made it impossible to live there. *Trn.* at 7, 15, 21-22. Ginny advanced several ideas for financing, *Trn*. at 7-8, 24, which Robert said had been explored to no avail. *Trn.* at 14-15, 19-23. Ginny suggested she would not be greatly concerned how Robert came up with the money, as long as she could realize her equity without sharing any transaction costs. *Trn.* at 13.

The parties appear to have agreed that selling the property was an option, but that it could not sell at the price declared by the court to be its value due to the housing market. Ginny's

attorney conceded that buyers are "not looking at the property because of its condition or because of the market or whatever it is." *Trn.* at 23. Robert's attorney agreed that "the primary reason why the house hasn't sold … is it's been put on [the marked] at a price which has not generated any interest." *Trn*. at 24.

As a result of the hearing, the court found Robert "has not complied" with the order requiring him to pay the fixed dollar amount of $112,500 to Ginny by the date specified. ORDER (June 17, 2008), *appx.* at 20. It ordered that unless Robert makes the payment within 30 days, "he shall deed title to the property" to Ginny, who "shall then make arrangements to sell the property, deduct expenses, retain her $112,500 and pay the balance" to Robert. *Id.*

This first post-divorce order thus maintained the status of the original property decree. It gave Ginny the fixed dollar amount of $112,500, while Robert would bear the transaction costs and realize only whatever equity was left.

III. Robert's Reconsideration: Second Post-Divorce Order

Robert requested reconsideration. MOTION TO RECONSIDER COURT ORDER DATED JUNE 19, 2008 (June 27, 2008), *appx.* at 22. He argued that the court had initially overvalued the property. He also argued that because the house could not sell for a price double the $112,500 fixed dollar amount he was directed to pay Ginny, a sale would result in an inequitable division. And he argued that him having to bear all transaction costs would likewise result in an inequitable distribution of property . *Id.* Ginny objected, claiming that she had been patient waiting for her money, that Robert was contemptuous, and that if the house sells for less than the court-pegged price his "sanction will be in the form of reduced equity." OBJECTION TO RESPONDENT'S MOTION TO RECONSIDER (July 1, 2008), *appx.* at 25.

This exchange betrays the parties' diverging interests due to the high pegged price and the declining real estate market. Once deeded to her, Ginny could sell the house for no more than $112,500 and get every cent due her under the decree. Robert, however, would need to sell for more than twice that if he were to realize equal equity.

The court (*Susan B. Carbon*, J.) issued an order following the two pleadings, granting Robert's request to reconsider. The court acknowledged two things: that it "was in error to state that [Ginny] was absolutely entitled to $112,500," and that it had "neglected to deduct expenses of sale." ORDER ON RESPONDENT'S MOTION TO RECONSIDER COURT ORDER DATED JUNE 19, 2008 (July 9, 2008), *appx.* at 27.

The court further said "it was the *net equity* that was being divided equally, not the establishment of a per se property division of $112,500." *Id.* (emphasis in original). The court thus gave Robert 30 more days to sell, and if he could not, "then the home shall be deeded to

[Ginny] to create a joint tenancy so that she may have the authority to sell the home." *Id.* It ordered the parties' equally share transaction costs, and allowed for splitting of costs for repairs necessary to facilitate a sale.

This second post-divorce order cleverly redefined the original property decree. The court silently recognized its original decree was not equitable, given market conditions, the weather, Robert's health, and other factors. By relying on its term "net equity," the court more evenly divided the proceeds from the house, and eliminated the lopsided burden of costs.

IV. Ginny's Reconsideration: Third Post-Divorce Order

Now Ginny requested reconsideration. She acknowledged that she and Robert should share equally in the equity of the marital home, but claimed $112,500 was pegged as the amount of her half regardless of the arrangements necessary to realize it. She argued that the most recent court order was an improper modification of the property division. OBJECTION TO PETITIONER'S MOTION FOR RECONSIDERATION (July 23, 2008), *appx.* at 32. Robert summarily objected. MOTION FOR RECONSIDERATION (July 17, 2008), *appx.* at 28.

This resulted in the court's third post-divorce order. ORDER ON PETITIONER'S MOTION FOR RECONSIDERATION (Aug. 12, 2008), *appx.* at 34. In it the court (*Susan B. Carbon*, J.) explained its previous actions. It recognized that "the parties had already agreed that they would share the equity equally, namely 50% for each." *Id.* It wrote that the issue to be decided in the divorce proceeding "was the *amount* of equity in the marital home," but that the issue post-divorce "was the *value* to be ascribed to the equity. *Id*. (emphases in original). The court said that it had considered the differing appraisals, and had adopted "the value offered by [Ginny]." *Id.*

The court then noted that because "there was never any original contemplation of sale," its previous (second post-divorce) order was in error "to suggest that it was 'net equity' that was being divided." Consequently, the court said "it was the establishment of a per se property division of $112,500" that had to have been paid within 90 days of the decree. *Id.* The court noted that the sanction for Robert's having failed to pay was deeding the property to Ginny so that she could sell it. *Id.*

Having thus explained itself, the court "reaffirm[ed] that [Ginny] is entitled to

$112,500 … as her share of the equity in the marital home. … [I]t is this amount, and not an amount of net equity, to which she is entitled." Because Robert did not pay that within 90 days, his "failure led to the finding of contempt." *Id.*

The court gave Robert 30 days to either mortgage the property or sell it and give Ginny the fixed dollar figure of $112,500; and if not, to deed it to Ginny in a joint tenancy. The court addressed cost-sharing, ordering Robert alone to bear costs of repairs necessary for sale. It allowed sharing of transaction costs, provided that Ginny get her $112,500 regardless of those costs.

The order effectively undid the court's previous (second post-divorce) order. It created a distinction between "amount" and "value." The undoing was based on the finding that sale of the property had not been originally contemplated, even though any sale would be due to the impossibility of adequate financing and Robert's failing mental health.

This third post-divorce order also required that Robert alone bear the cost of repairs necessary for the sale. Ginny, however, would conduct the sale. She can thus deem necessary such repairs as she wishes, regardless of Robert's views. Finally, although the court ordered that the "parties shall share the expenses of sale," Ginny received the fixed dollar amount of $112,500. Because it is unlikely in the declining real estate market that the property will sell for enough to cover both Ginny's $112,500 equity and an equal sum for Robert, the order effectively makes Robert alone bear the costs of the transaction.

V. Final Disposition: Fourth Post-Divorce Order

Robert filed a subsequent motion for reconsideration, raising these issues and also pointing out that sale had been contemplated. MOTION TO RECONSIDER COURT ORDER DATED AUGUST 13, 2008 (Aug. 22, 2008), *appx.* at 36. Ginny summarily objected. OBJECTION TO RESPONDENT'S SECOND MOTION TO RECONSIDER (Sept. 2, 2008), *appx.* at 38.

In its fourth post-divorce order, the court (*Susan B. Carbon*, J.) cryptically wrote: "While [Robert] has not been found *in contempt*, the Court has nonetheless found that he has failed to comply with the Court's orders." ORDER (Sept. 19, 2008), *appx.* at 39 (emphasis in original). The court emphasized its remedial powers under the circumstances, and denied Robert's request for reconsideration. *Id.*

This appeal followed.

SUMMARY OF ARGUMENT

Robert Burr, Sr., first argues that although property decrees cannot be modified for changed circumstances, upon implementation the court must ensure that its original equitable mandate be carried out. He then points out that due to the weather, his declining health, the poor real estate market, and the unavailability of suitable financing mechanisms, the terms of the court's original divorce decree could not be complied with. He finally argues that this Court should order the lower court to look at its ultimate ratification of the decree and its apparent finding of contempt, and to formulate a more just result.

ARGUMENT

I. Reformation of Decree is Available Remedy

This Court has made clear that a decree regarding property distribution can be reformed if there is fraud, undue influence, deceit, misrepresentation, or mutual mistake. *McSherry v. McSherry*, 135 N.H. 451 (1992). A mistake that is mutual justifies reformation, *Grabowski v. Grabowski*, 120 N.H. 745 (1980), whereas a mistake of just one party does not. *Sommers v. Sommers*, 143 N.H. 686 (1999). A "change in circumstances" stemming from mere financial hardship is insufficient to alter a property decree. *McSherry*, 135 N.H. at 453-54. Alleged problems in a property distribution discovered long after the decree cannot justify reforming it. *Spellman v. Spellman*, 136 N.H. 235 (1992).

Existing law does not account for a mistake made by the court rather than the parties, for changes in circumstances more innocent and significant than mere financial hardship, nor for problems in the decree discovered immediately after issuance.

When the "terms of the decree material to [the property] settlement must be interpreted and implemented by further order of the court, it is appropriate that the court take a second equitable look to determine what order would carry out the original equitable mandate." *Spellman*, 136 N.H. at 238 (1992).

Here, it was clearly the intent of the parties and the court to equally divide the equity of the marital home. Immediately after the decree was issued, it became clear that Robert was incapable of complying with it – there was no financial vehicle available to provide Ginny the amount of equity ordered by the court. This was due to the court's initial over-valuing of the property, Robert's declining health, and the general condition of the real estate market.

Ginny's request for contempt put the court in the position of implementing its order. It was thus required to "take a second equitable look" in order to "carry out the original equitable mandate." When the court took that look, its post-divorce orders revealed its initial error in determining the value of the property, in awarding Ginny a fixed dollar figure of $112,500 rather than 50% of the equity as the court and the parties intended, and in not accounting for the costs of repair and the transaction. ORDER ON RESPONDENT'S MOTION TO RECONSIDER COURT ORDER DATED JUNE 19, 2008 (July 9, 2008), *appx.* at 27.

II. Impossibility of Complying with the Decree

The facts here demonstrate there is a problem with the decree creating an injustice. The collapse of the out-building roofs was caused by the weather, and the need for Robert to move out of the marital home was caused by his declining health. If Ginny realizes less equity than the court ordered, it will be due to either the court's initial overvaluing, a declining real estate market, or both.

Enforcement – in its final iteration – of the divorce decree, accomplishes an unequal sharing of equity, in violation of the marital statute, the parties' intent, and the decree. Ginny can sell the house for any price she wishes or can get. If she sells for less than $112,500, she can enjoy the proceeds, and still hold Robert liable for the amount between the sales price and $112,500. If she sells for exactly $112,500, Robert will not realize a dime of equity, even though he owned the house without a mortgage before his marriage to Ginny. If she sells for a price modestly over $112,500, Robert still will not realize equity as he is charged with the costs of necessary repairs and the transaction. Only if Ginny can sell for $250,000 – the amount the court ordered the house is worth but immediately subsequent evidence shows it is not – will Robert equally share the equity as was intended and the divorce statute requires.

Robert simply cannot comply with the court order. No buyers are available at the price the court ordered the property is worth. The cause of this is no fault of Robert's. Rather it is the court's initial error in overvaluing the property. As Ginny's attorney aptly noted during the contempt hearing, the cause is "its condition or because of the market, or whatever." *Trn*. at 23.

The existence of a plain injustice is demonstrated by the court's inconsistent post-divorce orders, all decided by the same judge. The first maintained the status of the original property

decree, giving Ginny the fixed dollar amount of $112,500, while Robert would bear the transaction costs and realize only whatever equity was left. The second acknowledged that the court "was in error to state that [Ginny] was absolutely entitled to $112,500," that it had "neglected to deduct expenses of sale,"and that "it was the *net equity* that was being divided equally, not the establishment of a per se property division of $112,500." The second order effectively recognized its original decree was not equitable, given market conditions, the weather, and Robert's health. The third and fourth orders reaffirmed the first, but also required that Robert alone bear the costs of repairs necessary for sale while it allowed sharing of transaction costs.

The existence of an injustice is similarly demonstrated by the court's post-divorce orders, which are even more inconsistent regarding whether Robert was actually in contempt.

In its first post-divorce order, the court "finds and rules that [Robert] has not complied with the Court Order requiring that he pay [Ginny] $112,500 within 90 days of the Final Hearing." ORDER (June 17, 2008), *appx.* at 20.

In its post-divorce second order, the court reiterated that Robert "has not yet sold the property and made payment of the 50% of the net equity," and thus ordered him, if a sale was not completed, to deed the home to Ginny within 30 days. ORDER ON RESPONDENT'S MOTION TO RECONSIDER COURT ORDER DATED JUNE 19, 2008 (July 9, 2008), *appx.* at 27.

In its third post-divorce order, the court noted that it was Robert's "responsibility to pay [$112,500] within 90 days." The court wrote that "[h]is failure to do so led to the *finding of contempt*." ORDER ON PETITIONER'S MOTION FOR RECONSIDERATION (Aug. 12, 2008), *appx.* at 34 (emphasis added).

In its fourth (and final) post-divorce order, the court wrote that "[w]hile [Robert] has not been found *in contempt*, the Court has nonetheless found that he has failed to comply with the Court's order, and has given him additional time and opportunity to come into compliance. He has failed to do so, and thus the Court's remedial measures are within its sound discretion." ORDER (Sept. 19, 2008), *appx.* at 39 (emphasis in original).

These inconsistencies in the orders, both on the financial requirements and on contempt, highlight the impossible situation into which the court put Robert.

III. Court Should Carry Out an Equitable Mandate

Mindful of the law regarding modification of property orders, nowhere did Robert request a modification in the property decree, and none is suggested here. Rather, in his pleadings he requested that the court reduce Ginny's equity in the homestead in the event he cannot finance a payment of $112,500. RESPONDENT'S MOTION TO RECONSIDER FINAL ORDER ON PETITION FOR DIVORCE AND SUPPLEMENTAL ORDER (Dec. 14, 2007), *appx.* at 4. He also asked the court to dismiss the petition for contempt and grant "such other and further relief as may be equitable and just." ANSWER TO PETITION FOR CONTEMPT (June 11, 2008), *appx.* at 15. In his remaining pleadings he thrice unspecifically asked the court to "[g]rant such other and further relief as may be equitable and just." MOTION TO RECONSIDER COURT ORDER DATED JUNE 19, 2008 (June 27, 2008), *appx.* at 22; OBJECTION TO PETITIONER'S MOTION FOR RECONSIDERATION (July 23, 2008), *appx.* at 32; MOTION TO RECONSIDER COURT ORDER DATED AUGUST 13, 2008 (Aug. 22, 2008), *appx.* at 36.

As noted, when the "terms of the decree material to [the property] settlement must be interpreted and implemented by further order of the court, it is appropriate that the court take a second equitable look to determine what order would carry out the original equitable mandate." *Spellman*, 136 N.H. at 238 (1992).

There is little doubt that Robert has been unjustly held in contempt (or some similar status) and also has had his equity unjustly distributed. Accordingly, this Court should require the lower court to "take a second equitable look" at these matters and formulate a more just result that would "carry out the original equitable mandate."

CONCLUSION

For the foregoing reasons, Robert Burr, Sr. respectfully requests this Court provide him relief from the inequitable and unjust requirement that he comply with orders that are, as a practical matter, impossible to comply with; and to order a more just result.

Respectfully submitted,

Robert Burr, Sr.
By his Attorney,

Law Office of Joshua L. Gordon

Dated: April 13, 2009

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Robert Burr requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issue raised by this case is novel in this jurisdiction.

I hereby certify that on April 13, 2009, copies of the foregoing will be forwarded to Diane M. Puckhaber, Esq.

Dated: April 13, 2009

Joshua L. Gordon, Esq.