

State of New Hampshire Supreme Court

NOTICE OF DISCRETIONARY APPEAL

This form should be used only for an appeal from a final decision on the merits issued by a superior court, district court, probate court or family division court in (1) a post-conviction review proceeding; (2) a proceeding involving a 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; (6) a probation revocation proceeding; (7) a landlord/tenant action or a possessory action filed under RSA chapter 540; (8) from an order denying a motion to intervene; or (9) a domestic relations matter filed under RSA chapters 457 to 461-A, except that an appeal from a final divorce decree or from a decree of legal separation shall be a mandatory appeal.

1. COMPLETE CASE TITLE AND DOCKET NUMBERS IN TRIAL COURT

In the Matter of Susan (Floros) Wallack and Peter N. Floros
2001-DM-0076

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

Salem Family Court (*Thomas G. Cooper, Master, M. F. Sullivan, J.*)

3A. NAME & ADDRESS OF APPEALING PARTY

Peter N. Floros
282 Middle St
Portsmouth, NH 03801

3B. NAME, FIRM, ADDRESS & TELEPHONE
NUMBER OF APPELLANT'S COUNSEL

Joshua L. Gordon
New Hampshire Bar No. 9046
Law Office of Joshua Gordon
75 South Main Street #7
Concord, N.H. 03301
(603) 226-4225
www.AppealsLawyer.net

4A. NAME & ADDRESS OF OPPOSING PARTY

Violet Floros
Address Unknown

4B. NAME, FIRM, ADDRESS, & TELEPHONE
NUMBER OF OPPOSING COUNSEL

Susan V. Denenberg, Esq.
147 Congress St.
PO Box 1142
Portsmouth, NH 03802-1142
(603) 427-5533

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

Susan (Floros) Wallack (ex-wife of Peter Floros, mother of Violet Floros)
12 Ruth St.
Portsmouth, NH
(603) 828-3503

Mark S. Moeller (representing Peter Floros below)
680 Central Ave., Suite 103
Dover, NH 03820
(603) 749-7500

6. DATE OF CLERK'S NOTICE OF
DECISION OR SENTENCING

Three court orders, dated June 26,
October 17, and October 22, 2013.

DATE OF CLERK'S NOTICE OF
DECISION ON POST-TRIAL
MOTION

October 23, 2013

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

n/a

8. APPELLATE DEFENDER REQUESTED?

n/a

9. IS ANY PART OF CASE CONFIDENTIAL? IDENTIFY WHICH PART AND CITE AUTHORITY

There no known basis for confidentiality.

10. NAMES OF PARENT, SUBSIDIARIES AND AFFILIATES OF CORPORATE PARTIES

n/a

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

There is no known basis for recusal.

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY?

Yes.

IF YES, COMPLETE TRANSCRIPT ORDER FORM

13. NATURE OF CASE AND RESULT (limit two pages double-spaced):

Peter Floros is a real estate owner and developer. He owns about two dozen properties, including houses, hotels, and buildings locating both well-recognized and lesser-known business enterprises throughout the seacoast in New Hampshire and southern Maine. All but a few carry a mortgage. His real estate business provides him an income, but also obligates him to pay on a monthly basis both interests and mortgage principles.

Mr. Floros has three children, ages 27, 24, and 17. Violet Floros is the middle of them. His generosity includes establishment of a \$3.5 million trust containing some of his most significant real estate holdings, which will leave all three beneficiary children well endowed when they attain the age of disbursement. In 2003 Mr. Floros was divorced from Susan Wallack, and their stipulated decree left them each with about \$7.5 million in assets. Mr. Floros lives in Portsmouth and used his share of the split to continue risking and investing; Ms. Wallack sold most of her real estate and lives off the proceeds near the water also in Portsmouth. Their 2003 stipulation included a college education contribution provision:

Private and Post-Secondary Educational Expenses - The parties agree that the children shall be afforded the advantage of such post high school education as may be appropriate for their interests, aptitudes and abilities consistent with the financial abilities and resources available to each party. To the extent they then may be financially able (in view of their then existing income, assets, needs and obligations) at the time such educational expenses arise, the parties shall contribute proportional to their then income and assets, to the cost of such education, including tuition, room and board, application and registration fees; and reasonable transportation. The parties shall make reasonable efforts to provide such educational expenses up to four years for each child. The parties agree to encourage their children to seek and obtain such financial assistance through scholarships, loans, military service and/or part[-]time employment as may be reasonably available and consistent with the educational program to be undertaken. Reasonably in advance of the children's application for admission to such educational institution, the parties shall consult with each other and with the children in an attempt to reach agreement on the institutions in which applications shall be made and the course of study to be undertaken. The parties shall be responsible for contributing to the education expenses only if the children's applications or attendance at that educational institution is undertaken with that party's reasonable consent, such consent not to be unreasonably withheld.

PERMANENT STIPULATIONS (Oct. 3, 2003) ¶6.¹

¹In March 2012 the family court held the provision unenforceable. A discretionary appeal was accepted by this Court, *In the Matter of Wallack & Floros*, N.H. Sup. Court. No. 2012-0388 (mandate Sept. 25, 2012), and then held in abeyance pending resolution of *In the Matter of Poulin & Wall*, 164 N.H. 41 (2012), see *In the Matter of Wallack & Floros*, N.H. Sup. Court. No. 2012-0388 (order July 12, 2012), whereupon it was remanded for enforcement. *In the Matter of Wallack & Floros*, N.H. Sup. Court. No. 2012-0388 (mandate Sept. 25, 2012). The college costs portion of this appeal grew out of that remand.

For the purposes of establishing the parties' respective shares of both college costs and child support, the Salem Family Division (*Thomas G. Cooper*, MM.), found Mr. Floros currently holds 61 percent of the assets and Ms. Wallack 39 percent. ORDER (June 26, 2013); ORDER (Oct. 17, 2013); ORDER (Oct. 22, 2013). It arrived at these shares, however, by taking into account Mr. Floros's obligations to pay interest on his many commercial loans, but not taking into account the loans' principles for which he is equally monthly obligated. His annual mortgage obligation is over a half-million dollars. And it is not sufficient to say that Mr. Floros can sell an asset or two to cover college costs and child support, especially in a down real estate market, because that would represent a diminution of the asset-base on which he hopes to create future streams of income for his family.

The court awarded Ms. Wallack child support for the third child, a minor who still lives with her, in the amount of about \$1,500 per month. On October 23, 2013, a motion for reconsideration was denied, prompting this appeal. NOTICE OF DECISION (Oct. 23, 2010).

In a separate order, also based on the 61/39 split, the court found that college costs for the Violet, recently graduated, total about \$40,000, and ordered Mr. Floros 61 percent responsible for them. The parties' third child is imminently reaching college age, making the outcome of this matter further relevant. On November 1, 2013 a motion for reconsideration was filed regarding college costs, but it has not yet been acted on. The issues it raises are nonetheless questioned here.

14. ISSUES ON APPEAL (limit eight pages double spaced):

The New Hampshire Supreme Court reviews each discretionary notice of appeal and decides whether to accept the case, or some issues in the case, for appellate review. The following acceptance criteria, while neither controlling nor fully describing the court's discretion, indicate the character of the reasons that will be considered.

1. The case raises a question of first impression, a novel question of law, an issue of broad public interest, an important state or federal constitutional matter, or an issue on which there are conflicting decisions in New Hampshire courts.
2. The decision below conflicts with a statute or with prior decisions of this court.
3. The decision below is erroneous, illegal, unreasonable or was an unsustainable exercise of discretion.

Separately number each issue you are appealing and for each issue: (a) state the issue; (b) explain why the acceptance criteria listed above support acceptance of that issue; and (c) if a ground for appeal is legal sufficiency of the evidence include a succinct statement of why the evidence is alleged to be insufficient as a matter of law.



I. Parties' Child Was Erroneously Granted Intervention

The family court allowed the parties' adult middle child, Violet, recently a college student, to intervene in her parents' divorce as a third party beneficiary, to enforce the college-contribution provision of the decree.

The existing law in New Hampshire sends several signals regarding children's intervention in their parents divorce cases. In *In the Matter of Stapleford*, 156 N.H. 260 (2007), this Court held that minor children have no constitutional, statutory, or common law rights to intervene, and cautioned:

Divorce litigation would be complicated exponentially by the involvement of children as parties. If children were allowed to intervene, they could participate in discovery, depose and cross-examine witnesses, and appeal the court's ruling. Should siblings disagree among themselves, they could each hire their own attorney to advocate for their individual preferences. We need not further detail the chaos that would ensue if we were to hold that every mature minor has a due process right to intervene in their parents' divorce litigation.

Stapleford, 156 N.H. at 265 (2007) (quotations and citations omitted). In *In the Matter of Goodlander*, 161 N.H. 490 (2011), however, the adult children had definite shares in the family businesses and one of the parties illicitly withdrew money from the children's custodial accounts.

This court allowed the parties' adult children to intervene "for the purpose of protecting their direct financial interests, and not to interject their opinions as to any parenting issues." *Goodlander*, 161 N.H. at 506.

Here, to the extent the parties have any obligations under what the court called an "ambiguous" college-funding provision, it is only to "consult" and pay "[t]o the extent they then may be financially able." The children thus lack the direct financial interest of *Goodlander*. Moreover, the court here did not find Violet had a direct financial interest, but only that she was a third-party beneficiary. See e.g., *Brooks v. Dartmouth College*, 161 N.H. 685, 697 (2011) (third party beneficiary only when "promisee intends to give the beneficiary the benefit of the promised performance").

"Among people ages 50 and older, the divorce rate has doubled over the past two decades." Susan Thomas, *The Gray Divorcés*, WALL STREET JOURNAL (Mar. 3, 2012) (citing Susan L. Brown and I-Fen Lin, *The Gray Divorce Revolution: Rising Divorce Among Middle-Aged and Older Adults, 1990-2010*, 67 JOUR. OF GERONTOLOGY (2012)). Because older parents means both more established parental resources and older children, it is likely that they increasingly will seek intervention in their parents' divorce cases.

This Court should accept this case to resolve the level of interest necessary for intervention, to review whether Violet was a third-party beneficiary, and to determine whether that status rises to the "direct financial interest" specified in *Goodlander*.

II. Court Erroneously Did Not Take Into Account Actual Cash Flow

The court counted Mr. Floros's obligations to pay the interest on his business loans, but because it took figures from income tax forms, did not count his obligations to pay the principle on those same loans. Even if it may not be a tax event, payment of principle is a cost of doing business for a real estate entrepreneur. The court effectively awarded support and costs based on Mr. Floros's gross income rather than his net.

The law is that such calculation is improper, and that the net figure should be used. *In the Matter of Albert*, 155 N.H. 259 (2007). This Court should accept this appeal to correct the error, and to ensure that income for other real estate owners is accurately accounted.

III. Child Support Calculation Unlawfully Based on Assets Rather than Present Income

For the purpose of child support, the court found that Peter's income was \$9,000 per month and Susan's was \$8,000. Child support is supposed to be based on "present income," *In the Matter of Crowe*, 148 N.H. 218 (2002), but *not* assets. *In the Matter of Plaisted*, 149 N.H. 522, 526 (2003) ("The use of assets for child support does not fall within the variety of circumstances set forth in [the statute], and, therefore, assets are not a relevant circumstance that may be considered when adjusting a child support obligation.").

First, it is unknown how the court arrived at the \$9,000 and \$8,000 income figures, and they appear to be arbitrary.

Second, had the court followed the law, the parties' respective percentage shares for child support would be a nearly even 53 percent to 47 percent split. Because the court unlawfully based its child support on assets however, it erroneously calculated respective percentage shares at 61 percent and 39 percent.

Third, the family court did its calculations in the wrong order. It first made its award of child support, and then its determination of college costs, thus not taking into account the effect of paying for college on Mr. Floros's present income.

The court erred, and this Court should review this case to correct the error.

IV. Court Ignored Explicit Proportional Shares Specified in Stipulation

The college-cost paragraph of the parties' decree provides that "[t]o the extent they then may be financially able (in view of their then existing *income*, assets, *needs* and *obligations*) at the time such educational expenses arise, the parties shall contribute proportional to their then income and assets, to the cost of such education." PERMANENT STIPULATIONS (Oct. 3, 2003) ¶6 (emphasis added).

Thus the money to be proportionally applied to college is composed of four elements – income, assets, needs, and obligations. The court clearly took into account assets, but not income, needs, nor obligations.

Had it been interested in income, the court would have noted the parties' respective tax returns, which show Mr. Floros and Ms. Wallack had essentially the same "existing income" – his was \$123,448 and hers was \$121,593 – or at the least the monthly \$9,000 and \$8,000 it developed. Had it been interested in needs, the court would have noted no substantial difference. Had it been interested in obligations, it would have noted that Mr. Floros's income is wholly dependent upon the satisfaction of his nearly \$44,000 monthly mortgage obligations, and that his assets, especially in a poor real estate market, are essentially illiquid. Rather, the court chose just one of the four explicit factors, and based its determination on assets only. It was thus in error, and this Court should accept this appeal to repair it.

15. ATTACHMENTS

Attach to this notice of appeal the following documents in order: (1) a copy of the trial court decision or order from which you are appealing; (2) the clerk’s notice of the decision below; (3) any court order deciding a timely post-trial motion ; and (4) the clerk’s notice of any order deciding a timely post-trial motion.

Do not attach any other documents to this notice of appeal. Any other documents you wish to submit must be included in a separately bound Appendix, which must have a table of contents on the cover and consecutively numbered pages.

16. CERTIFICATIONS

I hereby certify that, upon information and belief, 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.

Joshua L. Gordon, Esq.

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).

November 22, 2013

Joshua L. Gordon, Esq.

ATTACHMENTS

1)	ORDER (June 26, 2013).	13
2)	ORDER (Oct. 17, 2013)..	14
3)	ORDER (Oct. 22, 2013)..	15
4)	NOTICE OF DECISION (Oct. 23, 2013)..	20