State of New Hampshire
Supreme Court

NO. 2005-0727

2006 TERM

JULY SESSION

IN THE MATTER OF JOHN M. MAYNARD

&

INGRID I. MAYNARD

. RULE 7 APPEAL OF FINAL DECISION OF
HILLSBOROUGH COUNTY (SOUTH) SUPERIOR COURT

BRIEF OF PETITIONER, JOHN M. MAYNARD

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   Preserved: transcript, *passim*

STATEMENT OF FACTS AND STATEMENT OF THE CASE

John Maynard and Ingrid Maynard were married in 1978. They have two sons: one was 26 at the time of trial, the other was completing high school.

John filed a Petition for Divorce, based on irreconcilable differences, in February 2002. PETITION FOR DIVORCE (Feb. 5, 2002), *appx.* at 1. The court's Order of Notice ordered John to give the Petition and the Order of Notice to Ingrid in hand or to leave it at her abode. ORDER OF NOTICE - DOMESTIC ACTION (Mar. 4, 2002), *appx.* at 5.

The Order of Notice contains instructions for how the recipient must proceed and by when; it indicates the date, time, and location of the temporary hearing at which she must appear; and warns that "[i]f you do not comply with these requirements, you may be considered in DEFAULT, you may not have an opportunity to dispute this case and the Court may issue orders in this matter which may affect you without your input." ORDER OF NOTICE - DOMESTIC ACTION (Mar. 4, 2002), *appx.* at 5.

The court also sent the Petition and Order of Notice to Ingrid. The mailing instructed Ingrid to appear personally at the court to accept service, and that if she takes no action she will be served by the Sheriff. IMPORTANT NOTICE TO INGRID I. MAYNARD (Mar. 4, 2002), *appx.* at 9.

Having apparently not heard from her, on March 14 the court notified John that Ingrid had not accepted service, and therefore advised him to effect service by the Sheriff. NOTICE TO PETITIONER (Mar. 14, 2002), *appx.* at 15. He did so. The Return of Service issued by the Sheriff's office indicates Ingrid was served by "leaving at the abode of the within named being at 27 Mitchell St., Merrimack NH . . . a copy of the writ and order of notice thereon." RETURN OF SERVICE (Mar. 21, 2002), *appx.* at 16. These orders of notice were also left for Ingrid in the

school bag Ingrid took to work. *Trn*. at 48-49.

The record thus indicates that Ingrid received notice of the divorce action, instructions on how, when and where to respond, and the consequences of failure to respond, in as many as three separate ways – from John, from the court, and from the Sheriff. Ingrid has offered no facts suggesting she was not aware of the proceeding. *See Trn.* at 48-50.

Upon filing the divorce, the court scheduled a structuring conference, which was noticed in the court's Order of Notice. ORDER OF NOTICE - DOMESTIC ACTION (Mar. 4, 2002), *appx*. at 5. The structuring conference took place, and the court established a discovery deadline of June 18, 2002. The court's resulting conference report says: "Respondent has not filed an appearance and she did not appear for hearing on 4/18/02. Accordingly, she is defaulted and the matter shall be scheduled for final default hearing." STRUCTURING CONFERENCE REPORT (Apr. 19, 2002), *appx*. at 17.

A default hearing was then scheduled for July 1, 2002, at which Ingrid *did* appear. An order issued which said, "[d]espite a default having been entered against her, [Ingrid] appeared at the final hearing." The court then delayed the proceeding to allow time for settlement discussions. ORDER (July 8, 2002), *appx*. at 31.

Ten months later, what was supposed to be the "final hearing" was scheduled. A few days before the May 29, 2003 hearing, however, Ingrid filed a handwritten request to delay the proceedings "so that I may seek legal representation for the final hearing." MOTION TO CONTINUE (May 15, 2003), *appx*. at 33. John objected, noting the length of time since the divorce had been filed, and pointing out that Ingrid appeared at a hearing nearly a year before and had had plenty of time to find a lawyer. PETITIONER'S OBJECTION TO RESPONDENT'S MOTION FOR CONTINUANCE

OF FINAL HEARING (May 21, 2003), *appx*. at 34. Ingrid's lawyer filed an appearance shortly thereafter. APPEARANCE (of Kathleen Hickey, Esq.) (June 12, 2003), *appx*. at 36.

Everybody showed up for the May 29, 2003 hearing, but before it commenced, Ingrid "was carried away by ambulance."[1] ORDER (June 6, 2003), *appx*. at 38. Lawyers for both parties were present, however, and while there is no transcript of the hearing, it is apparent they used the opportunity to litigate the default. Afterwards, the court held:

> The petition was filed in February 2002. A default has been entered due to respondent's failure to attend a structuring conference and due to her failure to file a timely appearance. When the final hearing was scheduled for the first time for July 1, 2002, respondent appeared and requested a continuance which was granted. She has had more than sufficient time in which to retain counsel and the Court is persuaded that she will never be ready for trial.

ORDER (June 6, 2003), *appx*. at 38. The court also provided Ingrid with a copy of John's proposed orders, and told Ingrid to file her own. The court wrote that "[s]hould she fail," the court might adopt John's proposal "and the matters shall be concluded." *Id.*

Ingrid, through her attorney, thus proposed her own orders, and again asked that the court revisit the default. RESPONDENT'S OBJECTION TO PETITIONER'S PROPOSED FINAL ORDER AND REQUEST THAT DEFAULT BE STRICKEN (June 25, 2003), *appx*. at 40. John objected, reciting the procedural history, noting that well over a year had passed since the commencement of the proceeding and Ingrid's appearance before the court, pointing out that she had plenty of time to seek legal and medical counsel, and alleging that she "essentially ignored these divorce proceedings until the eleventh hour." PETITIONER'S REPLICATION TO RESPONDENT'S OBJECTION

[1]Months later the court inquired into what caused Ingrid's collapse. Medical records disclosed to the court indicate it was caused by stress associated with the divorce. See HOSPITAL ADMISSION RECORD (Aug. 19, 2003), *appx*. at 54.

TO PETITIONER'S PROPOSED FINAL ORDER AND REQUEST THAT DEFAULT BE STRICKEN (July 8, 2003), *appx*. at 49.

A hearing was scheduled for August 19, 2003, to address these two pleadings. Although the appellant has provided no transcript of the hearing, it is apparent from the resulting order that the parties litigated the matter of whether the default was valid. The court wrote:

> The respondent's request that the default be stricken is denied. The respondent has had notice of these proceedings since at least April 25, 2002 when the temporary order and the structuring conference order in which the Court defaulted the respondent was issued. Once aware of the divorce proceeding, for the next 14 months, the respondent took no action. She neither filed an appearance nor a request to strike the default and she has failed to persuade the Court that her inaction was the result of "accident, mistake, or misfortune" as defined in the case of State of New Hampshire v. Consolidated Recycling, Inc. & a., 144 NH 467 (1999). The default entered by the Court constituted a judgment pro confesso and a final hearing was scheduled on the issues before the Court within the context of the divorce matter.
>
> The first time that the case was scheduled for final hearing on July 1, 2002, the respondent was present and the matter was continued to pursue settlement discussions. However, by letter dated February 26, 2003, the petitioner requested that a final hearing be scheduled and filed with the Court his proposed final decree and other necessary documents. Once again, the respondent did nothing and by notice dated April 25, 2003, the Court scheduled the final hearing for May 29, 2003. Pro se litigants are bound by the same rules as parties represented by counsel. Accordingly, the default stands and since the respondent timely filed an objection to the adoption of the Petitioner's Proposed Decree, a final hearing on the merits shall be scheduled consistent with the case of Charles G. Douglas, III and Caroline G. Douglas, 143 NH 419 (1999).

DECREE ON OBJECTION TO PROPOSED FINAL ORDER AND REQUEST THAT DEFAULT BE STRICKEN (Aug. 24, 2003), *appx*. at 67.

In September 2003 Ingrid was accused of two crimes – misdemeanor resisting detention and felony criminal threatening. COMPLAINT (misdemeanor resisting detention) (Sept. 8, 2003); COMPLAINT (felony criminal threatening) (Sept. 8, 2003), *appx*. at 75 & 76. Shortly thereafter

she was involuntarily committed to the New Hampshire Hospital, LETTER FROM MICHAEL NORMANDIN TO KATHLEEN HICKEY (Dec. 16, 2003), *appx*. at 70; *see also* RESPONDENT'S MOTION FOR RECONSIDERATION (Aug. 26, 2004), *appx*. at 118, where she stayed for about eleven months. RESPONDENT'S MOTION TO CONTINUE FINAL HEARING SCHEDULED FOR OCTOBER 7, 2004 (Sept. 8, 2004), *appx*. at 126; *Trn.* at 29; *see also* PETITIONER'S OBJECTION TO RESPONDENT'S MOTION FOR RECONSIDERATION (Sept. 1, 2004), *appx*. at 122 (Ingrid escaped from New Hampshire Hospital). The criminal proceedings included an evaluation for competency to stand trial. RESPONDENT'S AMENDMENT TO MOTION TO CONTINUE FINAL HEARING SCHEDULED FOR OCTOBER 7, 2004 (Sept. 30, 2004), *appx*. at 135. The divorce proceedings were stayed pending the outcome of the competency inquiry. NOTICE OF DECISION (Oct. 14, 2004), *appx*. at 140. Ingrid was deemed competent to stand trial, *State v. Ingrid Maynard*, AGREEMENT (Merrimack Dist.Ct., Dec. 8, 2004), *appx*. at 141, but the outcome of the criminal proceedings are not part of the record here.

Ingrid's hospitalization and criminal troubles, however, did not stop her divorce attorney from pursuing the matters of concern here. During the period of Ingrid's commitment, in separate motions, she made a variety of affirmative requests. She filed motions to have John pay for property appraisals, to grant alimony, to compel discovery, to alter visitation of the parties' minor son (now emancipated), and to award attorneys fees. After a number of continuances based on attorneys' scheduling conflicts, the court issued an order denying them. ORDER (July 12, 2004), *appx*. at 115. On the matter of Ingrid's request for discovery, the court denied her motion by adopting John's objection. The grounds for denial were because she had been defaulted, she delayed by 20 months her request for discovery, she missed the discovery deadline by 18 months,

she had plenty of time to retain counsel, and other similar dilatory-type reasons. *Id*. (denied "for reasons set forth in the objection"); ***see also*** PETITIONER'S OBJECTION TO RESPONDENT'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND EXPERT INTERROGATORIES PROPOUNDED BY THE RESPONDENT AND TO PRODUCE DOCUMENTS REQUESTED BY THE RESPONDENT (Jan. 20, 2004), *appx*. at 94.

After several more delays, there was an actual "final hearing" on April 25, 2005, which has been transcribed for this appeal. While the court denied alimony, it heard testimony on the issue of property division, and ordered the significant assets split to be split 60 percent to Ingrid and 40 percent to John. DECREE OF DIVORCE (May 5, 2005), *appx*. at 174.

Ingrid appealed on the issues of default and alimony, and John cross-appealed on the inequitable property division.

SUMMARY OF ARGUMENT

After a chronological review of the pleadings in this case, John Maynard notes that Ingrid's failure to appear as required in the court's order of notice is cause for a judgment *pro confesso*. He then points out that there are not sufficient facts to review the matter because the appellant did not transcribe the two hearings during which the matter was litigated below. Consequently, he argues, this court must assume there was sufficient evidence of default, and even if it doesn't, the record facts plainly show Ingrid defaulted.

John then argues that there are consequences to a default. Normally, a defaulting defendant can only be heard on damages, but contesting mere liability in divorce actions is rare. The consequences suffered by a defaulting divorce defendant include the inability to seek affirmative relief, to partake in discovery, and enjoy the other rights that go along with being a party.

He then addresses an argument made by Ingrid. John points out that just because he once submitted a proposed order that included alimony, the default is not somehow waived.

Finally, John Maynard goes through the various findings below and argues that the court acted properly in not awarding alimony, but that it should have made a more equitable property division.

He concludes by asking this court to affirm the judgment of the court below on the default and alimony, but to remand with respect to property division.

ARGUMENT

I. Court Properly Exercised Discretion by Finding Ingrid in Default

A. Failure to Timely Appear Results in a Judgment *Pro Confesso*

When a respondent fails to take some procedural action that would result in a default, the bill is taken *pro confesso*. *O'Brien v. Continental Ins. Co.*, 141 N.H. 522 (1996).

> In equity proceedings . . . actions that would constitute a default at law technically result in a judgment *pro confesso* in equity. A judgment *pro confesso* is neither a verdict nor a judgment. It is merely an interlocutory order that results in the admission of all material and well-pleaded allegations of fact and forms the basis for the later entry of judgment upon proof of right and amount.

Bursey v. Bursey, 145 N.H. 283, 285 (2000) (quotations and citations omitted).

Failure to timely appear results in a judgment *pro confesso*. *O'Brien v. Continental Ins. Co.*, 141 N.H. 522, 523 (1996); *Brady v. Mullen*, 139 N.H. 67 (1994); *Hutchinson v. Manchester St. Ry.*, 73 N.H. 271 (1905) (failure to appear results in default).

Failure to appear may be excused if it was caused by "accident, mistake or misfortune." These terms mean "something outside of one's control, or something which a reasonably prudent person would not be expected to guard against or provide for. The words import something that is outside the expectation or control of a party or its attorney." *State v. Consolidated Recycling, Inc.*, 144 N.H. 467, 469 (1999) (quoting *Morriss v. Towle Hill Associates*, 138 N.H. 452, 454 (1994) and *Lakeview Homeowners Assoc. v. Moulton Constr.*, 141 N.H. 789, 791 (1997)) (brackets and quotations omitted). Whether there has been accident, mistake or misfortune is also within the discretion of the trial court. *Hutchinson v. Manchester St. Ry.*, 73 N.H. 271 (1905).

Whether to strike a default is also within the discretion of the trial court. *Morriss v. Towle Hill Associates*, 138 N.H. 452, 454 (1994).

B. Lacking Transcripts, Supreme Court Must Assume Sufficient Evidence Supporting Default

It is apparent from the record that the lower court visited and revisited the issue of whether Ingrid was properly defaulted. She was found in default in April 2002. After Ingrid collapsed at the May 2003 hearing, her attorney raised the issue of whether the default was proper, and the court found it was. She filed a motion to strike the default in June 2003. The court held another hearing on the matter, and issued an order affirming the default in August 2003. There are no transcripts, however, of these hearings. During the final hearing (which was transcribed), Ingrid twice again raised the issue. The court noted it had ruled on the issue "[s]everal times." *Trn.* at 50. Later, in the context of whether Ingrid could request alimony after a default, the court indicated it had already ruled on the procedural circumstances "several times before." *Trn*. at 72.

Because Ingrid has not presented this Court with a record, there is no way for this Court to review those proceedings. "[A]bsent a transcript of the hearing, we must assume that the evidence was sufficient to support the result reached by the trial court." *Bean v. Red Oak Property Management, Inc.*, 151 N.H. 248, 250 (2004). Accordingly, this Court "must assume" that the evidence supporting the default was sufficient.

C. There is Sufficient Evidence of Default

Nonetheless, the evidence of default is unassailable.

John filed his Petition for Divorce in February 2002. The court's Order of Notice, which contained instructions regarding how, when, and where to respond, also warned that the consequences of ignoring the notice was default. The court mailed it to Ingrid, she was served by

the Sheriff, and John put the orders in her handbag. Despite three separate modes of notification, Ingrid did not take the action required, did not file an answer or appearance, and did not show up in court.

The court reiterated the procedural facts in specifically finding that Ingrid's failure to appear was not due to "accident, mistake or misfortune."

> The respondent has had notice of these proceedings since at least April 25, 2002 when the temporary order and the structuring conference order in which the Court defaulted the respondent was issued. Once aware of the divorce proceeding, for the next 14 months, the respondent took no action. She neither filed an appearance nor a request to strike the default and she has failed to persuade the Court that her inaction was the result of "accident, mistake, or misfortune."

DECREE ON OBJECTION TO PROPOSED FINAL ORDER AND REQUEST THAT DEFAULT BE STRICKEN (Aug. 24, 2003), *appx.* at 67. *See Bursey v. Bursey*, 145 N.H. 283 (2000) (no error in divorce defendant being defaulted for failing to answer interrogatories).

In addition, the fact that Ingrid was committed to the New Hampshire Hospital does not excuse the default. Her failure to appear occurred on April 18, 2002. STRUCTURING CONFERENCE REPORT (Apr. 19, 2002), *appx.* at 17. Her involuntary commitment occurred in September 2003, a year-and-a-half later. RESPONDENT'S MOTION FOR RECONSIDERATION (Aug. 26, 2004), *appx.* at 118.

Accordingly, even if this Court has the authority to consider the procedural facts despite no transcripts of the relevant hearings, it should find that the lower court properly exercised its discretion by finding Ingrid in default.

II. Defaulting Divorce Defendant Cannot Seek Affirmative Relief, Such as Requesting Alimony, Compelling Discovery, Pursuing Payment for Property Appraisals, or Seeking Attorneys Fees

This case raises the question of the consequences of Ingrid's default.

A defendant who is taken *pro confesso* is deemed to have admitted matters such as subject matter jurisdiction, that the case was filed according to acceptable procedures, that the plaintiff has stated a claim upon which relief may be granted, the existence of all well-pleaded material allegations of fact, and that the defendant is liable to the plaintiff. *See e.g.*, *Toppan's Petition*, 24 N.H. 43 (1851); *Manchester's Petition*, 28 N.H. 296, 300 (1854); *Brady v. Mullen*, 139 N.H. 67 (1994); *Huntress v. Effingham*, 17 N.H. 584 (1845); *Bell v. Liberty Mut. Ins. Co.*, 146 N.H. 190 (2001); *Bowman v. Noyes*, 12 N.H. 302 (1841).

Normally, then, after a party has been deemed *pro confesso*, the court has an obligation to either take evidence regarding remedies, or to calculate a remedy from the facts deemed admitted. *Pope v. United States*, 323 U.S. 1, 12 (1944) ("It is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary or by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly."); *Hutchinson v. Manchester St. Ry.*, 73 N.H. 271 (1905).

In divorce, however, unless it is the rare case in which the respondent is contesting the actual dissolution of the marriage itself, *everything* is damages.

In *Douglas v. Douglas*, 143 N.H. 419 (1999), the divorce respondent did not show up at the final hearing; instead she sent her brother, who was not a lawyer. Because the notice of hearing required that the "parties shall be available" for the hearing, and the respondent wasn't, she was defaulted. In finding the default was proper, this Court wrote:

> Competing considerations are involved in such a determination. It is important that cases be decided on their merits, that a party have his day in court and that rules of practice and procedure shall be tools in aid of the promotion of justice rather than barriers and traps for its denial. It is likewise important that litigation be concluded finally and with reasonable dispatch and that the dilatory shall not be rewarded at the expense of the diligent.

Douglas, 143 N.H. at 425. In keeping with the law of *pro confesso* judgments generally, this Court went on to hold that the defaulted respondent is "entitled to notice and a hearing on the issue of the proper disposition of the parties' marital assets." *Id.*

Ingrid is not here complaining that she lacked her final *Douglas* hearing; rather she claims that because she is entitled to it, she should also be entitled to demand discovery associated with the issues that hearing encompasses. If this were the law, however, there would be no consequences to defaulting. Savvy divorce attorneys would strategically default, secure in the knowledge that not filing an answer would have no lasting effect.

But defaulting does carry consequences.

The rules of the superior court require that "[a]n answer to a petition or a cross-petition is required in cases where the responding party wishes to seek alimony or other affirmative relief." SUPER.CT.R. 185. Ingrid was defaulted for not filing an answer as specifically demanded in the Notice of Hearing accompanying the Petition for Divorce; she also did not file a cross-petition. Likewise, the court's scheduling order established a discovery deadline long before Ingrid even asked for answers to interrogatories. Moreover, "[t]hough a defaulting party may be entitled to notice of the damages hearing, that party is limited to cross-examining witnesses and objecting to evidence." *Roche v. Young Bros., Inc., of Florence*, 504 S.E.2d 311, 314 (S.C. 1998).

By defaulting Ingrid gave up the opportunity to seek affirmative relief. That includes

requesting alimony, compelling discovery, pursuing payment for property appraisals, and seeking attorneys fees. Granting such relief may be beyond the court's jurisdiction. *Ely v. Gray*, 224 Cal.App.3d 1257, 1260, 274 Cal.Rptr. 536, 538 (Cal.App.1990) ("An entry of a default judgment which exceeds the relief requested is an act beyond the court's jurisdiction.").

Accordingly, as "the dilatory shall not be rewarded at the expense of the diligent," *Douglas*, 143 N.H. at 425, the court properly refused to award alimony and compel discovery.

As to any error regarding discovery, it is harmless for two reasons. First, it appears that she received the items she sought. Second, in his proposed order, John requested dividing all assets by halves. Ingrid requested a 60 percent - 40 percent split of the major assets, and the court's award largely effectuated Ingrid's request. Because she got what she wanted, there is no prejudice. *Hoffman v. Hoffman*, 143 N.H. 514 (1999) (error in marital property distribution harmless because valuation varied by insignificant amount). Any error she might claim by being denied discovery is therefor harmless.

III. Initial Proposal for Alimony Does Not Somehow Waive Default

In advance of the hearing that was truncated due to Ingrid's collapse, John filed a proposed order that contained a proposed alimony award. The proposed order filed in advance of the actual final hearing nearly two years later, however, did not contain any alimony proposal. Rather it suggested: "That neither party shall be responsible to pay alimony to the other party." (PROPOSED) ORDER (Apr. 25, 2005), *appx.* at 151.

Ingrid argues that John's initial proposal somehow waived her default and that alimony somehow remains before the court. *Ingrid Brief* at 18. It is unclear how such a waiver might work. Ingrid's brief merely reiterates her psychological troubles, but does not cite authority nor develop the argument. In any event, there is no known law providing for a waiver of default based on stale proposed orders.

As noted, Ingrid was defaulted for failing to file an appearance or an answer. As such, she may not make any affirmative requests for relief, including for alimony. Accordingly, the court properly denied alimony due to the default.

IV. Court Properly Exercised Discretion by Not Awarding Alimony, But Should Have Reached a More Equitable Property Distribution

Even if the court could properly entertain Ingrid's request for alimony despite the default, it was within its discretion in denying an award.[2]

"The trial court is afforded broad discretion in determining matters of property distribution and alimony in fashioning a final divorce decree. We will not overturn a trial court's decision on these matters absent an unsustainable exercise of discretion." *Matter of Harvey & Harvey*, __ N.H. __ (decided April 26, 2006).

New Hampshire law provides that:

> the trial court shall award alimony if: (1) the party in need lacks sufficient income, *property*, or both to provide for his or her reasonable needs, considering the style of living to which the parties have become accustomed during the marriage; (2) the payor is able to continue to meet his or her own reasonable needs, considering the style of living to which the parties have become accustomed during the marriage; and (3) the party in need cannot be self-supporting through appropriate employment at a standard of living that meets reasonable needs, or is the custodian of the parties' child, whose condition or circumstances make it appropriate that the custodian not seek employment outside the home."

Id.; RSA 458:19, I (emphasis added). As the conjunctive is used, all three conditions must be met. *See Douglas*, 143 N.H. at 424.

John and Ingrid's children are emancipated, so there are no issues regarding cost of custody. Although the court was apprised of Ingrid's mental health issues, there was no evidence that it is not curable, or that it prevents her from working. *See Trn.* at 73 Under the decree, Ingrid will receive much of the parties' stocks and bonds, DECREE OF DIVORCE ¶ 13, and half of one of the parties' retirement accounts worth about $40,000. DECREE ¶ 12C. Ingrid will take

[2]The issues decided in *Norberg v. Norberg*, 135 N.H. 620 (1992), have no application here because there is no stipulation regarding alimony, and modification is premature.

sixty percent of the value of the parties two homes in Merrimack, New Hampshire. DECREE ¶ 16 & 17. At the time of trial the collective value of the homes, measured by their tax assessments, and subtracting mortgages and liens, was $320,241, of which Ingrid will get $192,145. *Trn.* at 10-14. These assets are not insignificant. *Trn.* at 92. Even without alimony, John will continue to pay for Ingrid's health and dental insurance "for so long as it is available." DECREE ¶ 8, *appx.* at 174. Health insurance is "a very big issue for me," Ingrid testified. *Trn.* at 117.

Under the temporary orders still in effect, John has been paying, "in lieu of alimony," the mortgage, taxes, insurance and utilities on ***both*** houses, as well as Ingrid's automobile liability insurance. TEMPORARY ORDER ¶ 5 (Apr. 19, 2002), *appx.* at 20. He has also been paying for her health, dental, and life insurance throughout these proceedings. TEMPORARY ORDER ¶¶ 6 & 7. At the time of trial John was also paying private highschool tuition for the parties' younger son, *Trn.* at 7-8, and planning to pay for college, which is estimated at $43,000 per year. *Trn.* at 7. It appears that Ingrid is assuming none of the child's education costs.

In light of these facts, the court was within its discretion in not also awarding alimony, and should have reached a more equitable property distribution.

CONCLUSION

In accord with the foregoing, John M. Maynard respectfully requests this honorable court to affirm the ruling of the court below regarding the default and alimony, but to remand with an order to revisit the equity of the property division.

Respectfully submitted,

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By his Attorney,

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Dated: July 10, 2006

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for John M. Maynard requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on July 10, 2006, copies of the foregoing will be forwarded to Kathleen A. Hickey, Esq.

Dated: July 10, 2006

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2002

[*]Entries in *italics* indicate document not cited in body of brief.

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