State of New Hampshire
Supreme Court

NO. 2004-0288

2004 TERM

AUGUST SESSION

IN THE MATTER OF

TATJANA A. DONOVAN
and
ROBERT F. DONOVAN

BRIEF OF ROBERT DONOVAN

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QUESTIONS PRESENTED

1. Did the court properly impute income to Tatjana Donovan based on its conclusion that she was a voluntarily underemployed CPA with significant earning potential?

2. Should the court have modified its child support order requiring Robert to pay for college expenses in the face of recently enacted legislation that overturns this Court's long line of cases allowing such an order?

3. Should the court have modified its decree requiring Robert to pay for extracurricular expenses over and above his child support obligation in the face of recent decisions by this Court holding that such expenses are already included in the statutory child support amount?

4. Should the court have modified its decree requiring an automatic escalation of Robert's child support obligation based on the Consumer Price Index when the escalator has caused Robert's obligation to reflect the level of inflation rather than the level of his income, as the statute requires?

5. Should the court have modified its decree requiring an automatic escalation of Robert's child support obligation based on the Consumer Price Index when the escalator has resulted in an adjustment every year without any showing of changed circumstances, rather than every three years or upon changed circumstances, as the statute allows?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Most of the statement of facts and statement of the case as presented by Tatjana Donovan in her brief are acceptable to Robert Donovan.

The only change "necessary in correcting any inaccuracy or omission in the statement of the other side," SUP. CT. R. 16(4), would be to delete the allegation that home-schooling prevented Tatjana from pursuing employment: The allegation is based on only an offer of proof by Tatjana's attorney, has no evidentiary support in the record, and is contrary to the court's conclusions.

It should also be noted that the event prompting Robert's request for modification of child support was his employer's across-the-board 15 percent salary reduction, which cut his weekly pay from $1,827 to $1,562. *Trn.* at 4-5.

After Tatjana appealed, Robert cross-appealed.

SUMMARY OF ARGUMENT

Robert Donovan first defends the lower court's order which reflected its conclusion that Tatjana Donovan is voluntarily unemployed. Tatjana is a qualified CPA with significant earning potential, and though she is home-schooling the parties' children the court heard evidence that she is able to work and contribute to their expenses.

Robert then discusses the order requiring him to pay college expenses. He stipulated to the provision several years ago, taking into account a long line of cases in which this Court held that college expenses could be required as part of a child support order. The New Hampshire Legislature has since overturned those cases and because of that legislation he argues that the current order is in error. Robert also notes that the order's unfairness is compounded by Tatjana's underemployment because her failure to maintain her career now will inevitably lead to a lower income when the parties' children reach college age.

Robert then alleges that the order requiring him to pay extracurricular activity expenses over and above his child support obligation is likewise in error. Several of this Court's recent decisions make clear that extracurricular expenses are already included in the statutory child support amount. He also points to a lack of any evidence suggesting that the children's extracurricular expenses are somehow higher as a result of home-schooling.

Finally, Robert argues that the order providing for an automatic child support escalator based on the Consumer Price Index is contrary to law. It causes his obligation to be tied to inflation rather than his income as the statute requires, and it results in an annual modification without any change of circumstances rather than every three years or upon a change of circumstances as the statue allows.

ARGUMENT

I. The Court Properly Took Into Account Tatjana's Voluntary Underemployment

New Hampshire law provides that:

> "The court, in its discretion, may consider as gross income the difference between the amount a parent is earning and the amount a parent has earned in cases where the parent voluntarily becomes unemployed or underemployed."

RSA 458-C:2, IV(a).

Courts have used several different methods to determine the amount of income imputed to a parent who has made herself voluntarily underemployed: her prior or former salary, her ability to earn an income ("income potential"), and the prevailing or minimum wage level in her field. *Doubleday v. Doubleday*, 131 N.H. 250 (1988) (child support may be based on earning capacity); *see e.g.*, Elizabeth Trainor, *Basis for Imputing Income for Purpose of Determining Child Support Where Obligor Spouse is Voluntarily Unemployed or Underemployed*, 76 ALR 5th 191.

Being a stay-at-home parent is not a sufficient reason to avoid imputation of intentional impoverishment.

> A parent who voluntarily leaves the world of gainful employment, for however good a reason, does not thereby foreclose inquiry into the need for child support and the responsibility of that parent to supply it. The fact that no court will actually order [the parent] to go to work does not mean that it cannot impute income to her and impose a fair obligation.

Bencivenga v. Bencivenga, 603 A.2d 531, 532 (N.J.Super. 1992) (children 2 years old and 3 months old). *See also Rojas v. Rojas*, 656 So.2d 563, 565 (Fla.App. 1995) (child 7 years old with leukemia; error when court refused to impute income to voluntarily unemployed parent based on recent work history, occupational qualifications, and prevailing earnings level in community); *Stanton v. Abbey*, 874 S.W.2d 493, 499 (Mo.App. 1994) (four children of school

age; no error in imputing income when parent had professional degree and experience, and substantial earning potential); *Brody v. Brody*, 432 S.E.2d 20, 22 (Va. App. 1993) (two children and an infant; error when court refused to impute income to voluntarily unemployed parent who had recent job with significant earnings). There is no known case in any jurisdiction condoning a custodial parent's voluntary underemployment due to home-schooling.

Imputing a reasonable salary comports with the purpose of New Hampshire's child support statute, which provides that "[t]he custodial parent shall share responsibility for economic support of the children, irrespective of any non-custodial parent's child support order." RSA 458-C:1 (I). Allowing Tatjana to escape financial responsibility for the well-being of her children would contravene the legislature's intent, and would create an un-enacted loop-hole for home-schooling parents.

Moreover, the evidence supports the court's underemployment conclusion. Tatjana is a certified public accountant who has the ability and skills to earn a significant income. *Trn*. at 5-6. Although she home-schools the parties' children, that is not a full-time occupation, and it leaves her ample time to earn some money. *Trn*. at 8. Tatjana conceded her schedule has room for part-time work. *Trn*. at 16. The amount imputed was modest: 20 hours per week at $11 per hour. CHILD SUPPORT GUIDELINES WORKSHEET, note at bottom, *Appx. to Br.* at 31. *See Stephenson v. Stephenson*, 111 N.H. 189 (1971) (finding that parent was "intelligent, articulate, attractive appearing individual with a first class education" was sufficient basis for finding of underemployment).

Determining whether a party is willfully underemployed is a question for the fact finder whose decision will not be disturbed on appeal if supported by evidence on the record. *West v.*

Turchioe, 144 N.H. 509, 513 (1999). Because the lower court had a sufficient basis on which to conclude Tatjana was voluntarily underemployed, this Court should take no action on the matter.

II. College and Extracurricular Activity Expense Orders are Contrary to Current Law

"A stipulation . . . is a voluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate need for proof or to narrow range of litigable issues." *State v. Desmarais*, 140 N.H. 196, 197 (1995) (quotations omitted)

New Hampshire law has long encouraged settlement of issues:

> "It is . . . to be noted that courts have shown a special disposition to sustain compromises of disputed claims, often without much regard to the injustice resulting from the stipulations agreed to. It is often said that such agreements are looked upon with great favor, as their tendency is to diminish litigation. A settlement of a controversy is valid, not because it is the settlement of a valid claim, but because it is the settlement of a controversy. Such settlements are favored by the law."

McIsaac v. McMurray, 77 N.H. 466, 471 (1915) (quotations omitted).

Similarly, numerous questions have been decided by this Court on the basis that the policy chosen is more likely to result in settlement rather than litigation of controversies. *See e.g.*, *Estate of Frederick v. Frederick*, 141 N.H. 530, 532 (1996) (construction of law regarding changing of beneficiary made in part because it "reduces the incentives for costly and divisive litigation"); *Workman v. Public Serv. Co.*, 113 N.H. 422, 425 (1973) ("the rule we are adopting should be simple to administer and should improve the pretrial hearing process by identifying and narrowing the issues, increasing the stipulations, and generally improving the chances of just settlements in advance of trial"); *Hoyt v. Company*, 80 N.H. 27, 31 (1921) (approving trial of two causes of action together because the alternative "would not be as prompt, inexpensive, or convenient as the procedure which was adopted").

Parties likewise have an incentive to reach agreements. They speed resolution of conflict, reduce litigation costs and attorney's fees, and avoid the possibility of creating bad faith such that

a party may be liable for an opponent's costs and fees. *See Harkeem v. Adams*, 117 N.H. 687 (1977).

However, "in families with minor children, existing law imposes substantial doctrinal constraints" on settlement terms. Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 954 (1979). When the law is changed regarding a particular issue, the parties' calculus for settlement is directly effected, and agreements once reached may later need revision.

A. College Expenses

New Hampshire law contains a long line of cases holding that a court may order a parent to pay for college. *See e.g., In the Matter of Breault & Breault*, 149 N.H. 359 (2003) (divorced parent required to continue paying child support while children attend college); *West v. Turchioe*, 144 N.H. 509 (1999) (sustaining order for parent to invest for child's future college costs); *Snyder v. Clifton*, 139 N.H. 549, 550-51 (1995) (not error for court to require parent to pay for high school equivalency classes of adult child); *Leclair v. Leclair*, 137 N.H. 213, 219, 225 (1993) ("we consistently have granted the superior court broad discretion in its decision whether or not to order a divorced parent to contribute toward college expenses; statute requiring such meets constitutional standards); *Dupuis v. Click*, 135 N.H. 333 (1992) ("college education expenses are in the nature of child support, which involves indefinite payments and are modifiable"); *Gnirk v. Gnirk*, 134 N.H. 199 (1991) (court had discretion to modify decree to include payment for college expenses when amount not foreseeable at time of divorce); *Morrill v. Millard (Morrill)*, 132 N.H. 685, 689 (1990) (enforcing stipulation providing for payment of college expenses); *Kayle v. Kayle*, 132 N.H. 402, 405 (1989) (sustaining order for parent to pay private-school

college education expenses); *Merrifield v. Merrifield*, 122 N.H. 372, 374 (1982) (discretion of court to order parent to finance education of self-supporting minor child);*Heinze v. Heinze*, 122 N.H. 358, 360 (1982) ("Ordinarily, support payments may not be ordered for children over eighteen. This court, however, has recognized that support may be awarded for higher education in appropriate circumstances."); *Byrne v. Byrne*, 120 N.H. 428 (1980); *Edin v. Edin*, 119 N.H. 783 (1979) (sustaining order that parent obliged to pay for college education of child); *Azzi v. Azzi*, 118 N.H. 653, 657 (1978) (sustaining order that parents pay for reasonable share of children's college educations); *French v. French*, 117 N.H. 696, 699-701 (1977) (approving order for parent to fund adult child's educational expenses: "a college education is indispensable for success in obtaining and holding a reasonably well-paid and secure position. . . [W]ith rare exceptions, no one's education is completed at age eighteen, nor in practically all professions, until well after twenty-one."); *Walker v. Walker*, 116 N.H. 717, 718 (1976) (requiring obligor to fund education even though child had reached age of majority); *Lund v. Lund*, 96 N.H. 283, 284 (1950); *Payette v. Payette*, 85 N.H. 297, 298 (1931) ("While there are decisions under the statutes of other jurisdictions which hold that a parent in divorce proceedings cannot be required to furnish support to a minor child who is attending college, the cases which reach a contrary conclusion appear to be more in accord with the liberal view which prevails in this state.").

In accord with this substantial body of law, as part of their divorce proceedings, Robert and Tatjana negotiated and signed a stipulation, which provides:

> Private & Post Secondary Educational Expenses: Each party shall contribute to the cost of the children's education through college in proportion to their respective income at that time.

Parties' PERMANENT STIPULATION ¶ 6 (May 5, 2000), *Appx. to Br.* at 19, 20.

This line of cases culminated with a pair of recent opinions: *In the Matter of Barrett*, 150 N.H. 520 (2004) and *In the Matter of Jacobson & Tierney*, 150 N.H. 513 (2004). In these cases, this Court held that a trial court may order divorced parents to contribute toward the educational expenses of their adult children.

The Legislature took decisive action, changing the law so that:

> No child support order shall require a parent to contribute to an adult child's college expenses or other educational expenses beyond the completion of high school.

RSA 458:17 XI-a. *Barrett* and *Jacobson & Tierney* – and the long line of cases leading up to them – have thus been legislatively overturned.

The new statute became effective after Robert's petition to modify child support was filed but before the hearing in this case and before the court denied his request to remove the college education provision from his child support obligation.

Because it is now beyond the jurisdiction of New Hampshire courts to order payment of college costs if a parent does not want the provision, and the court here ordered the continuation of the provision without the continued consent of Robert, its order is in error and that portion of the stipulation providing for college education expenses should be deleted.

The parties stipulation provides that each will contribute to the cost of the children's college education "in proportion to their respective income at that time." Given Tatjana's voluntary underemployment, it is likely that her income at college-time will be much less than if she resumes her certified public accounting career now. If she waits until the children are done with school to resume her career, she will have not only earned less over the years, but she will have lost seniority in her field and the commensurate earning capacity that status implies. Her

decision to forgo her career now will make her inevitably poorer later, thereby directly impacting Robert's "proportion" of the cost of education for which he will be liable. This Court should thus delete that portion of the child support order requiring Robert to pay for college.

B. Extracurricular Activity Expenses

A similar situation exists with regard to extracurricular expenses. During their divorce proceedings, the parties entered a stipulation, which provides:

> Miscellaneous Expenses for Children: As is indicated by the parties' Uniform Support Order, Respondent shall contribute $150.00 per month toward the children's activities and expenses.

Parties' PERMANENT STIPULATION ¶ 7 (May 5, 2000), *Appx. to Br.* at 19, 20. The court's order reiterated: "In addition to his child support obligation, Obligor shall contribute $150.00 per month toward the children's activity expenses." UNIFORM SUPPORT ORDER ¶ 18 (May 8, 2000), *Appx. to Br.* at 22, 23.

In 2002, this court decided *In the Matter of Coderre*, 148 N.H. 401 (2002):

> "We hold . . . that extracurricular activity expenses are part of basic guidelines support. Extracurricular activities fall into the same category of basic support as food, shelter and recreation. Absent any language to the contrary in the guidelines, or elsewhere, we conclude that such expenses are included in the parties' total support obligation.

Coderre, 148 N.H. at 406. The holding was subsequently reiterated in *In the Matter of Arabian*, __ N.H. __ (decided June 11, 2004), in which this Court wrote that the lower "court erred by requiring the petitioner to pay for part of the minor child's extracurricular activity expenses in addition to child support under the guidelines." *Arabian*, __ N.H. at __.

To the extent that Tatjana seeks to distinguish *Coderre* and *Arabian* because she is home-schooling the parties' children, there is no evidence in the record that extracurricular activities are

more expensive for home-schooled children than for those attending public or private schools. The cost of extracurricular activities is dictated largely by the interests of the child, the approval of the parents, and the availability of suitable programs. Such matters are highly variable, and absent some evidence that child is somehow gifted in an area of extraordinary expense, *Coderre* and *Arabian* rule this case. Moreover, although Tatjana is free to home-school her children, that is a choice, made largely by her, and if it is more expensive, it is an expense she has voluntarily undertaken.

Accordingly, the court should have ordered, in line with *Coderre* and *Arabian*, the reformation of the parties' stipulation and the deletion of that portion of the Uniform Support Order requiring Robert's payment of $150 over and above his child support obligation.

The lower court noted that despite of Robert's request, he nonetheless agreed to the provisions of the stipulation, *Trn*. at 7, thus implying that stipulations cannot be subsequently revised. Such a view cannot be sustained because stipulations, once approved by the court become orders of the court, *See* SAMUEL GREEN & JOHN V. LONG, MARRIAGE AND FAMILY LAW AGREEMENTS §4.07-4.08 (1988), which can be modified like any child support obligation pursuant to statute and courts' *parens patriae* duties, *see id.; Grabowski v. Grabowski*, 120 N.H. 745, 747 (1980), so long as there is a substantial change in circumstances. *Morrill v. Millard (Morrill)*, 132 N.H. 685, 689 (1990). If stipulations cannot be altered once entered, astute attorneys will counsel divorcing clients to not enter them on the grounds that should the law or the parties' situation later change, they may be stuck with a stipulation that no longer makes sense. In *In re Peirce*, 146 N.H. 611 (2001), for example, because the obligee was receiving income from her live-in fiancé, this Court mandated modification of a child support stipulation.

III. Use of CPI Escalator Violates New Hampshire's Child Support Statute

A. New Hampshire's Child Support Statute is an Income Shares Model, but CPI Escalator Divorces Amount of Obligation from Amount of Income

The Consumer Price Index (CPI) is a measure of price inflation designed to track the buying power of a dollar bill. It is a handy number on which to base cost of living increases. Numerous government programs and private contracts make use of the CPI. *See e.g.,* Mike Putnam, *Lease Escalation Clauses Using the Consumer Price Index - How Well Do They Work?*, 7 OKLA. CITY U. L. REV. 489, 492 (1982). The CPI, however, does not purport to account for various economic factors, and is simply a measure of consumer prices. *See* Lynne Merrill and Charles H. Robertson, *The Consumer Price Index and Child Support Proceedings*, 47 TEX. B. J. 1341 (Dec. 1984) (CPI escalator works well to address problem of inflation in support orders). It is most useful in times of inflation, when costs and salaries routinely tick upward. *See Heinze v. Heinze*, 122 N.H. 358, 361 (1982) ("automatic escalation clause is a sensible response to the economic pressures that this country has been experiencing for some time").

Accordingly, authorities recommend that if a child support order uses an escalator, it should also include a provision to address circumstance in which "increases in parental income may not keep pace with inflation." Marian F. Dobbs, DETERMINING CHILD & SPOUSAL SUPPORT, § 6:22

New Hampshire's child support statute provides that: "The total support obligation shall be determined by multiplying the parents' total net income . . . by the appropriate percentage. RSA 458-C:3, II(a). It is thus an "income-shares model." *In the Matter of Plaisted & Plaisted*, 149 N.H. 522, 524 (2003). If support is based on factors other than income, the support order

violates the statute. *Id.* at 525 (parents' assets not income for purposes of calculating child support).

In this case, the child support order provides that: "Obligor's child support obligation shall be reviewed annually and adjusted for inflation in accordance with the Consumer Price Index." UNIFORM SUPPORT ORDER ¶ 18 (May 8, 2000), *Appx. to Br.* at 22, 23. Robert is thus mandated to pay an annual cost of living increase, while his income is actually decreasing. *Trn.* at 4-5. The automatic operation of the escalator has thus caused Robert's obligation to become ever further divorced from the percentage of income the statute specifies.

The cases Tatjana relied on below are easily distinguished. In *Roya v. Roya,* 494 A.2d 132 (Vt. 1985), the court approved of a CPI escalator based on Vermont's statute which allows basing child support on "inflation with relation to the cost of living." New Hampshire has no such law, making the case inapplicable here. In *Branstad v. Branstad*, 400 N.E. 2d 167 (Ind. App. 1980), the court noted that CPI escalators work well in times when "rampant inflation quickly diminishes the effective amount of support" – a problem thankfully not now occurring. In *Heinze v. Heinze*, 122 N.H. 358, 361 (1982), this Court approved an automatic escalation clause, but unlike the CPI escalator here, it was tied specifically to the parties' real income. It should be noted that *Roya*, *Branstad*, and *Heinze* were all decided in the early 1980s when inflation was a serious daily concern.

The several other New Hampshire cases that mention CPI escalators are not helpful here. *Walker v. Walker*, 133 N.H. 413, 414 (1990) involves alimony, which need not be based strictly on income, and the statutory basis for which does not contain specified percentages. Moreover, the case makes only the briefest of mentions of the CPI, and it did not figure in this Court's

determination of the issues. *Appeal of Campaign for Ratepayers Rights*, 133 N.H. 480 (1990), is a public utilities case dealing with CPI-based inflation adjustments to the State's nuclear decommissioning fund. *Woodstock Soapstone Co. v. Carleton*, 133 N.H. 809 (1991), involves a CPI-based tax escalator clause in a commercial lease. None of these cases support Tatjana's position here, and they merely highlight that CPI escalators are most useful where there is a need to automatically account for inflation.

Because the court order here includes a CPI escalator with no provision to mitigate the effect of the obligor's income decreasing at the same time his support obligation is automatically increasing, the clause violates New Hampshire's income-shares statute and should be stricken.

B. Child Support Statute Allows Modification Every Three Years or Upon Change of Circumstances, But Not Annually

New Hampshire law provides that

> The obligor . . . may apply to the court . . . for modification of [a child support] order 3 years after the entry of the last order for support, without the need to show a substantial change of circumstances. This section shall not prohibit the obligor or obligee from applying at any time for a modification based on substantial change of circumstances.

RSA 458-C:7. The statute thus allows modification in two specific instances: when three years has passed, or when there is a substantial change in circumstances. In the absence of a change of circumstances, the statute does not allow for periodic modification before three years has passed.

"In a modification hearing, substantial change in circumstances is the threshold question." *Logan v. Logan*, 120 N.H. 839, 842 (1980), without which modification cannot be made. If there is no change in circumstances, the passage of three years is likewise a threshold question. *In re Rohdenburg*, 149 N.H. 276 (2003).

The decree in Robert's and Tatjana's case provides for an annual automatic adjustment of child support based on the CPI. The escalator operates every year, without any change of circumstances, substantial or not.

Robert works in the telecommunications industry. He was involved in the company when it was a small start-up, and for several years it rewarded him with increasing salaries. During this period, the court's order made sense, and the CPI escalator may have roughly approximated his salary and kept roughly constant the percentage of income he was obliged to pay in child support. The downturn in telecommunications industry, which could not have been predicted, resulted in a cessation of pay raises and a sudden 15 percent across-the-board cut in pay by his employer. The CPI escalator thus no longer mimics Robert's income, and if it stays in place will cause an ever-increasing disparity between the percentage of income he is obliged to pay and the percentage of income specified by the statute. Accordingly, the escalator provision should be struck.

It should be noted that while the escalator here is contrary to law, not all annual escalators are barred by the statute. In *Heinze v. Heinze*, 122 N.H. 358 (1982), for example, the annual escalator was grounded in changes to the obligor's income. Had Robert's and Tatjana's order included such a provision, Robert's obligation presumably would have automatically *decreased*, and because it would have been tied to his income, the provision would be in line with the statute.

CONCLUSION

Based on the foregoing, Robert Donovan respectfully requests this honorable Court to leave in place the court's conclusion that Tatjana Donovan is underemployed; but remand for a reformation of the parties' stipulation concerning college costs, extracurricular expenses, and the automatic annual CPI escalator.

Respectfully submitted,

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Dated: August 25, 2004

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Robert Donovan requests that his counsel, Joshua L. Gordon, be allowed 15 minutes for oral argument.

I hereby certify that on August 25, 2004 copies of the foregoing will be forwarded to Bronwyn Asplund-Walsh, Esq.

Dated: August 25, 2004

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APPENDIX