State of New Hampshire
Supreme Court

NO. 2015-0345

2016 TERM

FEBRUARY SESSION

In the Matter of

Danielle C. Ross & Christopher K. Ross

RULE 7 APPEAL OF FINAL DECISION OF THE
SALEM FAMILY COURT

REPLY BRIEF

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ARGUMENT

I. Comparative Recrimination

At common law, a successful defense of recrimination had the effect of making the marriage indissoluble. *Rockwood v. Rockwood*, 105 N.H. 129 (1963). That is, if an innocent party proved fault of the other, the innocent was granted a divorce; if both were guilty, the court could not grant either a divorce, and they were stuck married. *See, e.g.*, *Butcher v. Butcher*, 178 S.W.2d 616, 617 (Ky. 1944) ("[W]e are of the opinion neither party was without fault, and that the chancellor did not abuse his discretion in refusing to grant either party a divorce."); *Pollini v. Pollini*, 103 N.H. 183, 184 (1961) ("[T]he result [is] the parties are half-married and half-free – one a wife without a husband and the other a husband without a wife."). To those acclimated to no-fault divorce statutes, the result seems absurd, or at least surprising. *See, e.g., Hatfield v. Hatfield*, 167 S.E. 89, 91 (W.Va. 1932) ("To compel two persons to live together under such circumstances would seem to do violence to the moral sensibilities of an enlightened age.").

Some states abolished common law recrimination by statute, *see, e.g.*, MASS. GEN. LAWS ch. 208 § 21, *Danielle Appx.* at 87; *Singer v. Singer*, 391 N.E.2d 1239, 1245 (Mass.App. 1979) ("Recrimination is no longer a defense to an action for divorce."); *Edwards v. Edwards*, 259 S.E.2d 11, 13 (N.C.App. 1979); VT. STAT. ANN. tit. 15, § 562, *Danielle Appx.* at 89, or by judicial decree. *Flagg v. Flagg*, 74 P.2d 189, 191 (Wash. 1937) ("We are of the opinion that both parties have been guilty of cruelty within the meaning of the statute … and that both, therefore, are entitled to a divorce."). The result is that mutual guilt allows both to escape the marriage. New Hampshire's no-fault statute goes somewhat further, appearing to reverse the common law effect of mutual fault, and allowing a divorce despite it. RSA 458:7-a ("a divorce shall be decreed and the acts of one party shall not negate the acts of the other nor bar the divorce

decree"); *Rodrique v. Rodrique*, 113 N.H. 49, 51 (1973) ("the present no-fault provision removes the probability of recrimination … preventing a decree in favor of a party against whom a legal separation has been decreed on fault grounds").

Recognizing that the common law rule may have served social purposes in years past but probably no longer, other states ameliorated it by adopting "comparative fault," or "comparative rectitude," such that the party less at fault is granted a divorce. This has been either by statute, *see, e.g.*, ME. REV. STAT. ANN. tit. 19-A, § 902, *Danielle Appx.* at 86; *Hitchcock v. Hitchcock*, 254 N.W.2d 230 (Wis. 1977), or judicial decree. *See, e.g., Thomason v. Thomason*, 355 So. 2d 908, 910-12 (La. 1978) (rebutting historical purposes of recrimination defense).

New Hampshire has no such doctrine, and despite Danielle's declaration that Christopher disputes the matter, *Danielle's Brf.* at 21, "comparative rectitude" or "comparative recrimination" is not relevant to this appeal.[1]

II. Recrimination Requires Causation

Despite Danielle's attempt to disentangle recrimination from causation, this Court has tied them together.

For instance, the text of *Rockwood*, which Danielle cites for the opposite proposition, *Danielle's Brf*. at 20, says: "Our court has stated flatly that a spouse who is guilty of an offense against the other spouse, *which would be grounds for divorce*, cannot himself obtain one." *Rockwood v. Rockwood*, 105 N.H. 129, 131 (1963) (emphasis added). Several decisions of this Court, both aged and fresh, repeat that the grounds for recrimination are identical to the "grounds for divorce." *Tibbetts v. Tibbetts*, 109 N.H. 239, 241 (1968) ("The defense of recrimination is available only where the spouse seeking relief is guilty of a marital offense *that would give the*

[1]"Comparative recrimination" is separate from the proposition that when both parties exhibit marital fault, "the more innocent of the two is entitled to favorable consideration in the division of their property and funds." *Kibbee v. Kibbee*, 99 N.H. 215, 216 (1954); RSA 458:16-a, II(l).

other party grounds for divorce.") (emphasis added); *In re Dube*, 163 N.H. 575, 579 (2012) ("[A] spouse cannot be the innocent party if he is guilty of an offense against the other spouse, *which would be grounds for divorce*.") (emphasis added, quotations omitted).

It is thus apparent, in accord with *Rockwood*, that to prove the defense of recrimination, one must prove that which would "give the other party grounds for divorce."

As Danielle correctly notes, "grounds for divorce" requires three elements: the adulterous act, causation, and an irremediably broken marriage. *Danielle's Brf*. at 21. Inexplicably however, Danielle claims that *Rockwood* "does not address the second and third elements but only the first." *Id*. Without explanation or citation, Danielle would liberate from *Rockwood*, *Tibbetts*, and *Dube* their crucial elements of a deteriorated relationship and the reasons for it.

Also without explanation, Danielle asserts that "[i]f recrimination did require causation it would never be a defense." *Id.* But one *can* be envisioned:

> Suppose husband had an extramarital affair. When wife confronts him about suspected infidelity, he denies it. Wife nonetheless feels unsupported and unloved, and consequently also begins an affair. When wife discloses her infidelity to husband, he leaves the marital home and she changes the locks. Husband seeks divorce on grounds of adultery, but during discovery, wife confirms husband's dalliance. Wife's recrimination defense has the required causation.

This is not a far-fetched example, yet disproves Danielle's categorical assertion.

Timing matters. In the hypothetical example, husband believes the marriage was irremediably broken when wife disclosed her affair; wife believes it was broken when husband had his earlier affair and lied about it. In the Ross's case, Christopher did not begin a relationship until 11 months after he discovered Danielle's affair in December 2011, when it cannot be disputed that the marriage, whatever its level of atrophy at the time, became irremediably broken. Thus, Danielle can allege a post-break adulterous act, but cannot meet her burden of proving causation for a recrimination defense.

III. Recrimination Was Preserved

In her brief Danielle claims that Christopher's notice of appeal did not adequately preserve the issue of Danielle's recrimination defense. *Danielle's Brf.* at 7-8.

In his notice of appeal, and also in the questions presented in his brief,[2] Christopher asked whether "the court err[ed] in dismissing fault grounds when Danielle engaged in a … extra-marital affair which caused the breakdown of the marriage, and Christopher began a post-separation relationship nearly a year later." This is nigh a definition of recrimination, *see* SUP.CT.R. 16(3)(b) ("The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein."), and therefore the issue was preserved.

IV. Equality in Division of Property is Not the Issue

In her brief Danielle delves into the equality with which the parties' property was divided. *Danielle's Brf.* at 27-29.

Christopher disputes neither that the court divided the property roughly equally, nor that if the court were attempting to make an equal split it roughly succeeded.

The issue here however, is that because the court improperly dismissed Christopher's fault grounds, it committed error in attempting equality. *Chris's Brf*. at 14-15. Rather the court should have granted Christopher a greater share, as promised by the statute, upon his proof of adultery. RSA 458:16-a, II(l).

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[2]*Notice of Appeal* at 4 ("Did the court err in dismissing fault grounds when Danielle engaged in an extra-marital affair for several years before separation, and upon learning of the affair Christopher moved out and Danielle immediately filed for divorce?"); *Chris's Brf*. at 1 ("Did the court err in dismissing fault grounds when Danielle engaged in a several-year extra-marital affair which caused the breakdown of the marriage, and Christopher began a post-separation relationship nearly a year later?").

V. Modification of the Temporary Order

Christopher argued in his opening brief that the court should have granted his motion to modify the temporary order regarding support, because subsequently the information upon which it was based became obsolete – it was later revealed that Danielle's income was higher than she originally declared. *Chris's Brf*. at 16; MOTION TO MODIFY TEMPORARY ORDERS (Mar. 19, 2013), *Chris's Appx*. at 20. In her brief, Danielle does not quibble with the numbers, thereby acknowledging that Christopher's bulleted list of income estimates is accurate, *Chris's Brf*. at 7, and that indeed her income was higher. Although Danielle's original declaration was an income of $92,000, her tax return subsequently showed her income at the time of the temporary orders was $203,000. *Id.* Other sources show varying figures. *Id.*

Rather, Danielle suggests that Christopher withdrew his motion in the trial court, and that the court's alleged failure to address it is proof it was withdrawn. *Danielle's Brf.* at 7. First, Danielle did not cross-appeal; to the extent there is an issue of withdrawal, it was waived.

Second, why would Christopher withdraw the motion? It is not reasonable to suggest that Christopher's attorney withdrew a motion for which the underlying facts are undisputed, and which if ruled in his favor would impend a significant refund.

Third, at most there was some sort of misunderstanding. Christopher's attorney's reference to withdrawal appears to have been in the context of modification based on the then-recent payoff of the couple's home equity line of credit, or some other context. *Apr. 14, 2014 Hrg.* at 28-32. Danielle's attorney preferred to understand the withdrawal as more global, repeatedly claiming the motion was withdrawn. PETITIONER'S MOTION TO EXCLUDE CLAIM FOR BACK CHILD SUPPORT AND OTHER RELIEF (Sept. 2, 2014), *Addn. to Reply Brf*. at 12; PETITIONER'S OBJECTION TO RESPONDENT'S MOTION FOR RECONSIDERATION/CLARIFICATION (Apr. 30, 2015), *Addn. to Reply Brf*. at 31. Christopher's

attorney repeatedly denied withdrawing it. RESPONDENT'S OBJECTION TO PETITIONER'S MOTION TO EXCLUDE CLAIM FOR BACK CHILD SUPPORT AND OTHER RELIEF (Sept. 11, 2014), *Addn. to Reply Brf.* at 17; RESPONDENT'S, CHRISTOPHER K. ROSS, MOTION FOR RECONSIDERATION/CLARIFICATION (Apr. 23, 2015), *Addn. to Reply Brf.* at 27.

Finally, as noted in Christopher's opening brief, the catch-all clauses in two of the court's orders denied Christopher's motion. ORDER ¶ 3 (July 2, 2014), *Chris's Addendum* at 19 ("All other aspects of the [t]emporary [o]rders shall remain in full force and effect."); RESPONDENT'S, CHRISTOPHER K. ROSS, MOTION FOR RECONSIDERATION/CLARIFICATION (Apr. 23, 2015), *Addendum to Reply Brf.* at 29 (margin order: "Motion granted as to "C" only. The balance of the requests are denied."). To the extent the family court was silent on the matter does not imply withdrawal, but denial. *See* SUP.CT.R. 21(11) ("Any order or decision by the court disposing of the case on the merits shall be deemed to be a denial of any pending non-dispositive motion.").

Accordingly, this court should disregard Danielle's claim of withdrawal, and rule on the merits of the modification, as presented in Christopher's opening brief.

VI. Factual Disputes Raised in Danielle's Brief

In her brief Danielle claims that Christopher "takes liberties with the record, too numerous to mention." *Danielle's Brf.* at 8. Christopher rebuts that allegation, but also points out that none of the alleged "liberties" are material to the issues before this Court.

A. When the Marriage was Irremediably Broken

In her brief Danielle alleges that neither her affair, nor her disclosure of it to Christopher, had anything to do with the breakdown of the marriage. *Danielle's Brf.* at 15, 25-27.

It must be pointed out that the family court was silent on the basis for its finding of irreconcilable differences. There is nothing in its narrative, *Chris's Appx.* at 95, nor in its numbered findings and rulings, *Chris's Appx.* at 68 (Danielle's requests) & 82 (Christopher's

requests), indicating whether it found no-fault irreconcilable differences based on pre-disclosure ebbing relations, or on post-disclosure exiting and changing-of-the-locks.

But contrary to Danielle's review, the fact that the parties were in couples' counseling tends to show a mutual commitment to improve the marriage, not end it. *C.f. Weeks v. Weeks*, 124 N.H. 252, 255 (1983) (refusal to engage in counseling indicates breakdown irremediable). And brash actions, such as Christopher's exit and Danielle's changing the locks, tend to show irremediability. *See, e.g., In re Dube*, 163 N.H. 575 (2012) (attempted murder and arson).

Moreover, this Court need not decide the exact point of irremediability. That is for the family court to determine on remand if this Court finds that fault grounds should not have been dismissed. *Yergeau v. Yergeau*, 132 N.H. 659, 661 (1990) ("marital breakdown and its irremediability are issues of fact").

B. Whether Danielle Admitted her Affair

Although Danielle did not admit her affair, that is because adultery was at the time a crime – she plead the Fifth. *Trial Trn*. at 259. While in criminal cases the fact-finder may not draw an inference of guilt from a defendant's refusal to testify, *Griffin v. California*, 380 U.S. 609 (1965), in a divorce proceeding "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify." *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). The family court was and this Court is thus free to infer, from Danielle's refusal to answer the question, that she indeed had extra-marital coital relations amounting to adultery.

In addition, despite Danielle's allegation, *Danielle's Brf.* at 9, Christopher does not claim that Danielle admitted her affair. Rather he asserts only that "Danielle acknowledged that *for Christopher* her dalliance was the cause of the breakdown of the marriage." *Chris's Brf*. at 5 (emphasis added).

C. Christopher was Supportive of Danielle's Career

In her brief Danielle disputes that Christopher was supportive of her career and starting a dental practice. *Danielle's Brf.* at 9. But the court explicitly found, "Husband was supportive of Wife's start-up," and "Husband was supportive of the Wife's buy-in into an existing practice or her start-up of her own practice." CHRIS'S FOF ¶¶ 32, 79 *Chris's Appx*. at 85, 90.

The court also found that Christopher sold his Porsche sports car to raise money "in light of the Wife's decision to start-up her own orthodontic practice." CHRIS'S FOF ¶ 89, *Chris's Appx*. at 91. In addition, despite Danielle's contrary accusations, *Danielle's Brf.* at 9, 13, 25, the court found that Christopher did not co-sign Danielle's business loans because "the lenders who financed Wife's start-up did not require it." CHRIS'S FOF ¶ 36, *Chris's Appx*. at 86.

D. Christopher Did Not Unnecessarily Prolong Litigation

In her brief Danielle alleges that Christopher engaged in unfair or improper prolongation of litigation, that Christopher's interlocutory appeal to this Court regarding the recrimination defense was also unfair or improper prolongation of litigation, and that litigating fault itself is an act of unfair or improper prolongation of litigation. *Danielle's Brf.* at 2, 13, 19.

The reason Christopher attempted an interlocutory appeal (approved by the family court but declined by this Court), was an effort at economy. In his interlocutory appeal, Christopher argued that by not approving it, "the parties would expend substantial time and resources, and … consume valuable time and resources of [the family] court … only to have the Husband thereafter appeal the final decree since he will have been denied his right to prosecute his adultery grounds." ORDER ON MOTION TO STAY (Oct. 28, 2013), *Danielle's Appx.* at 39.

Contrary to Danielle's allegation, merely asserting adultery does not constitute unfair prolongation of litigation. Unlike other states, New Hampshire has not repealed its fault-divorce statute, thus allowing fault and no-fault to exist side-by-side. RSA 458:7 & 458:7-a; *Ebbert v.*

Ebbert, 123 N.H. 252, 254 (1983). And a party is permitted to press alternative statutory remedies. *Hewes v. Roby*, 135 N.H. 476 (1992). Further, the family court declined to find that Christopher issued too many subpoenas, sought too many depositions, or litigated unnecessarily or vexatiously. DANIELLE'S FOF ¶¶ 90, 92, *Chris's Appx*. at 79-80.

Moreover, to the extent that Danielle's accusation of prolongation is for the purpose of suggesting sexual abstinence is self-imposed, it should be noted that fault-based divorce cases in the 19th Century, when the law of adultery developed, proceeded much more speedily than in the 21st Century, when the Ross's divorce arose. A review of several older cases[3] suggests that fault divorces moved from inception to resolution in a matter of months rather than years. *See, e.g., Kimball v. Kimball*, 13 N.H. 222 (1842) (two to three months); *Masten v. Masten*, 15 N.H. 159 (1844) (eight months); *Payson v. Payson*, 34 N.H. 518 (1857) (seven months); *Davis v. Davis*, 37 N.H. 191 (1858) (five months).

Finally, while Christopher does not deny his part in this lengthy lawsuit, protracted litigation typically cannot be ascribed to just one party.

E. "Opportunity Cost" of Danielle's Startup Business

Danielle correctly notes that the court declined to find an amount of "opportunity cost" for her startup. *Danielle's Brf.* at 8. But the court made explicit findings that Christopher worked extra to finance Danielle's startup, the family forewent Danielle's $90,000 of income for each of two years, and that the family contributed $24,000 to Danielle's practice for each of two years, CHRIS'S FOF ¶¶ 80, 81, 82, *Chris's Appx*. at 90-91, thereby totaling $228,000 of family investment, whatever it is called.

[3]Although not all 19th Century fault decisions disclose dates, some explicitly say when the libel was filed, and others allow either a calculation or an approximation of the amount of time from filing to reported resolution.

VII. Irrelevant Matters Raised in Danielle's Brief

Throughout her brief Danielle points to a variety of factual issues that consumed the parties below, but have no relevance on appeal. To the extent Danielle seeks to create prejudice, those facts on which she seems to focus are briefly refuted.

The valuation of the parties' dental practices comprised probably two-thirds of the trial. Although the issue appeared in Christopher's notice of appeal, it was explicitly waived. *Chris's Brf.* at 9. In that context the parties disputed the credibility of Christopher's business valuation expert. Not because he was a liar or lacked sufficient education or experience, but because the court chose the opposing expert's methodology, it found Christopher's expert not credible for valuing Danielle's business; the court found simultaneously, however, that he was credible for valuing Christopher's business. ORDER at 2-3. Tarring him is undue.

Danielle suggests that Christopher is "conspicuously silent" about the children, *Danielle's Brf.* at 27, but that is because the parties stipulated to a parenting plan, ORDER at 1, and neither the amount of child support nor any other issue concerning the children was appealed.

Danielle disputes whether Christopher was cuckolded for several years, as Christopher believes, or for some shorter period. *Danielle's Brf.* at 9. It is conceded that Danielle has not admitted on the record the length of her affair, but the amount of time is not relevant because as long as the adulterous act was during the marriage, a cuckolding occurred. Danielle also insists Christopher now has a girlfriend, also not relevant, but neglects that she still shares a home with the co-respondent.

Finally, Danielle disputes the extent to which the parties' accountant, Raymond Anstiss, was involved in their decision-making, and the alleged quality of his tax advice. *Danielle's Brf.* at 8. The matter has no connection to this appeal.

Respectfully submitted,

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Dated: February 23, 2016

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CERTIFICATION

I hereby certify that on February 23, 2016, copies of the foregoing will be forwarded to Steven G. Shadallah, Esq.

Dated: February 23, 2016

Joshua L. Gordon, Esq.

ADDENDUM

1. PETITIONER'S MOTION TO EXCLUDE CLAIM FOR BACK CHILD SUPPORT AND OTHER RELIEF (Sept. 2, 2014). 12

2. RESPONDENT'S OBJECTION TO PETITIONER'S MOTION TO EXCLUDE CLAIM FOR BACK CHILD SUPPORT AND OTHER RELIEF (Sept. 11, 2014). 17

3. RESPONDENT'S, CHRISTOPHER K. ROSS, MOTION FOR RECONSIDERATION/ CLARIFICATION (Apr. 23, 2015). 27

4. PETITIONER'S OBJECTION TO RESPONDENT'S MOTION FOR RECONSIDERATION/CLARIFICATION (Apr. 30, 2015). 31