

**STATE OF NEW HAMPSHIRE
SUPREME COURT**

Case No. 2017-0697

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SUPREME COURT
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IN THE MATTER OF

MITCHELL COHEN

and

MARIAN RICHARDS

BRIEF OF THE APPELLANT, MARIAN RICHARDS

MARIAN RICHARDS,

By her attorney,



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QUESTIONS PRESENTED FOR REVIEW

- I. Whether the Family Division erred in the determination of the amount of alimony necessary to provide for Wife's reasonable needs, taking into account the style of living that the parties have become accustomed to during the marriage, pursuant to N.H. Rev. Stat. Ann. § 458:19, (Trial Transcript, "Trn." pp.47-52, 183-184, 198-200; Appendix ("Appx." pp.1-64, 89, 107,113, 123, 133, 143, 145).
- II. Whether the Family Division erred in its determination that Husband's Deferred Compensation/Severance should be treated as income for purposes of additional alimony rather than division of property, (Trn.70-71, 97-107, 136-137, 165-167, 202; Appx. pp. 65, 77, 89-120, 123, 133, 145).
- III. Whether the Family Division erred when it calculated Wife's additional alimony share of the Deferred Compensation/Severance by first applying the *Hodgins*¹ formula and then applying an alimony percentage to the "marital share" of the Compensation/Severance benefit thereby dividing or reducing the benefit twice, (Trn.70-71, 97-107, 136-137, 165-167, 202; Appx. pp. 65, 77, 89-120, 123, 133, 145).

¹ *Hodgins v. Hodgins*, 126 NH 711 (1985)

STATEMENT OF FACTS/STATEMENT OF THE CASE

The parties, Mitchell Cohen (hereinafter "Husband") and Marian Richards (hereinafter "Wife"), (collectively "Parties"), married in February 2006 and separated in 2015 and had no children born from this marriage, ("Trn." 6).

Temporary Orders issued on August 1, 2016, (Appx. p.55), awarding temporary use and possession of the marital home and alimony in the amount of \$8,000.00 per month to Wife. Trial Court modified the Temporary Orders on February 22, 2017, by reducing Wife's alimony "on a temporary basis" to \$7,000.00 per month, as Wife had become employed earning \$2,478.00/month and purchased a home for \$268,000.00 on Campbell Road resulting in additional expenses, (Appx. p. 63); (Trn. 196). Final Hearing was August 29, 2017. The Decree of Divorce ("Decree") entered on October 11, 2017.

Husband was born August 3, 1959, (Appx. p.45), and at the time of the divorce was a doctor who was and continued to be employed both by SJ Physicians Service Inc., ("SJ Physicians"), since 1994, and Pinewood Medical Group, ("Pinewood"), since 2014, (Trn. 62, 63). Husband's Trial Financial Affidavit, ("TFA"), reflected income of \$27,852.00 and expenses of approximately \$18,000.00+ a month, depending upon his various calculations of his anticipated alimony and divorce litigation legal fees, (Appx. p.45). Husband testified that his pay from SJ Physicians was consistent while his pay from Pinewood varied, and that his TFA reflected a yearly average, (Trn. 70; Appx. p.45).

Wife was born on May 10, 1956, (Trn. 10). Although Wife held various temporary and seasonal jobs during the marriage, she never earned more than \$2,500.00 per month, and her earnings were inconsistent, (Trn.12 and 13). Wife's TFA reflected income of \$2,494.00 per month with expenses in excess of \$10,000 per month, (Appx. p.19).

The marital home, One Homestead Hill Road, Bedford, NH, was sold on June 30, 2017, (Appx. p.45). Husband valued the home at \$700,000.00 on his August 1, 2016 Financial Affidavit, (Appx. p.31). In March, 2017, Husband moved in with his girlfriend, Lori Johnson, at 47 South Depot Road, Hollis, NH, who had recently purchased her home for approximately \$724,900.00; a home that Husband testified as being comparable to the Parties' marital home, (Trn. 113, 149). Husband had no ownership interest in Ms. Johnson's home, (Trn. 150).

The expenses in the amount of \$5,779.00 attributable to the Parties' marital home for housing, utilities, and homeowner's insurance were reflected on Wife's February 14, 2017 Financial Affidavit, (Appx. p.9). Wife's TFA reflected that the same household expenses relative to her new home had been reduced to \$4,148.00, (Appx. p.19).

Husband's TFA and his testimony at trial reflected that he paid \$4,016.00 per month in household expenses for his girlfriend's home, including her mortgage, (principal, interest and taxes, ("PIT")), and contributions toward her utilities, maintenance, and furnishings, (Trn. 149-150).

HUSBAND'S EMPLOYMENT BENEFITS PACKAGE INCLUDING RETIREMENT AND DEATH BENEFITS

Husband had employment benefits with SJ Physicians set forth in a Deferred Compensation Agreement executed in the 1996 as amended in 2005, ("DCA"), (Appx. p.65); and an Employment Contract, (Contract"), (Appx. p.77).

DCA EMPLOYMENT BENEFITS (APPX. P. 65)

DCA's employment benefits have a Death Benefit, ("DCADB"), of \$1,000,000.00 paid in accordance with Addendum A of DCA, ("Add. A"), and a Retirement Benefit, ("Retirement"), also paid in accordance with Add. A. DCADB was payable to Husband's beneficiaries in the event of his death while employed by SJ Physicians before reaching retirement age, which is

described in DCA as being one month past his 65th birthday, (“Retirement Age”). DCADB could be paid monthly or in a lump sum to the designated beneficiary, “...in lieu of the monthly income in an amount equal to the monthly payments”, (¶1 DCADB).

Add. A establishes the guaranteed death benefit amount, depending upon the employee’s years of employment with SJ Physicians. The Parties do not dispute that Husband was entitled to a \$1,000,000.00 Death Benefit payable over ten years at a rate of \$100,000.00 per month, or in a lump sum of \$1,000,000.00, since at the time of the filing of the divorce, Husband had been employed by SJ Physicians for over twenty- one (21) years and continued to be employed there.

DCA’s retirement benefit”, (“Retirement”), as set forth paragraph 2 of DCA, provides Husband a Retirement benefit of \$1,000,000.00 if he is employed by SJ Physicians upon Retirement Age. Once Husband’s Retirement payments begin, they do not cease upon his death, but instead continue to be paid out to his beneficiaries in full.

In summary, the DCADB and Retirement provided guaranteed employment benefits to Husband or his beneficiaries in the amount of One Million (\$1,000,000.00) Dollars as of the date of the filing of the divorce action.

CONTRACT EMPLOYMENT BENEFITS (APPX. P. 77)

Exhibit A, paragraph 5 of Husband’s Contract is entitled “Fringe Benefits.” Husband’s Benefits included, among other things, a term life insurance policy, a dental and health insurance plan, a Long Term Disability policy, a 401K Plan, and a guaranteed Severance benefit in the event Husband left SJ Physicians before Retirement Age, as long as Husband was not terminated for cause. If Husband left before Retirement Age but died before the Severance benefit was paid, the Severance benefit would be paid to his beneficiaries, similar to the DCADB. The payment amounts are set in accordance with the “Severance Schedule” which is contained in

Contract. The Severance Schedule establishes the increasing value of the Severance to which Husband would be entitled based upon his years of employment at the time of his separation. Husband's Severance was a guaranteed employment benefit of which Husband had an expectancy.

According to Fringe Benefits as set forth in Exhibit A, if Husband left the employ of SJ Physicians at the time of his marriage in 2006, he would have received a guaranteed Severance benefit of \$137,000.00 Severance. If he had left SJ Physicians at the time he filed for divorce in 2015, he would have received a guaranteed Severance benefit of a \$281,000.00. Each year he continues to work at SJ Physicians, his Severance benefit increases, similar to his Retirement.

Contract also provides Husband with a term life insurance policy, "Contract Life Insurance"), equal to up to twice his annual base compensation.

SUMMARY OF ARGUMENT

- I. Wife argues that Trial Court erred by not issuing findings to provide the bases for its exclusion of certain Wife's expenses;
- II. Wife argues that Trial Court's treatment of Husband's employment benefits as income for the purposes of a supplemental alimony calculation as defined in N.H. Rev. Stat. Ann. § 458:19 was an error of law and fact, and the error deprived Wife of her appropriate share of the marital property;
- III. *ALTERNATIVELY* - Wife argues that Trial Court erred when it calculated Wife's supplemental alimony by improperly applying the *Hodgins* formula to the additional income to be derived from Husband's DCA and Contract employment benefits and then applying an arbitrary alimony percentage to further reduce the expected income to be considered.

ARGUMENT

I. **Trial Court Erred by Failing to Issue Findings and Rulings to Support Its Award of Alimony**

Trial Court found that the Parties agreed that an award of alimony was warranted, pursuant to N.H. Rev. Stat. Ann. § 458:19. Appellate Counsel agrees that Trial Court declined trial counsels' offers of written submissions, including proposed Findings of Fact. Ultimately, Trial Court failed to issue any Findings of Fact that identify or give any bases for excluding certain of Wife's household expenses as being "extraordinarily high", or excluding Wife's health/dental expenses as being "speculative". Further, Trial Court issued no Findings to support its consideration of the consistency and reasonability of Wife's expenses in comparison to the lifestyle of the Parties during the marriage.

It is not clear what Trial Court relied upon in making its award of alimony. However, Husband's TFA evidences a high lifestyle comparable to what he enjoyed prior to the marriage and reflects that his income covers all of his expenses, leaving him with a substantial surplus. Wife's TFA evidences that alimony award provided in the Trial Court's Decree is insufficient to meet the shortfall of her expenses and reasonable needs, after application of her earned income.

IMPROPER EXCLUSION OF WIFE'S HOUSEHOLD EXPENSES

Trial Court excluded certain of Wife's household expenses as being "extraordinarily high" when evaluating whether they were "...reasonable and consistent with the parties' lifestyle during the marriage..." (Decree). Trial Court not only failed to identify the offending expenses, but it failed to articulate on what it based its evaluation of reasonability and consistency vis-a-vis the Parties' lifestyle during the marriage. The only evidence before the Court as to the Parties' lifestyle during the marriage was the Financial Affidavits of the Parties filed throughout the pendency of the action and at trial.

IMPROPER EXCLUSION OF WIFE' UNINSURED HEALTH/DENTAL EXPENSES

Trial Court excluded certain of Wife's medical/dental expenses as being "speculative", without identifying which expenses the Trial Court decided to exclude, and why they were so speculative as to justify exclusion. Wife testified as to her medical and dental expenses and health issues, and detailed expenses related to her specific health issues on her TFA. Husband did not dispute any of Wife's testimony as to her health, nor her TFA relative to her health/dental expenses. Nevertheless, Trial Court excluded undisputed expenses with no findings. Wife's testimony and the medical expenses set forth on her TFA are summarized as follows:

- Wife's health was fair; (Trn 183)
- Wife suffered from medical/health issues including migraines and sinus infections, an ulcer, thyroid issues that are not under control, heart problems, (Trn pp. 183, 184); eczema and arthritis, she wears eyeglasses and needs eyewash, she attends counseling twice a month, she has massage therapy for her knee and back, and she needs two root canals and other dental work, (Appx. p.19);
- Wife has a family history of colon cancer and that her results have not been very positive, (Trn. 184);
- Wife anticipated two surgeries in the near future which would result in high medical expenses because her deductible was very high and that she would have to take unpaid time off for the procedures and recovery, (Trn 184);
- Wife's prescriptions include thyroid medication, medication for her stomach issues and sinus infections, and that her costs for the prescriptions were high because her prescription coverage also had a deductible, (Trn. 184);
- Wife's TFA also details costs for arthritis medication, allergy medication, nasal spray, antibiotics for sinus infections, and ointments for her eczema, (Appx. p.19);
- Wife would be responsible for paying her own health and dental insurance premiums post-divorce, (Trn. 184);

Husband's and Wife's medical expenses are similar and both testified to health issues. (Trn. 121 and 183-184, respectively). Husband's total uninsured medical/dental expenses

including premiums as set forth on his TFA were \$1,039.00 per month. Wife's total uninsured medical/dental expenses including her premiums as set forth on her TFA \$1,389.00 per month.

Notably, Trial Court did not exclude the clearly speculative expenses deducted by Husband on his TFA for his estimated legal fees as a result of the divorce action and his range of what he thought might be his alimony obligation, ranging from \$3,680.00 to \$5,180.00 per month.

As such, Wife argues that her alimony award of \$4,700.00 per month is unsupported by the evidence presented at trial and on the face of Decree, insufficient to meet her reasonable needs as demonstrated, does not take into account the style of living the Parties had become accustomed to during the marriage as set forth in (*Id.* § 458:19), and that the Court erred in failing to issue Findings of Fact or identifying the expenses excluded by Trial Court and the bases for the exclusion. As such, Wife requests that this Court vacate the alimony award and remand the case for a new trial on the issue of alimony.

II. Trial Court Erred as a Matter of Law When it Designated Husband's Employment Benefits Afforded by DCA and Contract As Income Instead of Dividable Property

In New Hampshire, property subject to division at the time of divorce is defined by statute, to wit; *id.* § 458:16-a, which provides in section I as follows:

Property shall include all tangible and intangible property and assets, real or personal, belonging to either or both parties, whether title to the property is held in the name of either or both parties. Intangible property includes, but is not limited to, *employment benefits, vested and non-vested pension or other retirement benefits*, or savings plans. To the extent permitted by federal law, property shall include military retirement and veterans' disability benefits. (Emph. Added.)

While Trial Court has broad discretion in determining the appropriate or equitable division of the marital assets, *Holliday v. Holliday*, 139 N.H. 213 (1994), however, the statutory language of N.H. Rev. Stat. Ann. § 458:16-a unambiguously requires that Husband's DCA and

Contract employment benefits be treated as property. Trial Court erred by redefining Husband's employment benefits as income, in direct contradiction to the Statute.

Trial Court is required to "therefore give the unambiguous language of the statute its plain meaning unless and until the legislature sees fit to change it". *Ellis v. Royal Ins. Co.*, 129 N.H. 326, 334 (1987); *Blanchard v. Blanchard*, 133 N.H. 427, 430-31 (1990). There is a wealth of case law that provides guidance as to the identification of assets dividable as property. For example, in *Blanchard*, the court affirmed the lower court's determination to treat military retirement pay as an asset. *In Re Valence*, 147 N.H. 663 (2002), the court treated contingent employment benefits, i.e., future unvested stock, as marital assets to be dividable as property. In *Halliday v. Halliday*, 134 N.H. 388 (1991), the court held that a non-vested pension was property subject to division pursuant to N.H. Rev. Stat. Ann. § 458:16-a. *In re Heinrich & Heinrich*, 164 N.H. 357, 362 (2012), the court opined that, "...retained earnings ultimately become property."

There is no dispute that as of the date Husband filed for divorce, he was entitled to a \$1,000,000.00 Retirement that survived his death, \$1,000,000.00 DCA death benefit if he died prior to Retirement Age, a \$281,000.00 guaranteed Severance benefit, and term life insurance benefit equal to up to twice his base salary. All payments were employment benefits, as described in N.H. Rev. Stat. Ann. § 458:16-a.

As such, Trial Court committed errors of both law and fact by holding, without explanation, that, "...given the terms under which these plans may be implemented, the Court finds that it would be fairer for these "Benefits" to be treated as income." (Decree)

A fortiori, when Trial Court improperly treated Husband's dividable employment benefits as income for the purposes of calculating supplemental alimony, it created additional restrictions and contingencies upon Wife's ability to receive payment that would not have

existed had Trial Court properly treated the employment benefits as dividable property. By awarding Wife a share of the income derived from the benefits as a supplemental alimony award, Trial Court require that Wife remain unmarried and alive and also required Husband to remain alive, in order for Wife to receive the supplemental alimony. No such conditions are required in a division of assets. Further, as alimony, the award is modifiable, whereas if the property were divided as an asset, the award would not be modifiable absent fraud. Finally, by improperly treating Husbands death benefits as income for the purpose of calculating supplemental alimony, Trial Court required Husband to die before any income could be realized upon which supplemental alimony could be calculated. However, Husband's death ends his alimony obligation to Wife. Therefore, under Decree, Wife cannot ever realize any supplemental alimony on that portion of Husband's employment benefits that are death benefits.

Trial Court erred as a matter of law and fact when it treated Husband's employment benefits as income for the purpose of the calculation of a supplemental alimony award, rather than treating the benefits as property and awarding each party an appropriate marital share.

III. ALTERNATIVELY, Trial Court Erred as a Matter of Law When It Calculated Wife's Supplemental Alimony By First Applying the *Hodgins* Formula to Husband's DCA and Contract "Income" and Then Further Reducing the Income By Applying an Arbitrary Percentage to the resulting "Marital Share"

If this Court affirms Trial Court's treatment of Husband's employment benefits as income for the purposes of calculating supplemental alimony, Wife argues that the application of the *Hodgins* formula to that future income is improper, since *Hodgins* applies to the valuation of a retirement benefits and is not appropriate to adjust non-retirement income for the purposes of calculating alimony. Trial Court must apply the standards of review set out in N.H. Rev. Stat. Ann. § 458:19. It is also not clear how Trial Court determined the percentage of 17% to further reduce the income stream that had already been reduced by the improper application of the

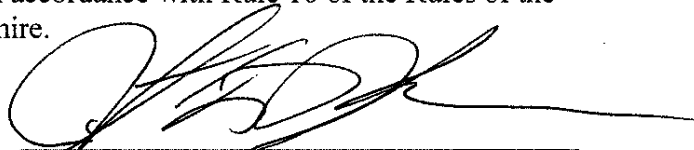
Hodgins formula or why the Trial Court applied the *Hodgins* formula as well, as the Trial Court made no findings of fact.

CONCLUSION

For all the foregoing reasons the Wife requests that this Court remand the question of alimony to Trial Court for further proceedings and/or to require the Trial Court to issue Findings of Fact to support its award consistent with the law. Further, Wife requests that this Court vacate the Trial Court's decree that treats Husband's DCA and Contract benefits as income, and remand the matter for further proceedings with instructions to treat said benefits as property to be divided in accordance with the law.

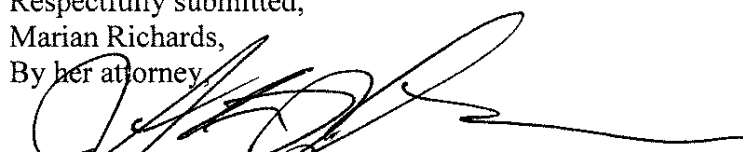
RULE 16 CERTIFICATION

I hereby certify that a copy of the written Decree entered October 11, 2017 that is being appealed herein, is appended to this brief in accordance with Rule 16 of the Rules of the Supreme Court of the State of New Hampshire.



Janet E. Dutcher, Esquire

Respectfully submitted,
Marian Richards,
By her attorney




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COUNSEL FOR MARIAN RICHARDS REQUESTS ORAL ARGUMENT

CERTIFICATION OF SERVICE

I hereby certify that copies of the above document and Appendix was served upon Ronald Caron, Esquire attorney for the Plaintiff at Devine Millimet, 111 Amherst Street, Manchester, NH 03101 in hand on July 9, 2018.



Janet E. Dutcher, Esquire

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

9th CIRCUIT COURT- FAMILY DIVISION- MERRIMACK

In the Matter of: Mitchell Cohen and Marian Richards

Case no. 657-2015-DM-186

DECREE OF DIVORCE

On August 29, 2017 a final hearing was held at which both parties appeared with counsel. The hearing focused upon disposition of substantial retirement and non-retirement assets and alimony.

The parties met and began living together in 2004. They were married on February 1, 2006 and they separated 9 years later in May 2015. Petitioner/husband had never married before, but this was the second marriage for respondent/wife. There were no children of this marriage.

The petitioner is a doctor and since 1994 has been employed with SJ Physician Services, Inc. Beginning in 2014, he took on a second job doing contract work in addiction medicine for Pinewood Medical Group/Pinewood Healthcare. His total income from both sources is presently \$27,852 gross monthly. Husband is 58 years of age.

The respondent was working as a medical billing specialist when the parties met. However, in October 2005 just a few months before the parties married, she lost this job and essentially has remained unemployed throughout the marriage. However, about 18 months after the parties separated, respondent found a job with Southern NH Medical Center as a support services representative for a group of physicians. Her income is \$2,494 gross monthly.

Contributions during the marriage: The parties decided to sell their pre-marital homes just prior to their marriage. With \$70,000 husband purchased a piece of land in Bedford upon which the parties built their new home. Husband spent an additional \$50,000 for landscaping. Wife invested \$140,000 of her own money in the home. After her initial funding of this home, wife contributed non-financially by taking on all of the responsibilities attendant to building a home and by doing much of the landscaping which she enjoyed. Once the house was completed, she did most of the maintenance and upkeep required. Wife also managed the parties' routine finances and, for the most part, her own investments. During the marriage the only source of income was that earned by husband and he paid all of the couple's expenses. Because husband worked long hours, easily up to 60 hours weekly, he contributed to a much lesser degree towards maintenance.

There was an assertion on the part of husband that he had wanted his wife to return to work and help out financially so that he would not be compelled to work long hours. Wife disputes that this was ever an issue. However, there is credible evidence to support husband's contention. It was discussed in marriage counseling at one point. In January 2011 he filed for divorce and by June 2011 wife did get a job as a marine patrol dispatcher. However, she lost this job 6 weeks later.

The parties have several investment accounts, proceeds from the sale of the marital home, tax deferred accounts and various checking/savings accounts. Additionally, with SJ Physicians Services, Inc., husband has a "Deferred Compensation Agreement" and potential income from a Severance Agreement.

The Court finds that the severance agreement is payable as income in the event that husband's job is terminated or should he die before age 65 years. The Deferred Compensation Agreement provides a monthly benefit for 10 years duration beginning a month after husband's 65th birthday and only upon certain conditions being met. The petitioner's trial memorandum sets forth the details of the plan concerning which there is no dispute. Given the terms under which these plans may be implemented, the Court finds that it would be fairer for these "benefits" to be treated as income.

RSA 458:16-a describes those factors to be considered by the Court in determining an equitable distribution of the marital assets. Under the statute, the court need not consider all factors or give them equal weight. See IMO Costa & Costa, 156 N.H. 323 (2006).

Husband's pre-marital assets have grown as a result of ongoing contributions and market factors; his contributions, however, were limited because he was solely responsible for the household expenses. Wife's non-financial contributions, however, were to manage her own assets and to maintain the house and manage the finances of the parties. Although the Court finds a disparity between husband's contributions and wife's contribution in favor of husband, greater weight has been given to the fact that wife is closer to retirement and has fair less opportunity to acquire more assets in the future bearing in mind. However, another not insignificant factor is that this was a marriage of modest duration. The Court has divided the property so that wife is awarded slightly more of the assets.

On this issue of alimony, there is agreement between the parties that an award of alimony is warranted.

It, therefore, logically follows that:

A. The parties agree that wife "lacks sufficient income, property or both [including property awarded herein], to provide for her reasonable needs, taking into account the style of living to which the parties have become accustomed during the marriage." RSA 459:19 I (a).

B. Husband is able to meet his reasonable needs while meeting those of wife, taking into account the style of living to which the parties have become accustomed during the marriage. RSA 458:19 I(b).

C. Wife is unable to be self-supporting through appropriate employment at a standard of living that meets her reasonable needs.

The parties disagree upon the amount and duration of the alimony to be paid. In determining the amount of alimony and duration, RSA 458:19 IV(a) and (b) set forth the factors to consider. Although this has been a marriage of only 9 years, the age of wife becomes more important because she is so close to retirement. The Court has considered the income which she has available from her post-separation employment and has compared that to her expenses. The Court has evaluated wife's expenses in relation to whether they are reasonable and consistent with the parties' lifestyle during the marriage. Wife purchased an older home knowing that it needed extensive and expensive repairs. Some of the extraordinarily high expenses for the home which wife incurred voluntarily and a portion of the expenses allocated for anticipated future uninsured health/dental care which are speculative, have been excluded for purposes of determining a reasonable alimony award. Also considered is the amount of the property awarded to wife as a future source of funding.

Based upon the foregoing findings, the Court orders:

1. A Decree of Divorce is granted to Petitioner (Mitchell G. Cohen) on his Petition for Divorce, on grounds of irreconcilable differences having arisen in the course of the Parties' marital relationship, causing the irremediable breakdown of the marriage. N.H. RSA 458:7-a. The Cross-Petition of Respondent (Marian T. Richards) is dismissed by agreement.
2. PARENTING PLAN AND UNIFORM SUPPORT ORDER: No Parenting Plan is attached to nor incorporated into this Decree. The Parties do not have children of their marriage.
3. TAX EXEMPTIONS FOR CHILD: Tax dependency exemptions are not applicable to this proceeding, in that the Parties do not have children of their marriage.
4. GUARDIAN AD LITEM FEES: No Guardian ad Litem has been appointed in this matter.
5. ALIMONY: Mitchell shall pay to Marian alimony as follows:
 - A. Mitchell shall pay to Marian alimony, pursuant to N.H. RSA 458: 19, as follows: Husband shall pay Wife the sum of Four Thousand Seven Hundred Dollars

(\$4,700) per month as alimony, commencing the first day of the month following the effective date of divorce and ending when Marian attains full retirement age as that term is defined by the Social Security Administration, currently September 10, 2022. If sooner, alimony shall terminate upon either party's death or Marian's remarriage. Mitchell shall make alimony payments on or before the first day of each month via direct deposit to an account designated by Marian.

B. From Severance Income: If and only to the extent Mitchell shall receive income in the form of a lump sum severance benefit per terms of the severance agreement heretofore entered into between Petitioner and his employer, SJ Physician Services, Inc., additional alimony ("Severance Alimony") shall be paid by Petitioner to Respondent calculated as follows:

- (1) Petitioner accrued a severance benefit as follows:
 - (i) \$137,000 as of the Parties' marriage in 2006; and
 - (ii) \$281,000 as of the filing of the Petition for Divorce in this matter in 2015.
 - (iii) The difference is \$144,000.
- (2) That portion of the severance benefit attributable to and accrued in the course of the Parties' marriage is \$144,000.
- (3) Mitchell shall pay to Marian as Severance Alimony a sum equal Seventeen (17%) of the gross sum \$144,000 (namely, \$24,480) as Severance Alimony if and only upon Petitioner ever receives a severance benefit pursuant to his employment contract with SJ Physician Services, Inc., in a sum reflected by terms of that contract.
- (4) The described Severance Alimony shall be paid to Marian within fourteen (14) days following receipt by Mitchell of the severance payment in question.
- (5) Mitchell shall provide documentation thereof to Marian.
- (6) Mitchell shall have no obligation to pay Severance Alimony as defined herein in the circumstance that Mitchell does not receive severance benefits per terms of the employment contract with his employer.
- (7) In the event Mitchell shall receive a severance benefit less than the severance benefit contemplated per terms of the employment contract with his employer, the calculated Severance Alimony shall be reduced proportionately.
- (8) The obligation of Mitchell pursuant to these provisions shall expire upon the earlier of (i) the death of Marian, (ii) the death of Mitchell or

(ii) the remarriage of Marian.

C. From Deferred Compensation: If and only to the extent Mitchell shall receive income in the form of deferred compensation per terms of a "Deferred Compensation Agreement" entered into between Mitchell and his employer, S1 Physician Services, Inc., additional alimony ("Deferred Compensation Alimony") shall be paid by Mitchell to Marian calculated as follows:

- (1) Mitchell accrued a deferred compensation benefit through his contract with his employer which provides, in pertinent part, that Mitchell upon reaching the age of 65 shall be paid \$100,000 per year for a period of 10 years.
- (2) The accrued deferred compensation benefit vested in 2014, after Mitchell's 21 years of service as employee.
- (3) As of 2006 (the year the Parties were married), Mitchell had accumulated 13 years of service as employee.
- (4) As of 2015 (the year of the filing of the Petition for Divorce), Mitchell had accumulated 22 years of service as employee.
- (5) Of the 22 years of service as employee, 9 years thereof represents the time period from the Parties' marriage through the date of filing the Petition for Divorce.
- (6) For the purpose of this Decree and its provisions treating deferred compensation, 9 of 22 years represents the accrual of this benefit in the course of the Parties' marriage, equating to forty-one percent (41 %).
- (7) Mitchell shall pay to Marian as Deferred Compensation Alimony a sum equal to Seventeen percent (17%) of forty-one percent (41%) of deferred compensation he may receive as Deferred Compensation Alimony, and then if and only if Petitioner ever receives the same per terms reflected in the Deferred Compensation Agreement.
- (8) In the event Mitchell shall receive deferred compensation in a sum less than the deferred compensation contemplated per terms of the Deferred Compensation Agreement with his employer, the calculated Deferred Compensation Alimony shall be reduced proportionately.
- (9) Deferred Compensation Alimony shall be paid to Marian within fourteen (14) days following receipt by Mitchell of the deferred compensation payment in question.
- (10) Mitchell shall provide documentation thereof to Marian.

- (11) To the extent Mitchell shall die such that a death benefit is payable pursuant terms of the Deferred Compensation Agreement, then Seventeen percent (17%) of forty-one percent (41%) of the said death benefit shall be paid to Marian as Deferred Compensation Alimony.
- (12) Mitchell shall have no obligation to pay Deferred Compensation Alimony as defined herein in the circumstance that Mitchell does not receive deferred compensation per terms of his contract.
- (13) The obligation of Mitchell pursuant to these provisions shall expire upon the earlier of (i) the death of Marian, (ii) the death of Mitchell or (ii) the remarriage of Marian.

(D) Production of Tax Returns: For so long as Petitioner shall have the obligation to pay Base Alimony, Additional Alimony, Severance Alimony and/or Deferred Compensation Alimony per terms of this Decree, he shall provide to Respondent a true and accurate copy of his federal income tax return reflecting income for all tax years in which either any form of the described alimony has accrued and is to be paid per terms of this Decree. The tax return in question shall be submitted not later than April 15 of the year following the tax year reflected in the tax return to be submitted.

(E) Life Insurance Maintained: For so long as Petitioner shall have an obligation to pay Base Alimony, Additional Alimony, Severance Alimony and/or Deferred Compensation Alimony per terms of this Decree, he shall maintain life insurance coverage on his life and name Respondent beneficiary thereof in a sum equal to the sum of alimony due to Respondent as of the date of Petitioner's death and not thereafter.

6. HEALTH INSURANCE FOR SPOUSE: Each party shall be responsible for his or her own medical and dental insurance and for paying all of his or her unreimbursed medical, dental, optical and other expenses not otherwise covered by insurance.

7. LIFE AND DISABILITY INSURANCE: Unless otherwise provided for by terms of this Decree, each Party is awarded all right, claim, title and interest in any disability and life insurance policies in which he/she is the designated owner, inclusive of any cash value therein. Consistent with this award, either Party may continue or discontinue such policy(ies) or maintain the same at his/her cost, with such beneficiary(ies) designated as he/she shall determine is reasonable and prudent, provided: Petitioner shall be obligated to maintain a life insurance policy pursuant to provisions of Paragraph 5(E) of this Decree. Notwithstanding the foregoing, the following policies of life insurance are awarded to the Party designated:

(A) To Mitchell:

- (1) Northwestern Mutual Insurance disability policy;

- (2) New York Life Insurance Co. disability policy;
- (3) UNUM Provident disability insurance;
- (4) UNUM Provident St. Joseph Hospital term life insurance policy; and
- (5) All death benefits available to Petitioner through his employment, including death benefits related to deferred compensation and severance income, unless otherwise provided by terms of this Decree.

(B) To Marian:

- (1) American General Life Insurance Policy No. **4545;
- (2) American General Life Insurance Policy No. ***7032;
- (3) American General Life Insurance Policy No. ***7033;
- (4) Prudential Life Insurance policy;
- (5) Old Line Life Insurance policy.

8. MOTOR VEHICLES:

(A) Petitioner is awarded the 2015 Subaru Outback, free and clear and unencumbered by any right, claim, title or interest of Respondent. Petitioner shall be responsible for all liens and indebtedness thereon, all insurance appertaining thereto and all costs associated therewith.

(B) Respondent is awarded the 2013 Subaru Outback and the 2006 Mazda 5, free and clear and unencumbered by any right, claim, title or interest of Petitioner. Respondent shall be responsible for all liens and indebtedness thereon, all insurance appertaining thereto and all costs associated there with.

9. FURNITURE AND OTHER PERSONAL PROPERTY: Unless otherwise provided for by terms of this Decree, each Party is awarded all personal property and household furniture and furnishings currently in their respective possessions. Notwithstanding the foregoing, further awards of personal property are identified at Schedule A. The described items of personal property shall be made available by Respondent for retrieval by Petitioner not later than thirty (30) days from the date of this Decree and the Parties shall reasonably agree on a date and time for such retrieval.

10. RETIREMENT PLANS AND TAX-DEFERRED ASSETS: The following award is made of the property identified. The intent of provisions of this Paragraph 10 is to

distribute to the Parties an equal amount and value of the assets treated, all of which are tax-deferred accounts:

(A) Mitchell is awarded all right, claim, title and interest in the following tax-deferred assets:

- (1) Transamerica/SJ Physician Services, Inc., 401K Plan, provided: Respondent is awarded an interest therein to the extent 26.5% of value of the 401K Plan, adjusted for gains or losses from the date of this Decree until the date of distribution by QDRO per provisions of Paragraph 10(B)(8) of this decree.

[The Plan is valued as of June 30, 2017, at \$643,414.33. Petitioner proposes an award of the balance of the same to Respondent in the sum of \$170,800.98. The proportion is: 170,800.98 / 643,414.33 = .26546]

(B) Marian is awarded all right, claim, title and interest in the following tax-deferred assets:

- (1) E*TRADE Securities Roth IRA Account No. '0*8230;
- (2) E*TRADE Securities IRA Account ***4333;
- (3) Fidelity Roth IRA Account ***9142;
- (4) First Command/Fidelity Destiny Plans 1-0 IRA Account No. ***7577;
- (5) Principal Life Insurance Co. - Abacus Technology Corporation 401 (k) Plan & Trust;
- (6) Tenet Healthcare Corp. 401 K Plan;
- (7) Vanguard Roth IRA Account No. **'3581; and
- (8) An interest in the Transamerica/SJ Physician Services, Inc., 401 K Plan of Petitioner equal to 26.5% thereof, calculated as of June 30, 2017, adjusted for gains and losses thereon from the date of this Decree to the date of distribution by Qualified Domestic Relations Order ("QDRO"). Investments therein contained shall be proportionately divided in distribution by QDRO. It shall be prepared by counsel for Respondent and submitted to counsel for Petitioner for review. Following agreement by the Parties as to terms of the QDRO, the same shall be filed with the Court for approval and subsequently submitted to the Plan Administrator for implementation per terms of this Paragraph 10(B)(8).

11. OTHER FINANCIAL ASSETS: The Parties are awarded all right, claim, title and interest in the following assets. The intent of provisions of this Paragraph II is to distribute to the Parties an equal amount and value of the assets treated, none of which are tax-deferred accounts:

(A) Petitioner is awarded all right, claim, title and interest in the following cash accounts:

- (1) A sum equal to 63.95% of the balance of Fidelity Investments Mutual Funds Account No. * * *3606, distributed by way of proportionate distribution of assets held in the Fund. *[As of June 30, 2017, the Fund balance was \$189,597.95, equating to \$121,249.30 to Petitioner, \$68,348.65 to Respondent. The proportion awarded to Petitioner is: $121,249.30/189,597.95 = .6395$].*
- (2) E*Trade Investment Account No. ***9304;
- (3) Hanscom Federal Credit Union Checking Account No. ***3100-2;
- (4) Hanscom Federal Credit Union Savings Account No. ***3100-1;
- (5) TD Bank Checking Account No. **8204;
- (6) TD Bank Savings Checking Account No. * **6090;
- (7) Triangle Credit Union Checking Account No. ** *2160-2; and
- (8) Triangle Credit Union Savings Account No. **2160-1.

(B) Respondent is awarded all right, claim, title and interest in the following assets:

- (1) AST American Stock Account No. ***3381 (to the extent the said Account is open);
- (2) Digital Federal Credit Union Savings Account No. ***6539-1;
- (3) Discover Bank Savings Account No. ***9303;
- (4) Discover Bank Checking Account No. ***9174;
- (5) Duke Energy Stock Account No. ***5587;
- (6) E*TRADE Securities Brokerage Account No. ***8497;
- (7) E*TRADE Savings Account No. ***3068;
- (8) Enbridge/CST Account;
- (9) Fidelity Investments Account No. ***6503;
- (10) The balance of Fidelity Investments Mutual Funds Account No. ***3606

following distribution to Petitioner per terms of Paragraph II(A)(1) of this Decree, distributed by way of proportionate distribution of assets held in the Fund;

- (11) Hanscom Federal Credit Union Checking Account No. ***550-2;
- (12) Hanscom Federal Credit Union Savings Account No. ***550-1;
- (13) Hanscom Federal Credit Union Checking Account No. ***140-2;
- (14) Hanscom Federal Credit Union Savings Account No. ***140-1;
- (15) Hanscom Federal Credit Union Money Market Account No. * * *140-10;
- (16) Spectra Energy Stock Account No. ***3068;
- (17) USAA Federal Savings Bank Savings Account No. ***014-4;
- (18) USAA Federal Savings Bank Checking Account No. * * * 15-2; and
- (19) Vanguard Investment Account No. ***4739.

12. **BUSINESS INTERESTS OF THE PARTIES**: Each Party is awarded all right, claim, title and interest and right to pursue any and all business endeavors in which he/she holds or may hold an interest and/or which he/she shall deem appropriate and necessary to pursue, without interference or right in the other.

13. **DIVISION AND ASSUMPTION OF DEBTS**: Unless otherwise provided for in this Decree, each Party is responsible for timely payment and satisfaction of any and all debt in his/her individual name. Notwithstanding the foregoing, the following order is made with respect to the following debt:

(A) Petitioner is a solely and exclusively responsible for the timely payment and satisfaction of the following debt:

- (1) Chase Slate Credit Card Account No. ***4783;
- (2) CitibankiCostco Account No. **0065;
- (3) Discover Credit Card Account No. ***5380;
- (4) Hanscom Federal Credit Union VISA Account Nos. ***7481 , ***7188;
- (5) Sears MasterCard Account No. ***6667;
- (6) TD Bank Visa Credit Card Account No. ***9521; and
- (7) Triangle Credit Union Account (auto loan).

(B) Respondent is solely and exclusively responsible for the timely payment and satisfaction of the following debt:

- (1) American Express/Costco Account No. ***4005;
- (2) CitibankiCosto Account No. ***8107;
- (3) Discover Credit card Account No. ***5800;
- (4) Hanscom Federal Credit Union Mortgage Account No. *** 140-190;
- (5) Hanscom Federal Credit Union Visa Account No. ***6933;
- (6) Sears MasterCard Account No. *** 1096;
- (7) MasterCard USAA Credit Card Account No. ***2576;
- (8) USAA Credit Card Account Nos. ***2576, ***7642; and
- (9) Wells Fargo auto loan Account No. *** 1300.

14. MARITAL HOME: The Parties' former homestead property located at I Homestead Hill Road, Bedford, New Hampshire (the "Property") has been sold. Net proceeds were deposited by the Parties' agreement in escrow with the office of counsel for Petitioner, in the sum of \$310,628.94. Each Party is awarded 50% thereof. However, from Mitchell's share, he shall pay over to Marian \$2,669.50 representing his one half-share of the cost of resurfacing the driveway and \$424 representing his one half share of the radon remediation. Counsel for Petitioner shall distribute from the escrow accordingly.

15. OTHER REAL PROPERTY: Respondent is awarded exclusive right, claim, title and interest in the real property known as 138 Campbell Hill Road, Bedford, New Hampshire, free and clear and unencumbered by any right or claim therein by Petitioner. Commensurate with this award, Respondent shall be responsible for payment of all debt associated therewith, including (without limitation) mortgage principal and interest indebtedness, property tax, liability and casualty insurance, utilities, capital improvements, repair and maintenance cost, and any other costs of any nature and however accrued.

16. ENFORCEABILITY AFTER DEATH: Unless otherwise expressly provided for by terms of this Decree, terms and provisions of this Decree are chargeable to the Parties' respective Estates upon death.

17. SIGNING OF DOCUMENTS: Unless otherwise expressly provided for by other terms of this Decree, the Parties shall execute all documents reasonably necessary and requisite to accomplish and implement terms of this Decree as soon as practically possible.

18. RESTRAINING ORDER: The Parties do not request any type or form of restraining order against either Party.

19. NAME CHANGE: Respondent has not indicated a desire to resume her name as it existed previous to the Parties' marriage.

20. OTHER ORDERS AND AWARDS:

(A) Attorney's Fees: Each Party shall pay and discharge attorney fees and costs each has sustained individually incident to this matter. Should either Party

unreasonably fail to comply with any material term or provision of this Decree or other order of the Court, such Party shall be responsible to reimburse the other for costs, including reasonable attorney's fees, incurred in enforcement of compliance therewith.

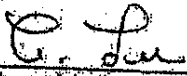
(B) Disclosure of Assets: The Parties have represented they have each disclosed to the other all assets within their knowledge on their respective Financial Affidavits, specifically including any pension, profit sharing or retirement account, along with reasonable estimated values of each asset. The financial information contained on each Party's Financial Affidavit has been relied upon by the other Party.

(C) Change of Address or Employment: Each Party shall promptly notify the other of any change in his or her residential and employment addresses and telephone number so long as there shall be continuing obligations per terms hereof.

(D) The Court concludes that a slightly higher percentage of the assets awarded to Marian is an equitable division with severance and deferred compensation agreement monies to be treated as income for distribution purposes.

Recommended:

10/10/2017
Date


Signature of Judicial Referee

A. LOWE
Printed Name

So Ordered:

I hereby certify that I have read the recommendation(s) and agree that, to the extent the marital master/judicial referee/hearing officer has made factual findings, she/he has applied the correct legal standard to the facts determined by the marital master/judicial referee/hearing officer.

10/11/17
Date


Signature of Judge

INTROCA80
Printed Name

SCHEDULE A

Acquired After Marriage Date and awarded to husband.

1. Ceramic statue of giraffe (in Library) (I fixed)
2. Ceramic statue of elephant (in Library)
3. Pablo Picasso Book
4. Large Oil Painting of 2 Women playing Instruments by G. Dattof (in Living Room)
5. Inversion table
6. Husqvarna Chainsaw (She can keep the Craftsman - which I bought before marriage.)
7. Ariens Snowblower (She has another - MTD)
8. Dremel Tool Kit (in Garage)

The parties did not agree about whether most of the following personal property was acquired before or after the marriage. There was no reasonable basis upon which this court could decide to whom the property should be awarded. Therefore, unless noted otherwise, each party shall select from the list on an alternating basis.

10. The Orchestral print by Dorit Levi (called folklore) (in Library)
11. Framed picture of piano (in Library)
12. Chagall painting of Man Painting (in Hallway)
13. Original small oil painting by Guido Borelli (small villa in the country) (in Living Room)
14. Two Pictures of Musicians (in downstairs Bathroom)
15. Ornate ceramic plate for display by Janet Duchesneau
16. Flower print (single red rose) by Georgia O'Keefe: to husband
17. John Deere Tractor and wagon: to husband

Gift to Petitioner

18. Clear Candle Sticks (between Kitchen & Family Room)
19. Book Tour De France Centennial 1903-2003 (with inscription to petitioner) (from Lou Desmarais)
20. Wooden carving of elephant with long trunk given to Mitch as a gift by friend (was in Library)
21. Orange and black ceramic Navajo Indian vase