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STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2017-0697

IN THE MATTER OF

MITCHELL COHEN

and

MARIAN RICHARDS

REPLY BRIEF OF MARIAN RICHARDS

MARIAN RICHARDS,

By her attorney,

/s/
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STATEMENT OF FACTS/STATEMENT OF THE CASE

The Appellant, Marian Richards, (hereinafter, "Wife") disputes the accuracy and/or presentation of some of the facts set forth in the Brief for Mitchell G. Cohen, (hereinafter "Husband's Brief"). Wife will address these as they arise in the argument and relies upon the Statement of Facts/Statement of Case previously filed.

ARGUMENT

I. THE TRIAL COURT ERRED IN ITS AWARD OF ALIMONY TO WIFE

Husband, in his Brief, admits that the Trial Court failed to make Findings of Fact as to the amount of the alimony awarded and why the Court chose to exclude or/to what level it chose to exclude home repairs and necessary future medical procedures. While both Husband and Wife could speculate with mathematical calculations to attempt to ascertain how the Trial Court reached its figures, the Trial Court's method remains unclear since it made no Findings of Fact relative to its bases.

Husband argues that the alimony award must be reviewed and considered hand-in-hand with the asset award. Although the Court has great discretion in dividing assets and awarding alimony, absent findings, it is impossible to determine whether the Trial Court considered the parties' asset division in making its alimony award, and if so, to what extent. Without such findings, the award cannot be appropriately scrutinized.

Husband also suggests that the alimony award was justified by a disproportionate assets division to Wife. As a result of the asset award, Wife realized a $565,766 increase in the assets she brought in to the marriage, ($282,000), (Appx. 393), resulting in a 200% increase in her assets. However, Husband realized a $701,380 increase in the assets he brought to the marriage, ($73,000), (Appx. 394), resulting in a 953% increase in his assets. Further, the assets awarded to Wife were not income-producing assets; a further justification for not considering those assets in calculating alimony. (Appx. 19)

Finally, Husband argues his inability to pay. Husband points to no trial testimony to support this conclusion, and offers only his Financial Affidavit which evidences income of $27,852/month or $334,224/year. Even taking his expenses at face value, including his proposed alimony of $3,680/month, Husband still has over $5,000/month surplus income. (Appx. 47) .Therefore, absent findings of fact to support the awards, the Trial Court's alimony award must fail.

II. TRIAL COURT ERRED IN CLASSIFYING HUSBAND'S DCA AND CONTRACT AS INCOME

In her Appellant's Brief, Wife outlined the components of Husband's two employment benefits with specificity as to why each benefit is an asset subject to division, to wit; his Deferred Compensation Agreement executed in the 1996, as

amended in 2005[1], ("DCA"), (Appx. p.65); and his Employment Contract, (Contract"), (Appx. p.77) .

A. Husband's DCA and CONTRACT are subject to division pursuant to N.H. Rev. Stat. Ann. § 458:16-a

Husband's keystone argument for the exclusion of the DCA and Contract benefits are that they were not acquired during the marriage, and therefore are not dividable pursuant to N.H. Rev. Stat. Ann. § 458:16-a, as they are "contractual in nature". Husband points to no case law, no expert testimony, no learned treatise, nor any other credible rationale in support of his assertion. It has not been disputed that during the marriage, throughout trial, and as of the date of divorce, the benefits afforded Husband by and through both his DCA and Contract were fully vested, and both the DCA and Contract existed and were in full force and effect during the marriage. Husband nevertheless argues that neither his DCA nor Contract can be divided by the Court as they are not vested rights and contain no enforcement mechanism. As set forth above, the benefits contained therein were vested and both DCA and Contract existed in full force and effect during the marriage. Again Husband points to no case law, no expert testimony, no learned treatise, nor any other credible rationale in support of his assertion. Relative to enforcement, the DCA, (Appx. 71), specifically provides that recourse for its enforcement lies against Husband's employer. The Contract (Appx. 81) provides

[1] Husband's DCA was amended on February 24, 2005 to make it compliant with I.R.C. § 409A (2012) (Appx. 75).

specifically for dispute resolution. Furthermore, Husband's interest in both had vested since prior to the divorce, he had already been employed for the requisite minimum number of years to avail himself of the benefits.

Husband's argument that N.H. Rev. Stat. Ann. § 458:16-a does not include his DCA and Contract is without merit, given the plain and unambiguous language of the statute.

B. DCA and Contract are assets not income.

Husband argues that his DCA and Contract benefits are not assets but are in fact discretionary future income, and therefore not subject to division as a marital asset. This is clearly not the case. Wife again argues that Husband's benefits under the DCA and Contract are vested, not discretionary, have already been earned, and provide for retirement and early resignation income for which Husband had already met the minimum obligations set forth in both documents. If Husband's argument were to be adopted, then no retirement of a working spouse would be subject to division because by its nature, it is future income.

Finding no relevant cases on point anywhere in the vicinity of New Hampshire or even New England, Husband cites to cases in Wyoming, Illinois, Michigan, and North Carolina for support. However, as set forth below, each case fails to compare to the case at bar.

Husband cites to *Dunham v. Dunham*, 125 P.3d 1015 (Wyo. 2006) to support his assertion. However, the court reviewed Dunham one year later in

Humphrey v. Humphrey, 157 P.3d 451 (Wyo. 2007), when making a determination on the division of a spouse's interest in a family business. In Humphrey, the court held that Dunham was only appropriate when the property in question was unvested with no expectancy that the interest would ever come into being. This is completely different from the case at bar, where although the interest has yet to be received, it is fully vested and defined. Husband testified that if he worked for SJ Physicians until his 65th birthday he would receive a set figure of $1,000,000.00 over a 10 year period. (T. 102-104). Similarly, Contract provides that if he left his job prior to his 65th birthday, he would receive $281,000.00. (Appx. 77). Both benefits are vested, and there is a definable interest that will come into being with certainty in each case.

Husband also cites to *In re Marriage of Wendt*, 995 N.E.2d 439 (Ill. App. Ct. 2013). In that case, the court reviewed the division of a discretionary bonus received post-divorce. Again, a case with facts completely unrelated to the case at bar. It is also interesting to note that Wendt arises out of a marital agreement which provided for distribution of the deferred compensation 50/50 between the spouses; *a division of future income*. Id at 441. As it related to the bonus, however, the court held that because the bonus was discretionary, it was not subject to division. In the case at bar, Husband's employment benefits are not discretionary, and have already been earned.

Husband cites also to *Skelly v. Skelly*, 780 N.W.2d 368 (Mich. Ct. App. 2009), in which the court reviewed whether a retention bonus paid out in three

installments was a marital asset. The bonus contained a clause which required that repayment if the employee was not employed at the time an installment was paid. Because the court determined the clause to articulate a condition precedent, the court determined that because the entire bonus would have to be repaid if Husband failed to remain employed until the date of the last installment, the bonus had not actually been earned at the time of the divorce and therefore it was not subject to division pursuant to Michigan Law. However, once again, this case represents a set of facts completely unrelated to the case at bar. In the case at bar, all conditions precedent had been met as of the date of the divorce, there was never any repayment requirement, and the amounts that Husband will receive were established with specificity and were not speculative or conditional.

The Husband also cites to Edwards v. Edwards, 428 S.E.2d 834 (N.C. App. Ct. 1993), the court found that wife had failed to demonstrate that husband's bonus was vested and not discretionary and therefore determined that the bonus was not marital property subject to division. Again, this case is completely irrelevant to the case at bar where Husband's benefits are both vested and nondiscretionary.

If this Court chooses to look to other Jurisdictions for guidance on this matter, Wife offers *In re Marriage of Brown*, 15 Cal. 3d 838 (1976), wherein the court ruled that non-vested pension rights were property subject to division and not mere expectancies. The Brown Court noted that "pension benefits represent a form of deferred compensation for services rendered ..., the employee's right to

such benefits is a contractual right derived from the terms of the employment contract. Since a contractual right is not an expectancy but a chose in action, a form of property ..., an employee acquires a property right to pension benefits when he enters upon the performance of his employment contract". Brown at 565.

The Massachusetts Courts have long held that intangible assets, even those not in a spouse's control, are part of the marital estate and subject to division, including pensions, stock options, rights in pending law suits, etc. The Court in *Baccanti v. Morton*, 434 Mass. 787 (2001) held the mere fact that the value is unknown does not remove them from assets subject to division.

Husband's argument must fail. N.H. Rev. Stat. Ann. § 458:16-a clearly includes all assets, vested or unvested at time of divorce. The issue of the equitable division of such these assets was resolved in Hodgins.

C. Benefits Provided By Contract Are Not Replacement Income

Husband argues that the benefits set forth in Contract must be viewed under the replacement income theory as set forth in *Davis v. Davis*, 87 P.3d 640 Okla. Civ. App. 2003). In *Davis*, *id.*, the husband was laid off after the parties separated. A severance agreement was then generated by the husband's employer. Under the replacement approach, the "touchstone of the classification is whether the severance pay was intended to compensate the employee for efforts made during the marriage or to replace post-separation earnings." *Luczkovich v. Luczkovich*, 496 S.E.2d 157 (Va. Ct. App. 1998). Again, this is not even remotely similar to the

case at bar where the issue is not a post-separation/post-employment severance agreement, but in fact is a case there the Husband was employed during the marriage and post separation under contracts that provide set, vested, determinable, expected benefits for either early retirement or retirement at age 65.

In the case at bar, Husband entered into Contract which included his salary and benefits including 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 provisions in the DCA. These benefits were not generated by the employer as part of Husband's termination, but as part of an employment package. They were intended to compensate Husband for efforts made as an employee during marriage. Therefore, even under the "replacement income" rationale argued by Husband, the employment benefits remain assets subject to division.

D. RSA 458:16-a Clearly Provides For Division Of Tangible And Intangible/Vested And Unvested Assets

Husband's argument that Wife's application of case law is inappropriate as it is based upon the presumption fact that the Husband's employment benefits, i.e. DCA and Contract, did not come to fruition during the marriage, must also fail. This fact neither defines an asset as vested or unvested, nor does it define a marital

asset. If this were true, all retirement assets of employed spouses would be excluded from division. Moreover, the Hodgins Court resolved the division of the marital coverture portion of which have not yet come to full term during the marriage.

E. Trial Court's finding of equity in the determination of the DCA and Contract Benefits as Income, is Unsustainable

Husband argues that the Trial Court's determination of DCA and Contract as income was a proper determination. The Trial Court's only hint of a finding was a clause stating that "equity" was the justification. However, there is no explanation of what equity was in fact determined, or how, or why the Trial Court chose to divide an vested asset as if it were income. The gravamen of Husband's argument appears to be only that the DCA and Contract were mere expectancies or bonuses, however, that is simply not true, as articulated hereinabove and in Wife's Appellant's Brief. The Trial Court entered no findings of fact as required by RSA 458:16-a to set forth its rationale pursuant to its determination as to why it would be more equitable to treat the DCA and Contract as income, therefore it is impossible to speculate as to whether the Court's rationale was proper or appropriate or justified by assumed considerations.

F. The Trial Court's determination of the DCA and Contract benefits as income improper

Husband's misinterprets the issue presented by Wife. This is not an issue of marital versus non-marital assets. Wife's assertion is that an asset was improperly defined as income, and therefore not divided. Instead, as income, it

was improperly assessed only for alimony purposes. As such, Husband's argument contained in his Brief at Section F, is unrelated to Wife's articulated issue.

III. TRIAL COURT ERRED IN ITS APPORTIONMENT OF DCA AND CONTRACT

Husband's brief merely asserts that the Trial Court's determination was proper, without citing to any case law or specific findings. Husband testified at trial that the marital coverture period of the DCA and Contract was 41% to Wife as determined by the Hodgins formula. (T. 107). Husband attributes testimony to Wife at page 32 of Husband's brief when in fact the testimony to which he refers is that of Husband. However, calculation of alimony must be determined by the factors set forth in RSA 458:19.

Husband's DCA and Contract are not mere expectancies. Husband will receive them. They are assets. Husband admits in his brief at pages 32 and 33 that each benefit has a known value, earned during the marriage. The Trial Court erred as matter of law and fact when it treated Husband's DCA and Contract benefits as income for the purpose of calculating supplemental alimony award, rather than treating the benefits as property and awarding each an appropriate share.

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.

Respectfully submitted,
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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 9/11 2018.

/s/
Janet E. Dutcher, Esquire