

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

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SUPREME COURT
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In the Matter of Mitchell G. Cohen and Marian T. Richards

Case No.: 2017-0697

MANDATORY APPEAL PURSUANT TO SUPREME COURT RULE 7 FROM FINAL
DECISION OF 9th CIRCUIT COURT – FAMILY DIVISION – MERRIMACK

BRIEF OF APPELLEE
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QUESTIONS PRESENTED

- I. Whether the trial court erred in its determination of Wife's reasonable needs and the amount of alimony necessary to provide for those needs pursuant to N.H. RSA 458:16-a(1).
- II. Whether the trial court erred in treating Husband's potential receipt of income under either Deferred Compensation or Severance benefits as income to be considered in ordering additional alimony, rather than treating that potential income as an asset subject to property division.
- III. Whether the trial court erred in calculating a "marital portion" of Husband's potential income under either Deferred Compensation or Severance benefits, and then awarding Wife a percentage thereof as additional alimony.

STATEMENT OF THE FACTS AND THE CASE

Background Information

The Parties began a romantic relationship in 2001. *Final Hearing Transcript* (“Tr.”) at 9:22-25. In 2004, the Parties separated. *Tr.* at 21:18-25. Shortly thereafter, they resumed their relationship. *Tr.* at 22-23.

In 2005, the Parties purchased land on Homestead Hill Road, Bedford, New Hampshire. *Tr.* at 24-25. Following purchase, they constructed their home upon that land. *Tr.* at 25:21-22. On February 1, 2006, they were married. *Decree of Divorce* (“Decree”), ¶2. P. 1. No children were born of the marriage. *Tr.* at 79:15-16.

In May of 2015, the Parties separated. *Appendix* (“App.”) at 1. Husband filed a Petition for Divorce on May 29, 2015. *App.* at 31. The marriage was a short-term marriage, comprised of approximately nine years. *Tr.* at 6:21-22.

By the time of the Parties married in 2006, Husband had obtained his doctor of medicine. *App.* at 31. He was also licensed to treat narcotic addiction. *Tr.* at 63:16-20. He has been employed at SJ Physician Services as a physician specializing in internal medicine since 1994. *Decree* at 1, ¶3. In the course of the marriage, Husband worked long hours at SJ Physician Services, up to 60 hours per week. *Id.* at ¶5, p. 1. He often worked weekends. *Tr.* at 79. Despite his employment as a physician, the Parties required additional income to meet their monthly expenses. *Tr.* at 79:12-14; 94:4-8. Consequently, Husband obtained additional employment to make ends meet. *Tr.* at 79:13-14. He obtained secondary employment as a hospitalist to help alleviate the Parties’ financial pressures. *Tr.* at 63:20-25. In 2010, husband stopped working as a hospitalist because he could no longer work both jobs simultaneously. *Id.*

In 2014, Husband again obtained secondary employment as a physician consultant at Pinewood Medical Center, practicing addiction medicine one day per week. *Tr.* at 63:16-22. As was the case previously, this secondary employment was secured for the purpose of meeting the Parties' financial needs. *Tr.* at 63-64; 94:1-8.

Wife held two bachelor's degrees at the time the Parties were married, being in the fields of psychology and criminal justice. *Tr.* at 13-14. She was previously employed as a police officer, office manager, social worker, and billing specialist. *Tr.* at 10-11,14,16. However, she was unemployed at the time of the marriage. *Tr.* at 11:8-10. Despite her education and previous employment experience, she remained essentially unemployed for the duration of the marriage. *Decree* at 1, ¶3.

Wife's continuous unemployment during the marriage was a source of contention between the Parties. *Tr.* at 78-79. They discussed the issue frequently. *Tr.* at 79:6-7. It was even discussed in the course of marriage counseling. *Decree*, ¶1, p. 2. Husband wanted Wife to help out financially so that he would not be compelled to work such long hours. *Decree* at ¶1.

Ultimately, Husband became disillusioned with Wife's failure to obtain employment. *Tr.* at 79-80. On January 19, 2011, Husband filed a Petition for Divorce due in part to Wife's refusal to secure gainful employment. *Tr.* at 80:1-15. Apparently the result of the filing of the Petition, Wife did obtain employment with the N.H. Marine Patrol. *Id.* Unfortunately, the employment was short-lived and Wife was discharged from that employment within six months. *Tr.* at 13:11-12. Nonetheless, the Parties temporarily reconciled their differences shortly after that filing. *Tr.* at 80:16-24.

Husband's income was, therefore, the sole source of income during the marriage, from which they paid their marital expenses. *Decree*, ¶5, p. 2. Wife controlled the finances and paid

expenses. *Tr.* at 27:23-24. The Parties lived a middle-class lifestyle. Their only real estate asset was the marital home. *App.* at 5. They undertook minimal travel or vacations. *Tr.* at 158:6-15. Husband testified their only vacation in the course of the marriage was to Europe in 2012, paid for by proceeds of liquidation of a life insurance policy. *Id.* They enjoyed inexpensive entertainment such as family celebrations, snowshoeing, skiing, and cycling. *Tr.* at 197-198. Husband testified that entertainment between them was “bare bones.” *Tr.* at 158:19-25.

In May, 2015, the Parties separated and the Petition for Divorce filed on May 29, 2015. *App.* at 31. Following the separation, Wife initially resided alone at the marital home. *App.* at 1.

On August 1, 2016, a temporary hearing was held, at which time Wife submitted a financial affidavit (the “Temporary Financial”). By her Temporary Financial, Wife reported income totaling \$100.00 per month from interests and dividends. *Id.* She reported monthly expenses of \$7,576.00. *App.* at 4. Her reported expenses included mortgage indebtedness and property taxes on the marital home, totaling \$4,308.00 per month. *Id.* She reported expenses of home maintenance, snow removal, and lawn care totaling \$300.00 per month; utilities totaling \$870.00 per month; and uninsured medical and dental expenses totaling \$70.00 per month. *Id.*

The trial court issued its Temporary Decree on August 1, 2016. *App.* at 55. Thereby, Husband was ordered to pay alimony to Wife in the amount of \$8,000.00 per month. *App.* at 55. The marital home was ordered to be placed on the market and sold. *App.* at 57-58.

In November of 2016, Wife obtained full-time employment as a support services representative. *Tr.* at 182. Her employment was for 40 hours per week, \$14.30 per hour. *Tr.* at 58:4-5; *App.* at 17. Presumably aided by her employment income and the alimony Husband was ordered to pay, Wife purchased a home in December, 2016, at Campbell Road, Bedford, New Hampshire (the “Campbell Road Property”). *Tr.* at 395. Moreover, upon learning of Wife’s

gainful employment, Husband filed a Motion to Modify Temporary Alimony. *App.* at 63. A hearing was held on February 15, 2017. *Id.* At the time of the hearing, Wife continued to reside at the marital home.¹ *App.* at 9. She submitted at the hearing a new financial affidavit (“Modification Financial”), through which she reported monthly home maintenance, snow removal, and lawn care expense of \$300.00 per month, utility expenses increased to \$1,086.00 per month, and uninsured medical and dental expenses increased to \$170.00 per month. *Id.* at the same hearing, Wife also submitted an expense sheet she entitled “Campbell Road Expenses.” *App.* at 12. The Campbell Road Expenses were substantially less than those appertaining to the marital home. *Id.* Home maintenance, snow removal, and lawn care expenses totaled only \$150.00 per month. *Id.* Utility expenses totaled \$184.00 per month. *Id.* At the time, Wife had owned the Campbell Road Property for nearly three months.

On February 27, 2017, the trial court issued its Order reducing Husband’s temporary alimony, but only to the sum of \$7,000.00 per month. *App.* at 63. The marital home was eventually sold on June 30, 2017. *App.* at 395.

Alimony

The Final Hearing was held on August 29, 2017. By his proposed decree, Husband proposed that Wife be awarded what he defined as “Base Alimony” from his “Base Income” in the sum of \$3,680.00 per month, representing 20% of his gross sum of his Base Income. *App.* at 90. He also proposed that Wife be awarded what he defined as Additional Alimony, defined as the same proportion (20%) of any earned income in excess of his Base Income. *App.* at 91.

In addition to Base Alimony and Additional Alimony, Husband proposed that Wife be awarded 10% of that “severance [income] benefit attributable to and accrued in the course of the Parties’ marriage”, based upon the *potential* that he would receive income in the future per terms

¹ The marital home is not sold until June 30, 2017.

of a severance agreement he had entered into with his employer, which he defined as “Severance Alimony”. *Id.* Finally, Husband proposed that wife be awarded the same percentage (10%) of income he would *potentially* receive per terms of a “Deferred Compensation Agreement” he had entered into with his employer, applying that percentage to a portion of such income as was accrued in the course of his marriage with Wife. *App.* at 92. He defined this additional alimony as “Deferred Compensation Alimony”. *Id.*

In contrast to the proposal of Husband, Wife proposed that she be awarded alimony in a fixed amount of \$6,700.00 per month from Husband’s gross monthly income (however that might be defined). *App.* at 113.

At the time of the Final Hearing, Husband’s monthly earned income totaled \$27,851.98. *App.* at 45. That income consisted of four components. First, he received a base salary from his employment at SJ Physician Services in the amount of \$18,404.53 per month. *Id.* The second and third components consisted of on-call and supplemental wages, which at the time of the Final Hearing was estimated to be \$3,105.50 per month. *Id.* The on-call and supplemental wages varied each month. *Tr.* at 66-67. Fourth, Husband earned non-employee income (Form 1099) from Pinewood Medical Center. *Tr.* at 64:22-25. That income varied based upon billings and collections for services rendered each month, being paid 65% of collections. *Tr.* at 64. At the Final Hearing, Pinewood Medical Center earnings were estimated at \$6,341.90 per month. *App.* at 45.

At the Final Hearing, Husband reported by his Financial Affidavit monthly expenses substantially exceeding his gross base salary. *App.* at 47-49. He reported personal debts having

increased excess of \$11,000.00 in a mere seven months.² He projected as an expense his proposed Base Alimony of \$3,680.00 per month, a substantial reduction from the Temporary Order of \$7,000.00 monthly. *Id.* Nonetheless, monthly expenses exceeded his Base Income. *Id.*

Husband also attached a monthly expense sheet to his financial entitled “Example with Johnson mortgage – MINIMAL”, whereby, hypothetically and unrealistically, he significantly reduced or eliminated many itemized monthly expenses to reflect the bare necessities. *App.* at 49. Even under the “minimal” expense sheet, Husband’s monthly expenses exceeded his Base Income. *Id.*

Husband testified of his concern that his employer, SJ Physician Services, would not indefinitely allow him to continue to work one day per week at Pinewood Medical Center due to the demands of his medical practice. *Tr.* at 94:9-12. Moreover, he testified that having to work a second job for additional income caused him to fall behind in his medical practice. *Tr.* at 94:1-8. He also testified that he may be limited in the future from continuing to work the long hours he did for health reasons. *Tr.* at 94. Husband was 58 years of age at the time of the Final Hearing. *Tr.* at 61:20-21.

Wife reported by her Financial Affidavit filed at the Final Hearing (“Final Hearing Financial”) monthly income of \$2,594.27, consisting of earned income of \$2,492.27 and \$100 per month interest and dividends.. *App.* at 19. At the time of the Final Hearing, Wife was residing at the Campbell Road Property. She reported monthly expenses having increased substantially from previously-filed affidavits to \$10,494.00 per month. *App.* at 22. She reported her expenses increased despite the fact that her monthly mortgage and property taxes had

² This amount was calculated by subtracting the personal debts on the Husband’s Financial Affidavit filed incident to the Motion to Modify Temporary Alimony from debts as listed on his Financial Affidavit submitted at the Final Hearing.

decreased by \$2,785.00 per month.³ She reported home maintenance, snow removal, and lawn care expense had substantially increased to \$1,165.00 per month; utility expenses substantially increased to \$1,602.00 per month; and uninsured medical and dental expenses substantially increased to \$745.00 per month. *Id.*

Wife testified that she was aware that the Campbell Road Property was in poor condition at the time she purchased it and that the seller had agreed to contribute \$10,000.00 towards the prepaids, closing costs, escrows, and down payment due to the property's condition. *Tr.* at 197:3-5. Wife testified that the home maintenance expense on her Final Hearing Financial of \$725.00 per month was due to repairs the property required. *Tr.* at 198:19-25. She testified that her substantially increased utility expenses were the result of the "issues with the house." *Tr.* at 199:13-25.

At the Final Hearing, it was revealed that Wife's reported uninsured medical expense of \$429.00 per month was not for actual medical expenses incurred, but instead reflected her estimates of medical expense for "two procedures" she professed she would undergo either "this year or next year." *Tr.* at 48-49. The same was true with respect to reported uninsured dental expense in the amount of \$316.00 per month. *Tr.* at 48. Wife's uninsured monthly dental expense was actually an "estimate to replace 2 root canals & 4 cracked fillings." *App.* at 29.

In support of her alimony proposal, Wife testified that she did not want to have contact with Husband. *Tr.* at 206:7-16. She testified that she needed a fixed amount per month to manage her finances. *Tr.* at 206:20-22. She was 61 years of age at the time of the Final Hearing. *Tr.* at 6:23-24.

³ The \$2,785.00 per month decrease in the Wife's mortgage and property taxes was calculated by taking the former marital home's mortgage (\$3,208.00) plus the marital home's property taxes (\$1,100.00) and subtracting the Campbell Road Property's mortgage and property taxes (\$1,523.00). *App.* at 3, 12.

Unvested Deferred Compensation Benefit and Unvested Severance Benefit

Husband benefits from a Deferred Compensation Agreement with SJ Physician Services. *App.* at 65. Husband submitted to the trial court at the time of Final Hearing his “Petitioner’s Trial Memorandum”, describing the Deferred Compensation Agreement. *App.* at 107. Pursuant to the agreement, if Husband were to continue employed by SJ Physician Services upon his 65th birthday, he would commence receiving payment of a monthly benefit for a term of 10 years. *App.* at 67-68. The schedule of Husband’s deferred compensation payments is contained on an Addendum attached to the agreement. *App.* at 73-74. No deferred compensation entitlement exists until the 21st year of employment, and the deferred compensation accrues only following the 21st year of employment until retirement age of 65. *Id.* The benefit is \$100,000.00 per year for a period of ten years, payable monthly per provisions of Paragraph 2 of the agreement, equating to the sum of \$8,333.33 per month. *Id.* The agreement also provides for the payment of a death benefit if Husband dies before reaching retirement age while employed by SJ Physician Services. *App.* at 68. The agreement imposes conditions to the payment of any deferred compensation benefit, which are (i) the continuous employment of Husband, (ii) the benefit is voided if employment terminates before retirement age, and (iii) Husband shall not engage in business activities which are in competition with those of his employer. *App.* at 68-69.

At the time of the Parties’ (2006), Husband had been employed for 12 years at SJ Physician Services. *Tr.* at 62:8-12. He had not at that time accrued any deferred compensation benefit. *App.* at 73. The death benefit was \$50,000.00. *Id.* At the time of the Parties’ separation in 2015, the deferred compensation benefit had accrued to the extent of \$100,000.00 per year for 10 years and the potential death benefit had accrued to \$100,000.00. *Id.*

The agreement provides that any payment to Husband (or a designated beneficiary upon his death) would be made only from assets of SJ Physician Services. *App.* at 70. The obligation of SJ Physician Services is one of an “unfunded and unsecured promise to pay money in the future.” *Id.* Per the agreement, SJ Physician Services absolves itself from any enforcement mechanisms, leaving Husband with nothing more than rights of an “unsecured general creditor”. *Id.*

Husband also benefited from an Employment Agreement (dated July 25, 2013) containing a severance provision. *App.* at 77. The severance benefit is paid, if at all, pursuant to a severance schedule. *App.* at 85. Pursuant to the schedule, Husband’s severance amount increases based upon the number of full years he is employed with SJ Physician Services. *Id.* At the time of the Parties’ marriage, Husband’s potential severance benefit totaled \$137,000.00. *Id.* At the time of separation in May of 2015, the potential severance benefit was \$281,000.00. *Id.*

By definition of the agreement, receipt of severance income is contingent. *Id.* at 84. Husband will not receive severance income if (i) he is terminated from employment for cause or (ii) he is employed upon reaching retirement age of 65. *Id.* If he leaves employment for any reason other than reaching normal retirement age of 65 or by reason of with-cause termination, is entitled to payment of the severance benefits. *Id.* At age 65 if still employed, he forfeits any potential severance benefits and instead receives benefits under the Deferred Compensation Agreement. *Id.* He cannot receive both.

As more particularly described above in this Brief, Husband proposed that the Wife receive either 10% of the amount of his unvested deferred compensation benefit, to the extent paid, or the same percentage of his unvested severance benefit accrued during the marriage, to the extent paid, as Deferred Compensation Alimony or Severance Alimony, as the case may be.

App. at 90-91. Husband calculated the portion of any severance benefit to be considered by the trial court to be \$144,000, and the portion of any deferred compensation benefit to be considered by the trial court to be 41% of any sum received by Husband. *App.* at 91. Counsel for Wife agreed at the time of trial with the calculations and methodology of those calculations proposed by Husband. *Tr.* at 99-100. What Wife reserved was the right to argue differing treatment of the sums so calculated. *App.* at 116.

Wife proposed that Husband's calculated portions of deferred compensation benefit or severance benefit be treated as an asset for purposes of equitable distribution. *App.* at 115-116. Wife proposed that she be awarded one-half of the amounts of these benefits accrued during the marriage, as calculated by Husband, if they were ever received by him. *Id.*

Decree of Divorce

On October 11, 2017, the Decree of Divorce was issued. *App.* at 124. Pursuant to the Decree, Wife was awarded a fixed sum of alimony in the amount of \$4,700.00 per month until she reached retirement age. *Decree* at 3-4. The trial court also treated the Husband's unvested deferred compensation and unvested severance benefits as income and awarded the Wife 17% of the income that accrued during the marriage.⁴ *Id.* at 4-6. In its rationale for its alimony award, the trial court provided:

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

⁴ Husband concludes the 17% ordered by the trial court derives from applying that percentage to the total monthly income reported by Husband on his Financial Affidavit of \$27,851.98, which reflects Base Income and all Additional Income of Husband, being base pay, income from on-call status, supplemental wages as reported, and income from his association with PMC/Pinewood. $4,700 / 27,851.98 = .1687$. Consequently, it follows that the trial court applied the same percentage to the potential deferred compensation and severance income, choosing not to adopt the proposal of Husband to apply a proportion of 10%.

extensive and expensive repairs. Some of the extraordinarily high expenses for the home which the 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.

Id. at 3. In its rationale for treating the Husband's unvested deferred compensation as income, the trial court provided:

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 at 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.

Id. at 2.

Wife timely filed her Motion for Reconsideration, which the trial court denied on November 9, 2017. *App.* at 63. This appeal followed.

SUMMARY OF ARGUMENT

I. The trial court's alimony award of \$4,700.00 per month, plus 17% of the marital portion of Husband's unvested potential deferred compensation benefit or unvested potential severance benefit was reasonable based on the evidence. Wife voluntarily incurred extraordinary housing and utility expenses as reported by her Final Hearing Financial, inclusive of having purchased a home she knew was in poor condition and that required extensive repairs. The evidence supports a finding that Wife did not actually incur the uninsured medical and dental expenses reported by her Final Hearing Financial. For purposes of determining a reasonable alimony award, Wife's housing and utility expenses were properly reduced by the trial court. The trial court also properly excluded Wife's uninsured medical and dental expenses. If Wife's

reported housing and utility expenses are reduced, her uninsured medical and dental expenses excluded, and her voluntary 401(k) expense and voluntary Health Savings Account expense excluded, alimony of \$4,700.00 allows her to meet her reasonable needs at the marital style of living. Moreover, the trial court awarded Wife a disparate division of substantial marital assets in part as a “future source of funding.” Consequently, the amount and duration of alimony awarded does not reflect an unsustainable exercise of discretion.

II. Husband’s unvested deferred compensation benefit and unvested severance benefit were properly classified as income by the trial court. The benefits are not “employment benefits” or “other retirement benefits” as contemplated by N.H. RSA 458:16-a. The prospective, potential benefits are contractual in nature and do not carry vested rights. The benefits confer a mere expectancy of future income based upon the satisfaction of conditions subsequent, post-separation. Husband’s deferred compensation benefit is an incentive for his future service at SJ Physician Services. His severance benefit, if any is paid, is tantamount to a replacement for lost future earnings. As these benefits represent future income paid in exchange for future services, the benefits cannot be considered marital property.

III. The trial court properly calculated the marital portion of the Husband’s unvested deferred compensation benefit and unvested severance benefit. Indeed, Wife agreed with the calculation. With respect to Husband’s deferred compensation benefit, the trial court properly calculated amount of the benefit that accrued during the marriage by dividing the years of service during the marriage (9) by the number of years necessary to obtain the Husband’s current entitlement (21). This yielded the percentage of the income that accrued during the marriage. The trial court then properly applied the percentage to the Husband’s deferred compensation payments to yield the amount attributable to his efforts during the marriage.

The trial court also properly calculated the marital portion of the Husband's unvested severance benefit by subtracting the Husband's current accrued severance benefit from his accrued severance benefit at the time of the marriage, reflecting the benefit attributable to Husband's efforts during the marriage. The trial court then properly treated the calculated sum as the equivalent of post-separation bonus income and awarded the Wife 17% of that sum as additional alimony. The approach was the most equitable manner through which to treat Husband's benefits because it accounts for the fact Husband will require the future income if he terminates employment (other than with-cause) before reaching the age of 65 and accounts for the fact that the amount of the benefit increased during the marriage. As a result, the trial court's apportionment of these benefits was proper and was not an unsustainable exercise of discretion.

STANDARD OF REVIEW

A trial court has "broad discretion in fashioning a final divorce decree and in managing the proceedings before it." *In the Matter of Kempton*, 167 N.H. 785, 792 (2015) (citing *In the Matter of Spenard and Spenard*, 167 N.H. 1, 3 (2014)). This Court "will not overturn a trial court's rulings absent unsustainable exercise of discretion." *Id.* Under the unsustainable exercise of discretion standard, this Court reviews the record "only to determine whether it contains an objective basis upon which to sustain the trial court's discretionary judgment." *Id.* If the trial court's findings "can reasonably be made on the evidence, they will stand." *Id.*

The trial court has "broad discretion in awarding alimony." *In the Matter of Dube and Dube*, 163 N.H. 575, 580 (2012) (citing *In the Matter of Peirano and Larsen*, 155 N.H. 738, 746 (2007)). This Court shall review the trial court's decision relative to an award of alimony under the unsustainable exercise of discretion standard. *Id.*

The trial court determines “what assets are marital property under N.H. RSA 458:16-a, I, and thus subject to equitable distribution, and then exercises its discretion to make an equitable distribution of those assets.” *In the Matter of Goodlander and Tamposi*, 161 N.H. 490, 495 (2011) (quoting *In the Matter of Chamberlain and Chamberlain*, 155 N.H. 13, 16 (2007)). These determinations are “reviewed de novo, while equitable divisions of property pursuant to RSA 458:16-a, I are reviewed for an unsustainable exercise of discretion.” *Id.*

ARGUMENT

I. TRIAL COURT ALIMONY AWARD IS REASONABLE BASED UPON THE EVIDENCE PRESENTED AND IS NOT AN UNSUSTAINABLE EXERCISE OF DISCRETION

The trial court’s alimony award of \$4,700.00 per month from Husband’s gross monthly income, plus 17% of the marital portion of the Husband’s unvested deferred compensation benefit or unvested severance benefit properly accounted for (i) Wife’s reasonable needs, (ii) the standard of living the Parties were accustomed to during the marriage, (iii) the property apportioned to Wife pursuant to N.H. RSA 458:16-a, and (iv) the factors set forth in N.H. RSA 458:19. Moreover, Husband lacks the ability to pay a greater amount of alimony to Wife. The trial court’s alimony award is reasonable and is not an unsustainable exercise of discretion.

The statutory authority for an award of alimony is N.H. RSA 458:19, which provides:

Upon motion of either party for alimony payments, the court shall make orders for the payment of alimony to the party in need of alimony . . . if the motion for alimony payments is made within 5 years of the decree of nullity or divorce and the court finds that:

(a) The party in need lacks sufficient income, property, or both, including property apportioned in accordance with RSA 458:16-a, to provide for such party’s reasonable needs taking into account the style of living to which the parties have become accustomed during the marriage; and

(b) The party from whom alimony is sought is able to meet reasonable needs while meeting those of the party seeking alimony, taking into account the style of living to which the parties have become accustomed during the marriage; and

(c) The party in need is unable to be self-supporting through appropriate employment at a standard of living that meets reasonable needs

A. Trial court properly determined based upon the evidence that Wife's need for alimony totaled \$4,700.00 per month

The trial court properly excluded of what it characterized as a portion of Wife's "extraordinarily high" expenses for the Campbell Road Property for purposes of determining a reasonable alimony award. Wife was aware the property was in poor condition and required extensive repairs when she acquired it. Wife acquired the property with knowledge that the acquisition would increase her monthly housing and utility expenses and, therefore, those expenses should not be considered in determining a reasonable alimony otherwise based upon a purported marital lifestyle. Wife's housing and utility expenses on her Final Hearing Financial also significantly exceed the same category of expenses attributed to her residence at the Parties' previous marital home.

In her Brief, Wife argues that it was error for the trial court to exclude certain of her claimed housing and utility expenses without publishing specific findings. Wife is misguided in her assertion. The trial court properly reduced only a portion of claimed expenses because Wife will have utility expenses at her new residence. Moreover, the extraordinarily high reported expenses are readily ascertainable by comparing her Final Hearing Financial to her prior financial affidavits, by way of example: \$495.00 per month for heating oil; \$156.00 per month for water and sewer; \$86.00 per month for trash collection; \$100.00 per month for pest control, etc. As a result, it was unnecessary for the trial court to recite each and every home expense it adjusted by its Decree. The trial court's decision was not erroneous.

The trial court also properly excluded Wife's uninsured claimed medical expense of \$429.00 per month and uninsured dental expense of \$316.00 per month in determining the alimony award. Those expenses were not actually incurred by Wife. The expenses represented the speculative costs Wife claimed she would incur if she elected to undergo certain medical procedures. There was no evidence Wife would actually undergo the procedures, nor was there evidence of the actual costs of the claimed prospective procedures. Nor did the evidence support a finding of the extent to which her insurance coverage would provide for payment of the claimed prospective procedures. Therefore, it was reasonable based upon the evidence for the trial court to exclude the expenses. In her Brief, Wife also argues that it was error for the trial court to exclude these uninsured expenses without making specific findings. In fact, the trial court made specific findings that these expenses were speculative through Wife's testimony. Wife's assertion that Husband did not "dispute" these expenses is factually inaccurate as Wife was questioned thoroughly on these high expenses at the final hearing. *Tr.* at 48-49.

An analysis of Wife's competing financial affidavits underscores the reasonableness of the trial court's order of alimony. If Wife's Final Hearing Financial expenses are reduced by (i) her monthly income, (ii) the difference between claimed housing expenses reported on her Final Hearing Financial (excluding mortgage and property taxes) and those reported on her prior financial affidavits, (iii) the difference between reported utility expenses on her Final Hearing Financial and reported utility expenses on her prior financial affidavits, (iv) the reported uninsured medical and dental expenses, and (v) reported voluntary contributions to her 401(k) and Health Savings Account, then the reasonableness of the Court's alimony is manifest. The analysis is depicted as follows:

Temporary Financial

| | |
|-------------|---|
| \$10,434.00 | (Final Hearing Financial monthly expenses) |
| \$ 2,594.27 | (Wife's monthly gross income) |
| \$ 865.00 | (Difference in housing expenses between each financial) |
| \$ 732.00 | (Difference in utility expenses between each financial) |
| \$ 429.00 | (Speculative uninsured medical expense) |
| \$ 316.00 | (Speculative uninsured dental expense) |
| \$ 548.00 | (Voluntary 401(k) contribution) |
| \$ 366.00 | (Voluntary HSA contribution) |

AMOUNT NECESSARY TO COVER REMAINING EXPENSES **\$4,583.73**

Modification Financial

| | |
|-------------|---|
| \$10,434.00 | (Final Hearing Financial monthly expenses) |
| \$ 2,594.27 | (Wife's monthly gross income) |
| \$ 865.00 | (Difference in housing expenses between each financial) |
| \$ 516.00 | (Difference in utility expenses between each financial) |
| \$ 429.00 | (Speculative uninsured medical expense) |
| \$ 316.00 | (Speculative uninsured dental expense) |
| \$ 548.00 | (Voluntary 401(k) contribution) |
| \$ 366.00 | (Voluntary HSA contribution) |

AMOUNT NECESSARY TO COVER REMAINING EXPENSES **\$4,799.73**

\$4,700.00 per month as alimony was reasonable and supported by the evidence. As is customary, Wife's monthly gross income should be applied against her expenses to determine her alimony award. Moreover, the additional housing and utility expenses reported by Wife by her Final Hearing Financial are of a character she voluntarily incurred and, therefore, should be excluded. It is also reasonable to allocate Wife the amount of the housing and utility expenses she incurred at the marital home as these amounts reflect the marital lifestyle.⁵ In fact, such an allocation is generous as the marital home is nearly twice the size of the Wife's current residence and presumably costs more to heat, light, etc. And Wife's utility expenses are likely to decrease once the repairs she testified to are complete. Furthermore, Wife, a mere seven months prior, submitted the Modification Financial which contained an expense sheet entitled "Campbell Road

⁵ Husband, through counsel, proposed this position at the final hearing. *Tr.* at 52.

Expenses” which showed that her housing and utility expenses for this property were substantially lower than the marital home’s expenses.

The uninsured medical and dental expenses reported were also properly excluded as they were speculation. Wife’s voluntary 401(k) expense and her voluntary contributions to her Health Savings Account should also be excluded in determining a reasonable alimony award. The purpose of alimony is to allow Wife to meet her reasonable needs based upon marital lifestyle, not to provide a recipient with excess cash. In fact, the trial court’s alimony award was quite generous.

The trial court’s findings also do not account for the other monthly expenses reported by Wife on her Final Financial which reflected an extraordinary increase to a level vastly exceeding those incurred in the course of the marriage, to wit:

| <u>Expense</u> | <u>Modification Financial</u> | <u>Final Hearing Financial</u> | <u>Increase</u> |
|----------------------|-------------------------------|--------------------------------|-----------------|
| Vehicle Maintenance | \$100.00 | \$362.00 | 262% |
| Clothing and Shoes | \$200.00 | \$579.00 | 189% |
| Pet Food and Care | \$ 35.00 | \$110.00 | 186% |
| Gifts | \$ 10.00 | \$102.00 | 920% |
| Newspapers/Magazines | \$ 7.00 | \$ 42.00 | 514% |

The trial court reasonably concluded that the alimony awarded will allow Wife to meet her reasonable expenses and maintain the marital lifestyle she endured the course of a marriage of nine years. The marriage was short term.

It is clear that there was a reasonable and objective basis for the trial court to award alimony to Wife in the amount of \$4,700.00 per month. The award will allow Wife to maintain the marital lifestyle based upon the factors enumerated in N.H. RSA 458:19-a, including the attendant tax consequences of the award. The trial court’s award is by no means an unsustainable exercise of discretion.

B. Trial court awarded Wife a significant amount of assets by way of property distribution

The trial court's alimony award must be viewed in conjunction with its property distribution. *N.H. RSA 458:19-a(1)*. Wife was awarded the following:

| <u>NON-RETIREMENT ASSETS</u> | <u>VALUE</u> ⁶ |
|--|----------------------------------|
| Marital home sale proceeds | \$ 158,407.97 |
| 138 Campbell Road, Bedford NH (equity) | \$ 57,079.91 |
| 2013 Subaru Outback (equity) | \$ 7,219.05 |
| 2006 Mazda 5 | \$ 3,987.00 |
| American General Life Insurance #4545 | \$ 3,220.05 |
| American General Life Insurance #7032 | \$ 5,262.45 |
| American General Life Insurance #7033 | \$ 4,849.77 |
| Prudential Life Insurance #0756 (net cash value) | \$ 1,528.51 |
| Old Line Life Insurance policy | Unknown |
| Fidelity Investment Mutual Funds #3606 | \$ 68,348.65 |
| AST America Stock #3881 | \$ 534.43 |
| Digital Federal Credit Union #539-1 | \$ 107.57 |
| Discover Bank Savings #9303 | \$ 2,771.30 |
| Discover Bank Savings #9174 | \$ 39.68 |
| Duke Energy Stock #5587 | \$ 3,074.39 |
| E*TRADE Securities Brokerage #8497 | \$ 22,198.30 |
| E*TRADE Savings #3068 | \$ 512.60 |
| Enbridge/CST Account | \$ 3,850.16 |
| Fidelity Investments #6503 | \$ 29,050.47 |
| TOTAL | \$372,041.80 |
| <u>RETIREMENT ASSETS</u> | |
| Transamerica/ SJ Physician Services, Inc. | \$170,800.98 |
| E*TRADE Securities Roth IRA #8230 | \$ 321.48 |
| E*TRADE Securities IRA #4333 | \$ 23,428.10 |
| Fidelity Roth IRA #9142 | \$ 1,813.85 |
| Fidelity Destiny Plan #7577 | \$ 81,305.62 |
| Principal Life Insurance Co. 401(k) #5767 | \$155,732.45 |
| Fidelity Tenet 401(k) | \$ 251.08 |
| Vanguard Roth IRA #3581 | \$ 38,050.80 |
| TOTAL | \$471,704.36 |

⁶ The asset values have been calculated using Wife's Final Hearing Financial. *App.* at 13.

In total, Wife was awarded \$843,746.06 in asset value. Wife's pre-marital assets at were valued at \$282,002.83 at the time of final hearing for divorce of this short-term marital relationship. *App.* at 393. The property award almost tripled Wife's net worth over the Parties' short-term marriage, despite the trial court's finding that Husband's contributions to the marriage were greater than Wife's and that Wife made virtually no financial contributions to the marriage. *Decree* at ¶3, p.1; ¶5, p.2. Wife benefited from this disparate division of assets, in addition to alimony in the amount of \$4,700.00 per month until retirement age (an alimony duration of over five years which does not include the Wife's receipt of temporary alimony, nor Severance Alimony, nor Deferred Compensation Alimony is awarded by the trial court). Wife benefited from the award of the additional alimony described which she shall likely receive after she reaches her own retirement. The Severance Alimony or Deferred Compensation Alimony, as the case may be, will allow Wife to maintain the same lifestyle she enjoyed in the short-term marriage to Husband after she reaches retirement age.

The alimony award, viewed in conjunction with property distribution, was generous and does not reflect an unsustainable exercise of discretion.

C. Husband does not have the ability to pay additional alimony to Wife

Husband's Final Hearing financial affidavit accurately reports monthly expenses substantially exceeded his Base Income. Personal debt had increased in excess of \$11,000.00 in a mere seven months. Despite the exemplary reduction of alimony expense on his financial affidavit to \$3,680.00 per month, Husband's monthly expenses nonetheless exceed his Base Income. Husband's monthly expenses even exceeded his gross base salary on his "Example with Johnson Mortgage – MINIMAL" expense sheet where he significantly reduced his monthly expenditures to the bare necessities.

II. TRIAL COURT DID NOT ERR IN CLASSIFYING HUSBAND’S DEFERRED COMPENSATION AND SEVERANCE BENEFIT AS INCOME

Based upon the evidence, the trial court reasonably held that based upon terms of Husband’s Deferred Compensation Agreement and Employment Agreement (severance) it is more equitable to treat these unvested benefits as income for purposes of additional alimony, rather than to treat the benefits as assets for purposes of property distribution. The trial court’s property distribution was reasonable based upon the evidence and was not an unsustainable exercise of discretion.

A. Husband’s future deferred compensation and severance benefits were not acquired during the marriage and are not assets pursuant to N.H. RSA 458:16-a, I

N.H. RSA 458:16-a, I provides:

Property shall include all tangible and intangible property and assets, real or personal, belonging to either or both parties, whether title to property is held in the name of either or both parties. Intangible property includes but it is not limited to, employment benefits, vested and non-vested pension or other retirement benefits, or savings plans...

N.H. RSA 458:16-a, II provides:

When a dissolution of a marriage is decreed, the court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution of property, . . . unless the court decides that an equal division would not be appropriate or equitable after considering one or more of [fifteen enumerated] factors. ...

When read in conjunction, these statutory provisions “show the legislature’s intention that marital property includes any property acquired up to the date of a decree of legal separation or divorce.” *Holliday v. Holliday*, 139 N.H. 213, 216 (1994) (emphasis added).

Neither of the described agreements is an “employment benefit” or “other retirement benefits” as contemplated by the statute. *N.H. RSA 458:16-a, I*. They are contractual in nature. For example, they are not in any sense or definition recognized under ERISA or other federal

law or regulatory provision as a “vested or non-vested pension or other retirement benefit or savings plan.” *N.H. RSA 458:16-a, I.* Both are merely contractual by nature. Neither is a tax deferred account akin to a 401(k) plan, pension benefit, IRA, stock option, etc. Neither agreement carries vested rights. Neither agreement carries an enforcement mechanism against the employer. Each absolves the employer from enforcement mechanisms, leaving the employee with nothing more than an “unsecured general creditor” claim.

Husband’s deferred compensation benefit and severance benefit were not “acquired” during the marriage for purposes of equitable distribution pursuant to N.H. RSA 458-16-a. There was nothing in the trial court’s “hands” to distribute to the Parties. At the time of the divorce, Husband had merely a contractual right created an expectancy of post-separation income based upon the satisfaction of conditions subsequent.

B. Husband’s non-vested deferred compensation is future income and properly excluded from the marital estate

New Hampshire law is silent with respect to the treatment of unvested deferred compensation benefit incident to a divorce as income versus marital property. However, a substantial number of jurisdictions have addressed the issue. *Dunham v. Dunham*, 125 P. 3d 1015 (Wyo. 2006); *In re Marriage of Wendt*, 995 N.E. 2d 439 (Ill. App. Ct. 2013); *Skelly v. Skelly*, 780 N.W.2d 368 (Mich. App. Ct. 2009); *Edwards v. Edwards*, 428 S.E.2d 834 (N.C. App. Ct. 1993).

To determine whether deferred compensation is income versus marital property, courts have observed whether the compensation was earned during the marriage. *Dunham*, 125 P.3d at 1018; *Wendt*, 995 N.H. 2d at 442; *Skelly*, 780 N.W.2d at 371. Courts have observed the nature of the deferred compensation, i.e., whether the compensation is vested or merely an expectancy of future income. *Dunham*, 125 P.3d at 1018 (“[W]ith respect to future property, we think the

rule must be that, when a court divides property incidental to the granting of a divorce, the court is limited by the amount of property in its hands for division and a mere expectancy is not subject to division”) (citation omitted); *Skelly*, 780 N.W.2d at 371; *Wendt*, 995 N.E.2d at 443. The courts have also looked at whether a mechanism exists for the employee to enforce his rights to deferred compensation against his employer. *Wendt*, 995 N.E.2d at 443.

If the deferred compensation was a mere expectancy during the marriage, courts have treated it as income rather than as an asset. *Dunham*, 125 P.3d 1015 (The husband’s deferred compensation, which accrued during the marriage, was treated as income for child support where the compensation was a mere expectancy at the time of the parties’ separation.); *Wendt*, 995 N.E. 2d 439 (The husband’s deferred compensation, which accrued during the marriage, was treated as income for child support where the husband had no contractually enforceable right to the compensation and needed to remain at his employment post-separation to obtain it.); *Edwards*, 428 S.E.2d 834 (The husband’s deferred compensation accrued during the marriage was excluded from the marital estate because it was a mere expectancy at the time of the parties’ separation).

To determine whether Husband’s unvested deferred compensation benefit is income versus marital property, the analysis in *Skelly v. Skelly* is instructive. In *Skelly*, the parties had been married for twenty-five years. *Skelly*, 780 N.W.2d at 369. The trial court entered a judgment of divorce on July 23, 2008. *Id.* at 370. The husband was the Director of International Tax at Ford Motor Company. *Id.* at 369. Pursuant to an employment agreement, the husband was eligible for deferred compensation in the form of a “retention bonus.” *Id.* The retention bonus was designed to “entice” the husband to remain with the company. *Id.* The bonus totaled \$108,000.00 and was to be paid in three installments. The husband received the first installment

payment of his retention bonus in the amount of \$13,500.00 during the marriage. *Id.* If the husband remained employed by Ford on May 31, 2008, and on May 31, 2009, he would receive second and third installment payments of his retention bonus totaling \$36,000.00 each. If the husband did not remain employed at Ford through May 31, 2009, he was required to pay back the entire retention bonus to his employer. *Id.* The trial court held that the first two installment payments of the husband's retention bonus, paid during the marriage, were marital property. *Id.* The husband appealed.

The Court of Appeals held that the trial court erred when it treated any portion of the retention bonus as marital property. *Id.* As part of the rationale for its decision, the Appeals Court reasoned that the "retention bonus was not earned during the marriage; thus no portion of the retention bonus was marital property." *Id.* The Appeals Court further reasoned as follows:

Although two installation payments were made during the marriage, [husband] had not earned that money when it was disbursed because he had not satisfied the condition subsequent (i.e., remain employed until May 31, 2009) required by the agreement between him and his employer.

Id. at 371. The Court went on to state:

[F]uture, speculative bonuses do not fit into either the category of marital assets, or separate assets, because they do not yet exist. These bonuses were not earned during the marriage and are based solely on the potential occurrence of future events unrelated to the marriage.

Id. The instant case is on all fours with *Skelly*. As in *Skelly*, Husband has a contractual claim to deferred compensation. Husband's contractual claim originates from his Deferred Compensation Agreement. The consideration for the agreement, as in *Skelly*, is to entice him to continue his employment at SJ Physician Services. The agreement provides:

[T]he Employee has promised to rendered (sic) the Employer many years of valuable service and it is the desire of the Employer to have the benefit of his continued loyalty, service, and counsel, and also to assist him in providing for the contingencies of retirement or death...

Id. As in *Skelly*, Husband's receipt of deferred compensation is entirely dependent upon his satisfaction of conditions subsequent post-separation (i.e., remaining employed at SJ Physician Services on first of the month following his 65th birthday). Husband has no mechanism available to enforce contractual claims against SJ Physician Services. If Husband terminates his employment preceding age 65, he receives no deferred compensation. Moreover, as in *Skelly*, Husband's deferred compensation benefit was not earned during the marriage, nor is it the product of any joint efforts of the Parties. To the contrary, Husband's deferred compensation benefit can only be earned post-separation. Any deferred compensation benefit is future income to Husband. The trial court did not err in excluding Husband's unvested deferred compensation from the marital estate.

C. Husband's severance benefit is future income, properly excluded from the marital estate

New Hampshire law is also silent with respect to the classification of an unvested severance benefit incident to divorce as income versus marital property. A substantial number of other jurisdictions have, however, addressed the issue applying similar approaches in analyzing severance benefits incident to a divorce.

The approach has been deemed the "replacement approach." *Davis v. Davis*, 87 P.3d 640, 642 (Okla Civ. App. 2003) (citation omitted); *see, Locskovich v. Locskovich*, 496 S.E.2d 157 (Va. Ct. App. 1998); *In re Marriage of DeShurley*, 255 Cal. Rptr. 150 (Cal. Ct. App. 1989); *Wiener v. Wiener*, 57 N.Y.S. 2d. 197 (N.Y. App. Div. 2008).

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." *Locskovich*, 496 S.E.2d at 161. If the nature of the

severance was to replace post-separation earnings, then it is excluded from the marital estate. *Id.* In making the determination, courts examines the terms upon which the severance was granted. *Id.* at 162; *see also, Wiener*, 57 N.Y.S. 2d. at 201.

On the issue of Husband's severance benefit, *Davis* is instructive. In *Davis*, the husband was informed after the parties separated, but before they were divorced, that his position was being eliminated due to downsizing. *Davis*, 87 P.3d at 642. He had been at his position for twenty-two years and was offered a severance benefit. *Id.* The husband's employer calculated the amount of his benefit based upon twenty-two years of service with the company. *Id.* To obtain the benefit, he signed a waiver and release of legal, equitable, or other claims against his employer. *Id.* The trial court excluded his benefit from the marital estate. *Id.* at 643. The wife appealed, arguing that because the severance benefit was based upon the husband's twenty-two years of service, all of which took place in the course of the marriage, the severance benefit was marital property subject to division. *Id.* at 642. The Court of Appeals affirmed the trial court's ruling. *Id.* at 643. The court stated that the husband's severance was to replace earnings he would have earned after the marriage had his employer not laid him off, and on the express condition that he forgo his right to bring suit against his employer. *Id.* The court reasoned that neither event was related to the parties' "joint efforts during the marriage." *Id.* The court also stated that the fact the husband's employer calculated the amount of the severance benefit based upon his years of service did not alter its conclusion. *Id.*

Other jurisdictions have expressly rejected using the length of a party's service in the course of the marriage to determine if a severance benefit should be included in the marital estate. *See, Wiener*, 868 N.Y.S. 2d 197 ("*Olivo v. Olivo*, 82 N.Y. 2d 202, 624, N.E. 2d 151, 604 N.Y.S. 2d 23 (1993) rejected a 'length of service' test for marital property.")

Here, Husband's Employment Agreement makes it plain that he will receive a lump sum severance if he terminates his employment before reaching the age of 65, except for termination with cause. As in *Davis*, the benefit is calculated based on Husband's years of service at his employment. In exchange for this benefit (and other employment benefits), SJ Physician Services requires Husband to agree not to engage in any other business activities in the course of his employment, not compete with SJ Physician Services for one year following termination, and to submit to arbitration in relation to any potential claims against SJ Physician Services. The severance benefit is not, per terms of the Agreement, compensation for employment service undertaken by Husband in the years he was married to Wife. The severance benefit is not the product of joint efforts by the Parties during the marriage. Rather, the expressed intent and purpose of the Agreement is to replace Husband's lost post-separation future earnings lost due to his termination. Husband's receipt of lost future earnings is income. Consequently, the trial court properly excluded the Husband's severance benefit from the marital estate.

D. Case Law cited by Wife in support of claim that Husband's deferred compensation and severance benefits are marital assets is inapposite.

In her Brief, Wife cites to *Halliday v. Halliday*, 134 N.H. 388 (1991); *Blanchard v. Blanchard*, 133 N.H. 427 (1990); and *In re Valence*, 147 N.H. 663 (2002) to support her contention that Husband's unvested benefits are marital property. These cases are inapposite.

Halliday treated a defined benefits pension plan, an asset by its nature, which squarely falls within the language of N.H. RSA 458:16-a. Similarly, *Blanchard* treats a vested military pension. *Valence* also treats an asset in the form of individual stock options. Nonetheless, Wife argues that these cases support her contention that the benefits are "employment benefits" under N.H. RSA 458:16-a. The contention is unsupported by the cited authorities. The benefits were not acquired at the time of the Parties' separation. The benefits were mere contractual rights to

future income subject to conditions subsequent. There were no assets in the trial court's "hands" to distribute between the Parties.

Valence also case makes it plain that "compensation for services to be rendered after the marriage is future income, which cannot be considered property belonging to a party at the time of the dissolution of the marriage." *In re Valence*, 147 N.H. at 667. In her Brief, Wife cites to *Heinrich* for the proposition that "retained earnings ultimately become marital property." To the contrary, *Heinrich* stands for the proposition that in order for retained earnings to become marital property they must be "received and retained during the marriage." *Heinrich* 164 N.H. at 362 (emphasis added).

Husband's benefits are future income. Husband's deferred compensation benefit is future income he will earn for post-separation service at SJ Physician Services. The severance benefit is a replacement for lost future income. As such, Husband's benefits are future income which cannot be treated or be distributed as marital property.

E. It is equitable to treat Husband's deferred compensation and severance benefits as income

It is fair and reasonable, indeed it is equitable, to treat Husband's unvested deferred compensation and severance benefits as future income rather than as marital property.

If Husband's unvested benefits were treated as an asset, Wife would be unjustly enriched. Wife would be awarded one-half of the "marital portion" of Husband's future earnings which were not a product of the marital partnership. The earnings were not earned, received, or retained in the course of the marriage. Such a position would run contrary to New Hampshire case law. *In the Matter of Heinrich and Heinrich*, 164 N.H. 357, 362 (2012) ("[F]uture earnings of a spouse from employment are not considered to be property at the time of the divorce." (citations omitted)). In addition, Husband would be harmed if Wife was awarded one-half of

his unvested deferred compensation benefit or unvested severance benefit. The purpose of the Husband's deferred compensation benefit is to "assist [Husband] in providing for the contingencies of retirement or death." *App.* at 66. Similarly, the purpose of his unvested severance benefit is to replace his lost future earnings from SJ Physician Services in the event of his termination before age 65. Wife's position, if adopted, effectively renders all such benefits marital property regardless of when they are received or retained. Under Wife's proposal, all that would be required is that an expectancy be obtained during the marriage. This is contrary to New Hampshire case law. *C.f. Goodlander*, 161 N.H. 490 (2011).

Moreover, if the Husband's benefits were treated as marital property as Wife has proposed, the trial court would have been within its discretion to award him the benefits free and clear of Wife. *In re Letendre*, 149 N.H. 31, 37 (2002) ("A trial court is not precluded from awarding a particular asset in its entirety to one party"). For example, courts in many other jurisdictions have awarded a spouse their severance benefits free and clear of any right, title, or interest of the other spouse. *Luczkovich*, 496 S.E.2d 157 (Husband's severance benefit was awarded to him free and clear of Wife); *Deshurley*, 255 Cal. Rptr. 150 (same).

The trial court properly employed an equitable approach to the apportionment of the benefits by treating them as the equivalent of post-separation bonuses. Due to nature of the benefits, the trial court properly awarded Wife additional alimony from the marital portion of each of the Husband's unvested benefits, if they are ever received, as income. This equitable apportionment Husband's benefits acknowledges Husband's need for the income upon termination of employment, and to plan for the contingencies of retirement, while acknowledging the benefits accrued, in part, in the course of the marriage. As a result, the trial

court's treatment of the Husband's benefits as future income akin to bonuses was equitable based upon the circumstances and was not an unsustainable exercise of discretion.

F. Trial court's property distribution was reasonable based upon the evidence; equitable; and within its discretion.

In her Brief, Wife argues that the future deferred compensation and severance benefits Husband may receive must be classified as marital assets and subject to distribution. The argument is misguided. The critical determination is "not whether assets are marital assets, but whether the trial court's distribution is equitable and within its discretion." *Holliday*, 139 N.H. at 216. In order to make the determination, the trial court must decide whether an "equal division is an equitable division of property" unless it decides that "an equal division would not be appropriate or equitable" based upon the fifteen enumerated factors in N.H. RSA 458:16-a, II. A short-term marriage "may be considered differently" than a long-term marriage. *Id.* at 217 (*quoting Rahn v. Rahn*, 123 N.H. 222, 225 (1983)).

For the reasons articulated herein, Husband's deferred compensation and severance benefits were not acquired or retained in the course of the marriage and are future income. The benefits were not marital assets and were properly excluded from the marital estate. The trial court applied the factors enumerated in N.H. RSA 458:16-a to order division of the Parties' marital estate. The property distribution ordered was equitable and, in fact, awarded Wife a greater proportion of the assets, upon the specific findings made. The trial court specifically found that the Parties' marriage was "of modest duration." *Decree*, ¶5, p. 2. The Parties had no children. *Id.* at ¶2, p. 1. Wife "essentially has remained unemployed throughout the marriage." *Id.* at ¶3, p. 1. The "only source of income was that earned by Husband and he paid all of the couple's expenses." *Id.* The trial court also found that Husband "worked long hours, easily up to 60 hours weekly" and credited his testimony 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.” *Id.* at ¶5, p. 1; ¶1, p. 2. The trial court even found a “disparity between husband’s contributions and wife’s contributions in favor of husband.” *Id.* at ¶5, p. 2.

Wife was nonetheless awarded a greater proportion of the marital assets because she is “closer to retirement and has fair (sic) less opportunity to acquire more assets in the future.” *Id.* This favorable award was made despite the short-term nature of the marriage. The trial court’s property distribution is generous to Wife and was not an unsustainable exercise of its discretion.

III. TRIAL COURT’S TREATMENT OF HUSBAND’S DEFERRED COMPENSATION AND SEVERANCE BENEFITS WAS NOT AN UNSUSTAINABLE EXERCISE OF DISCRETION.

The trial court’s apportionment of the Husband’s unvested benefits was reasonable based upon the evidence presented and was equitable. For the reasons previously stated herein, the Husband’s benefits are future income and not marital assets. The trial court properly treated the benefits as the equivalent of post-separation bonuses and awarded Wife a percentage of the income that accrued during the marriage as additional alimony if it is ever received by Husband.

A. Trial court properly apportioned Husband’s deferred compensation benefit by calculating marital portion of the benefit and awarding Wife seventeen percent of the marital portion as additional alimony

The trial court properly calculated the marital portion of Husband’s deferred compensation benefit by dividing the years of service during the marriage (9) by the number of years necessary to obtain the Husband’s current entitlement (21). This yielded the percentage of the income that accrued during the marriage, that is, 41% of \$100,000 (\$41,000 per year). In fact, Wife agreed to this apportionment for purposes of trial. *Tr.* at 99.

The trial court then properly treated each payment as the equivalent of a post-separation income and awarded Wife 17% of \$41,000 per year (the same percentage used to calculate her

monthly base alimony) as additional alimony. As a result, if Husband receives deferred compensation, then Wife will receive \$6,970.00 per year for ten years as additional alimony. The trial court's approach is in accord with other jurisdictions that have addressed similar types of benefits. *See, Dunham*, 125 P.3d 1015; *Skelly* 780 N.W. 2d 368; *Edwards*, 428 S.E.2d 834; *Wendt*, 995 N.E. 2d 439. The trial court also properly apportioned Husband's potential death benefit by subtracting the current death benefit (\$100,000.00 per year) from the death benefit applicable prior to the marriage (\$50,000.00) to yield the marital death benefit accrued during the marriage as \$50,000.00. The trial court then properly awarded Wife 17% of the death benefit so calculated, namely, \$8,500.00 annually. The treatment of Husband's deferred compensation benefit as the equivalent of a post-separation bonus is proper because it accounts for the fact that any future income received by Husband, as is the case of a post-separation bonus, was not received or retained in the course of the marriage and is not marital property. The percentage applied in the methodology of determining the proportion is also reasonable given the short-term duration of the marriage.

B. Trial court properly apportioned Husband's severance benefit by calculating the marital portion of the benefit and awarding Wife seventeen percent of the benefit as additional alimony

The trial court properly calculated the marital portion of Husband's potential severance benefit. It subtracted Husband's current accrued severance benefit (\$281,000.00) from his accrued severance benefit at the time of the marriage (\$137,000.00). This yielded a "marital portion" of the benefit, namely, \$144,000.00. The trial court then properly treated the severance benefit as post-separation bonus income and awarded 17% of that calculated benefit as additional alimony, namely, \$24,480.00. The trial court's apportionment of Husband's severance benefit was generous, as other jurisdictions have awarded a spouse his/her severance benefit outright,

considering the nature of the benefit as a replacement for lost future earnings. *See Luczkovich*, 496 S.E. 2d 157; *DeShurley*, 255 Cal. Rptr. 150.

The treatment of Husband's severance benefit as the equivalent of a post-separation bonus is proper because it accounts for the fact that any future income received by Husband, like in the case of a post-separation bonus income, was not acquired in the course of the marriage, and as such is not marital property. This treatment is also proper given the short-term nature of the parties' marriage.

CONCLUSION AND REQUEST FOR RELIEF

For the reasons outlined herein, the Appellee, Mitchell G. Cohen, respectfully requests that the Court affirm the trial court's ruling in all respects.

Dr. Cohen **respectfully requests fifteen minutes of oral argument** before the full Court.

Ronald J. Caron will present oral argument for Dr. Cohen.

Respectfully submitted
MITCHELL G. COHEN,
By his Attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

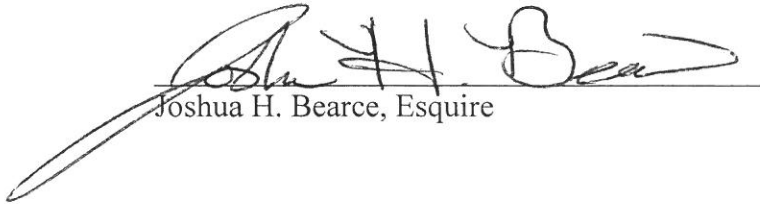
Dated: August 23, 2018

By:


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Certification of Service

On the 23 day of August, 2018, I hereby certify that two (2) copies of the foregoing Appellee's Brief has this day been forwarded by U.S. mail, postage prepaid, to Janet E. Dutcher, Esquire.



Joshua H. Bearce, Esquire