

STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2019-0734

IN THE MATTER OF MICHAEL GREENBERG AND ANNE GREENBERG
(N/K/A ANNE WINKLER)

BRIEF OF MICHAEL GREENBERG PURSUANT TO RULE 7
FROM JUDGMENT OF THE CIRCUIT COURT – NASHUA FAMILY DIVISION

Michael Greenberg, Appellant
By and through his counsel

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QUESTIONS PRESENTED

1. In light of the fact that New Hampshire is a notice pleading state, requiring a pleading to inform the opponent of the theory and relief sought, the trial court erred when it entered an order including relief for an alleged failure to pay child support, where Ms. Winkler had filed a Petition to Change Order requesting a “new uniform support order based upon a three (3) year review and possibly based on a substantial change in circumstances and not a Motion to Enforce or a Motion for Contempt.

Motion for Reconsideration and Notice of Appeal Issue 1.

2. The trial court erred and abused its discretion when it awarded Ms. Winkler retroactive child support dating back through 2015 in response to her May, 2019 request for a three year review of child support pursuant to NH RSA 458-C:7, where the statute expressly states that “any child support modification shall not be effective prior to the date that notice of the petition for modification has been given to the Respondent.”

Motion for Reconsideration and Notice of Appeal Issue 2.

3. The trial court erred and abused its discretion when it interpreted the parties’ divorce decree and uniform support order as including RSU’s received from Mr. Greenberg’s employer as a source of income on which he must pay child support where the divorce court explicitly ordered that Mr. Greenberg’s restricted stock was not bonus income and was awarded to him free of all interest of Ms. Winkler.

Motion for Reconsideration and Notice of Appeal Issue 3.

4. The trial court erred and abused its discretion when it order Mr. Greenberg to either liquidate, or pay a percentage of the estimated value of his RSU’s, when RSU’s are received and are restricted, and where there is no income realized when received.

Motion for Reconsideration and Notice of Appeal Issue 6.

STATEMENT OF THE CASE

The Parties to this action were divorced by Decree dated December, 2015. See Appendix at page 42, Order dated November 6, 2019. As part of the divorce Order, Ms. Winkler was awarded 61% of the marital estate, to Mr. Greenberg's 39%. See Appendix at page 58, Exhibit 3. The trial court's Final Order states that Mr. Greenberg "is awarded any stock options he may have an interest in with BT free of any interest on the part of" Ms. Winkler. See Appendix at page 49, Final Decree at Section 12(f). At the time of the trial in the divorce, Mr. Greenberg disclosed that his compensation package at Bottomline Technologies consisted of salary, potential bonus and *restricted stock* units. See Transcript at page 66, line 20 – page 67, line 10. Appendix at page 40, Exhibit J (*emphasis added*). The compensation package, properly disclosed to the trial court, made no reference to "stock options" but rather to "restricted stock" units. Appendix at page 40, Exhibit J. The Uniform Support Order "USO" made a provision for the payment of additional child support as follows:

"In addition to regular payments of child support, obligor shall pay, as child support, 28% of any bonus he may receive within 3 days of receipt. Payment shall be accompanied by a pay stub or other evidence of the amount of the bonus."

See Appendix at page 53, Uniform Support Order dated 12/4/15 at paragraph 21. The only stock earned by Mr. Greenberg were the disclosed "restricted stock" disclosed in the offer of employment, which must be the stock referenced by the Divorce Court in the USO.

Following the issuance of the Final Decree in the Divorce matter Ms. Winkler's counsel did not request a reconsideration of the award of all "stock options free of any interest of" Ms. Winkler to Mr. Greenberg. Transcript at page 107, lines 14 – 18. Mr. Greenberg paid child support pursuant to the Uniform Support Order issued as part of the Final Decree, including the payment of 28% of all bonus income. See Transcript at page 65, line 10.

Ms. Winkler initiated a Petition to Bring Forward for Modification of Child Support and an Extension of Alimony on or about May 3, 2019. Appendix at page 33, Petition to Bring Forward. The Petition specifically sought a child support modification based on a three year review and possibly a substantial change in circumstances. Appendix at page 35, Petition to Bring Forward. There was no mention of “restricted stock units” in Ms. Winkler’s pleading nor did she include a Motion for Contempt, Motion to Enforce or a Motion to Modify the Final Decree. See Appendix at page 35, Petition to Bring Forward. Mr. Greenberg was served with the Petition on June 1, 2019, and filed his Answer on June 8, 2019. See Appendix at page 37, Answer. At the time of the hearing Ms. Winkler testified that she was seeking a modification of child support and an extension of alimony. See Transcript at page 12, line 15 – 22. Ms. Winkler testified that she was asking the Court to clarify that additional child support should be paid, based on any bonuses or any restricted stock awards that Mr. Greenberg receives. See Transcript at page 33, line 21 – 25. The request for the inclusion of RSU’s was not included in any of Ms. Winkler’s pleadings.

The trial court acknowledged in its Order on Petition to Change Court Order, that Ms. Winkler “brought this matter forward for a three year review of child support and an extension of alimony.” See Appendix at page 4, Order. In spite of the fact that Ms. Winkler’s pleading merely sought a modification of child support, and an extension of alimony, the trial court entered an Order that made a retroactive award of child support based on Mr. Greenberg’s restricted stock awards, and found him \$90,959.86 in arrears in child support payments dating back to 2015. See Appendix at page 8, Order at page 3. There was no Motion for Contempt based on a failure or refusal to pay court ordered child support. See Appendix generally. There was no request in any pleading to enter a retroactive order on Restricted Stock Units or

Restricted Stock Awards of an arrearage of additional child support. See Appendix at page 33, Petition to Bring Forward. Ms. Winkler requested the trial court to modify child support based upon a three (3) year review, or possibly a significant change in financial circumstances. See Appendix at page 35, Petition.

No Motion to Amend was filed to broaden the scope of Ms. Winkler's request at any point during the pendency of this action. See Appendix generally. At no point during the litigation did Ms. Winkler file a pleading seeking 28% of Mr. Greenberg's restricted stock units as additional child support. See Appendix generally. The trial court's Order provides an award of child support, retroactive to 2015, three years prior to the filing of the underlying Petition to Modify based on a three year review of child support, in direct contravention of the governing statute, and is therefore an error of law and an abuse of discretion.

SUMMARY OF ARGUMENT

Michael Greenberg asserts that the trial court committed an error of law in issuing an order on making a retroactive award of child support based on a request for a three year review of child support under NH RSA 458-C:7. The trial court abused its discretion when it determined that Ms. Winkler's request for a retroactive application of child support, and its attendant order modifying the Divorce Decree, and/or alternatively a contempt/enforce, was appropriate under the circumstances. The trial court undertook an analysis of the existing Divorce Decree, which had not been properly pled or noticed for hearing. The only pleading filed by Ms. Winkler in this matter was a request for a three year review of child support or possibly based on a significant change in financial circumstances. The trial court is restricted by statute as to what can, and should be considered in a three year review. The trial court

effectively modified the existing property award entered by the Divorce court in 2015 without a pleading or evidence of fraud, duress or undue influence.

Ms. Winkler initiated her action under the modification of child support statute, NH RSA 458-C:7, which provides that any modification of a child support obligation shall not be effective prior to the date of notice of the petition to the respondent. New Hampshire has long required a litigant to provide notice of the claims being brought against an opponent in a litigation. NH RSA 458-C:7 allows a prospective modification of child support every three years or upon a substantial change in circumstances. There is no mention of the Divorce Decree, or any request to modify the language of the Final Decree in any pleading filed with the trial court in this matter. The trial court undertook an examination and analysis of the Divorce Decree and determined the Divorce Court intended for Mr. Greenberg to treat his “stock options” as a bonus which would be subject to the payment of additional child support. The question the trial court claims to be before the court, had never been raised prior to Ms. Winkler’s testimony during the hearing. The trial court’s sua sponte and unilateral inclusion of this issue was an error of law.

The provision of the statute that allows for child support modification clearly states that any modification of child support shall not be effective prior to the date of service. Regardless of the plain language used in the statute, the trial court determined it had the authority to enter an award of child support dating back to 2015. The exercise of said authority is both an abuse of discretion and legal error warranting a review and reversal. There is no support for the trial court’s exercise of the power to impose a retroactive order in the statute, court rule or common law.

The parties’ Divorce Decree included a significantly unequal property division, which was not reconsidered or clarified by either party after its issuance. The trial court engaged in an

unrequested, and unsupported modification of the 2015 property distribution. A trial court may engage in the modification of a property division upon evidence of fraud, duress or undue influence. The trial court heard no evidence of fraud, duress or undue influence, and made no such findings. Nonetheless, regardless of the fact the Divorce Decree was clear and unambiguous in its award of stock options, free of all interest of Ms. Winkler, the trial court found Mr. Greenberg should have filed a Motion for Clarification prior to liquidating the stock. The trial court's action is both an error of law and abuse of judicial discretion.

It has been recognized that an asset can be both property and income, such as stock options. Stock options do not become income until they are exercised. RSU's are chargeable to the recipient upon the grant. The value is taxable to the recipient. However, the grant of RSU's does not obligate the grantor to sell the stock. The trial court is requiring Mr. Greenberg to incur a tax consequence, by selling the property immediately, for which it has no authority to order.

The trial court erred as a matter of law, and demonstrated an abuse of judicial discretion when its order required Mr. Greenberg to liquidate a property interest, awarded to him in the Divorce Decree, and then again by his employer to pay additional child support. There is a difference between "stock options" and "RSU's" in that "RSU's" become an asset of the party receiving them upon the grant, but those stock units are property, not income until they are liquidated. The trial court's order requires Mr. Greenberg to liquidate these stock units, upon their receipt. Mr. Greenberg is no longer married to Ms. Winkler. He has the ability and the right to hold the stock units, as they are his property, and not his income. The trial court's order is unsupported by any statute, rule or common law.

The trial court strayed well beyond the issues raised in Ms. Winkler's pleading. The trial court ignored the plain language of the statute invoked by the initiation of this matter, and

ignored the limitations enumerated within the statute. The trial court then made an unsustainable exercise of discretion by engaging in an analysis of the Divorce Decree that had not been pled, nor had it been argued. Finally, the trial court engaged in an impermissible modification of the property division issued by the Divorce Court in 2015 without a pleading, and without the evidence that would enable the court to make a modification. The trial court erred in its interpretation of the law, and in its unsustainable exercise of discretion in determining that it had the authority to enter the order it made.

LEGAL ARGUMENT

A modification order in this state is always subject to review and will be set aside only if it clearly appears on the evidence that there has been an abuse of judicial discretion. Douglas v. Douglas, 109 NH 41 (1968). The Supreme Court will uphold the trial court's decision unless the record does not support it or it is tainted by error of law. In the Matter of Aube and Aube, 158 NH 459, 466 (2009).

NH RSA 458-C:7, II provides that any modification of a child support obligation shall not be effective prior to the date that notice of the petition for modification has been given to the respondent.

- I. THE TRAIL ERRED AND ABUSED ITS DISCRETION WHEN, IN LIGHT OF THE FACT THAT NEW HAMPSHIRE IS A NOTICE PLEADING STATE REQUIRING A PLEADING TO INFORM THE OPPONENT OF THE THEORY AND RELIEF SOUGHT, THE TRIAL COURT ENTERED AN ORDER INCLUDING RELIEF FOR AN ALLEGED FAILURE TO PAY CHILD SUPPORT WHERE MS. WINKLER FILED A PETITION TO CHANGE COURT ORDER REQUESTING "A NEW UNIFORM SUPPORT ORDER BASED UPON A THREE (3) YEAR REVIEW AND POSSIBLY BASED ON A SIGNIFICANT CHANGE OF FINANCIAL CIRCUMSTANCES."**

Ms. Winkler initiated this action as a Modification of Child Support based on a three year statutory review, or potentially a significant change in financial circumstances. The statute specifically provides that modification of a child support orders shall not be effective prior to the date that notice of the modification has been given to the respondent. NH RSA 458-C:7, II, In re: Stall and Stall, 153 NH 163, 166 (2005). Ms. Winkler filed her Petition on or about May 3, 2019. Mr. Greenberg was served with the Petition on or about June 1, 2019, and filed his answer on June 7, 2019. Ms. Winkler's petition was a clear request for a modification of child support going forward, pursuant to the statute. There was nothing in the pleading suggesting Ms. Winkler was seeking a review of past due child support, nor did any pleading reference Mr. Greenberg's "RSU's" or restricted stock units, or any claim that Mr. Greenberg owed her child support from the liquidation of the restricted stock. The trial court acknowledged in its Order that the matter before the court was Ms. Winkler's "three year review of child support and an extension of alimony."

The statute is unambiguous. The terms of the Order cannot predate the notice to the respondent of the underlying request for a modification of child support. NH RSA 458-C:7.

"Notice means:

- a) Service as specified in civil actions, or
- b) Acceptance of a copy of the petition, as long as the petition is filed no later than 30 days following said acceptance by a certified mail receipt,

NH RSA 458-C:7, II.

New Hampshire is a notice pleading jurisdiction, and as such, the Supreme Court takes a liberal approach to the technical requirements of pleadings. City of Keene v. Cleaveland, 167

NH 731, 743 (2015)(quoting Porter v. City of Manchester, 151 NH 30, 43 (2014)); Pike Industries, Inc. v. Hiltz Construction, Inc., 143 NH 1, 3 (1998). “It is well settled that a defendant is entitled to be informed of the theory on which the plaintiffs are proceeding and the redress that the claim as a result of the defendant’s actions.” Pike Industries, supra, (quoting Morancy v. Morancy, 134 NH 493, 497 (1991). In the divorce context, notice to the parties must give the defendant actual notice of hearing *and the issues to be addressed*. Douglas v. Douglas, 143 NH 419, 423 (1999) citing Duclos v. Duclos, 134 NH 42, 44- 45 (1991). (*Emphasis added*).

The New Hampshire Family Court Rules require specificity of pleadings in order to provide notice of the changes being requested. A properly filed petition to change court order includes: “.....the parts of the Court’s order that are being requested to be changed; the specific changes that are being sought;...”. NH Family Court Rule 2.30(B). Ms. Winkler’s Petition to Change Court Order identifies “Child Support Only” and “Alimony” as the specific issues to be addressed identified at Section 9 of her Petition. In her Petition at Sections 11 and 12, regarding the specific requests of the court, Ms. Winkler states “to enter a new Uniform Support Order based upon a three (3) year review and possibly based upon a significant change of financial circumstances.” There is no mention of RSU’s or any allegation of an unpaid child support arrearage.

New Hampshire courts require the inclusion of alimony as an issue, in order to make any award of alimony. In re: Bernier and Bernier, 125 NH 517, 519 (1984). A party must be given a fair notice in an appropriate pleading that alimony is being sought so he or she may answer and offer evidence pertaining to the allowance of alimony. Id. Mr. Greenberg is entitled to the same type of notice required in an alimony case. The issue of a retroactive award of child support is, by its nature, not an action under NH RSA 458-C:7, because that relief is expressly prohibited.

In order to maintain an action for past due child support, Ms. Winkler would have had to have filed another request, under a different statute or theory of recovery. Requiring a party to plead alimony, or contempt, will also serve to formulate relevant issues prior to the trial and thereby provide structure for the proceeding. Bernier, at 519. Ms. Winkler provided no notice of her request for the trial court to undertake reconsideration of the language of the Final Decree with respect to Mr. Greenberg's award of RSU's.

The trial court engaged in an inquiry into whether the "restricted stock" should have been considered a "bonus" under the USO made part of the Final Decree, in spite of the fact that Ms. Winkler's pleading requested only a modification of child support and an extension of alimony. The trial court not only modified child support going forward, but found Mr. Greenberg to be \$90,959.86 in arrears. The trial court concluded that Mr. Greenberg should have paid 28% of the proceeds of his restricted stock units to Ms. Winkler as child support. The trial court entered an Order that far exceeded the requests of Ms. Winkler in her Petition, with no notice, no tax consideration, and no request to interpret the Divorce Decree. The trial court gave no consideration to the fact that the Divorce court made the property division it made, in light of the fact that it had awarded 61% of the marital estate to Ms. Winkler in the divorce.

This Petition to Change Order was only initiated in May 2019. Mr. Greenberg received "notice" of the filing in June, 2019. The trial court's Order in the matter extends an obligation for additional child support retroactively to 2015, four years prior to the filing of the instant action. The award is a clear violation of the statute that Ms. Winkler cited as the basis for her claim. The trial court's award of proceeds from the sale of restricted stock options is a plain error of law. The use of assets for child support does not fall within the variety of circumstances set forth in NH RSA 458-C:5(I) and, therefore, assets are not a relevant circumstance that may be

considered when adjusting a child support obligation. In the matter of Plaisted and Plaisted, 149 NH 522, 526 (2003). The issue of restricted stock units had never been raised prior to the final hearing on Ms. Winkler's Petition to Change Child Support and an Extension of Alimony. There was no notice made to the court or to Mr. Greenberg by Ms. Winkler's pleading.

The trial court scheduled a final hearing on Ms. Winkler's pleading. The issue of Mr. Greenberg's restricted stock was not included in her Petition to Bring Forward and Modify Child Support and Extend Alimony. The trial court based its analysis on its determination that the divorce court's award of restricted stock was limited to the "initial 5000 RSA granted....but not to subsequent awards....." Appendix at page 6, Order page 3. The trial court undertook an analysis that was outside the scope of any issue raised in the underlying pleadings in this case. Further, the trial court imposed language in the Final Divorce Decree that is not present, nor had ever been suggested, at the time of the divorce. The trial court has effectively re-written the Final Order in the divorce, to include a provision that the Divorce court did not include at the time of the issuance of the Order, nor did Ms. Winkler raise the issue in a Motion for Reconsideration of the Final Decree.

II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT AWARDED MS. WINKLER RETROACTIVE CHILD SUPPORT DATING BACK THROUGH 2015 IN RESPONSE TO HER MAY 2019 REQUEST FOR A THREE YEAR REVIEW OF CHILD SUPPORT PURSUANT TO NH RSA 458-C:7, WHERE THE STATUTE EXPRESSLY STATES THAT "ANY CHILD SUPPORT MODIFICATION SHALL NOT BE EFFECTIVE PRIOR TO THE DATE THAT NOTICE OF THE PETITION FOR MODIFICATION HAS BEEN GIVEN TO THE RESPONDENT."

The trial court's Order found Mr. Greenberg in arrears on child support dating back to 2015, four years prior to being served with Ms. Winkler's Motion for Modification of Child Support. The trial court's Order violates the express terms of the statute. The trial court entered

its Order finding that “restricted stock units” which had been awarded to Mr. Greenberg in the divorce, “free of all interest of” Ms. Winkler, should be treated as bonus income and therefore would be subject to additional child support from 2015 forward, in spite of the Final Decree which awarded all stock options to Mr. Greenberg free of all interest of Ms. Winkler. There was no Motion for Contempt or Clarification seeking a determination of the treatment of restricted stock units. This matter was brought forward under NH RSA 458-C:7 seeking a prospective modification of child support. The trial court’s order, which modified child support retroactively to 2015, is a direct violation of the statute and is therefore, an error of law.

This Court has held that by making orders retroactive to a date prior to the respondent receiving actual notice of the filing is legal error. In re: Stall and Stall, 153, NH 163, 166 (2005). The trial court apparently found that Mr. Greenberg should have known that the restricted stock units, awarded to him in the divorce decree free of all interest of Ms. Winkler, were intended to be treated as a “bonus” subject to “additional child support.” Importantly, the Divorce Court issued its Decree awarding stock options to Mr. Greenberg, and separately awarding 28% of any bonus income as additional child support. The trial court modified a material term of the Divorce Decree and imposed a retroactive award to 2015 based on a request for a three year review of child support. By operation of law, the trial court is restrained from modifying the child support award retroactively to a date prior to actual notice of the filing to Mr. Greenberg. The trial court re-wrote the Final Divorce Decree, providing detail the Divorce Court did not include, and ignored the plain language of the Final Decree and the significantly higher percentage of property awarded to Ms. Winkler. The Final Decree did not state that additional child support would be 28% of bonus *and stock options or RSU’s*. The trial court provided relief

which had not been requested in any of Ms. Winkler's filings, and which materially altered the terms of the Final Decree of Divorce.

The trial court's order states "Ms. Winkler brought this matter forward for a three year review of child support and an extension of alimony." See Appendix at page 4, Order. Later in its order, the trial court erroneously states "[t]he question presented to the court is whether the money Mr. Greenberg has earned by selling the RSA's over the years should be treated as a bonus upon which he should have paid child support under Section 21 of the USO, or whether the RSA's fall under a property division in Section 12(f). See Appendix at page 5, Order at page 2. A request for a three year review of child support is a motion that seeks an adjustment to child support prospectively, not retroactively. NH RSA 458-C:7. An inquiry under the statute does not provide the trial court with a means of rewriting terms of the Divorce Decree. The "question presented" was in fact never posed in any pleading filed by Ms. Winkler and is therefore an error and an unsustainable exercise of judicial discretion.

Ms. Winkler had the ability to file an action, in the form of a Motion for Contempt, seeking recovery of proceeds from the sale of restricted stock units. The trial court would have had to have found Mr. Greenberg failed without just cause to obey a prior court order to decree. NH RSA 458:51. However, based on a three year review of child support, the trial court found Mr. Greenberg in arrears to Ms. Winkler in the amount of \$90,959.86, dating back to 2015.

The trial court then included three paragraphs of instruction for the treatment of "restricted stock" moving forward, which would suggest the original Order lacked specificity with respect to their treatment. The trial court dismissed the divorce court's award of the "stock options" to Mr. Greenberg free of all interest of Ms. Winkler, in spite of the fact that the property division reflected a 61/39 percent division of property favoring Ms. Winkler. The trial court's Order with

respect to the inclusion of Mr. Greenberg's RSU's dating back to 2015 is an impermissible modification of a property award and an abuse of discretion.

III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT INTERPRETED THE PARTIES' DIVORCE DECREE AND UNIFORM SUPPORT ORDER AS INCLUDING THE RSU'S RECEIVED FROM MR. GREENBERG'S EMPLOYER AS A SOURCE OF INCOME ON WHICH HE MUST PAY CHILD SUPPORT WHERE THE DIVORCE COURT HAD EXPLICITLY ORDERED THAT MR. GREENBERG'S RESTRICTED STOCK WAS NOT BONUS INCOME AND WAS AWARDED TO HIM FREE OF ALL INTEREST OF MS. WINKLER.

The trial court undertook an analysis of the award of "restricted stock" by the divorce court without a corresponding pleading. The Final Decree in the Parties' divorce is clear and unambiguous with respect to the award of the stock units to Mr. Greenberg. Not only was the issue not properly before the trial court, the trial court ignored the plain meaning of the language the divorce court used in rendering its order. Within the Final Decree of Divorce, the court stated "Petitioner is awarded any stock options he may have an interest in with BT free of any interest on the part of the Respondent." See Appendix at page 49, Order. The trial court found the Final Decree to apply to any "stock options" or "restricted stock" to any interest that existed at the time of the divorce, and any additional restricted stock earned after the divorce was to be treated as a "retention bonus" and subject to additional child support. There is no support for the trial court's conclusion with in the Final Decree, and reflects the trial courts lack of impartiality.

Ms. Winkler had the opportunity to seek clarification of the language within the Final Decree, which she has never done. Ms. Winkler had the opportunity to suggest the proceeds of restricted stock unit sales be included, prospectively, in a calculation of child support. Her pleadings failed to raise the issue of restricted stock. Ironically, the trial court suggests that Mr. Greenberg had an obligation to seek clarification of the Order, in spite of the fact that the issue of

restricted stock had not been raised in any pleading to be considered by the trial court. “It seems pretty clear to the court that, rather than seek a contemporaneous clarification, Mr. Greenberg relied on Section 12(f)....” See Appendix at page 6, Order. The trial court suggested that while Mr. Greenberg should have sought clarification, Ms. Winkler could receive retroactive child support without ever having requested said relief, but had only initiated this case as a three year review of child support and a request to extend alimony pursuant to NH RSA 458-C:7. The trial court is tasked with fairly and impartially deciding the issues presented. In holding Mr. Greenberg to a standard that the trial court refuses to hold Ms. Winkler to, with respect to filing pleadings, demonstrates its lack of impartiality.

The Divorce Decree was issued on December 8, 2015. Ms. Winkler made no filings until she sought a modification of child support and extension of alimony. Nevertheless, the trial court undertook an analysis of the Final Decree. The trial court unilaterally corrected what it determined to be a misstatement in the Final Decree with respect to restricted stock. In spite of the fact that the Divorce Decree awarded of all restricted stock in Bottomline Technologies to Mr. Greenberg free of all interest of Ms. Winkler, and ordered additional child support to be paid on any bonus earned, the trial court Mr. Greenberg in arrears on child support dating back to 2015.

IV. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ORDERED MR. GREENBERG TO EITHER LIQUIDATE, OR PAY A PERCENTAGE OF THE ESTIMATED VALUE OF HIS RSU’S, WHEN THE RSU’S ARE RECEIVED AND ARE RESTRICTED, AND WHERE THERE IS NO INCOME REALIZED WHEN RECEIVED.

The trial court has impermissibly imposed requirements on Mr. Greenberg with respect to his treatment of a property interest. In ordering Mr. Greenberg to liquidate all shares of restricted stock he is awarded, the court has impermissibly modified the property award of the divorce

court, forcing him to incur taxes and disallowing him any discretion with respect to assets acquired after the divorce. Property distributions or stipulations decreed by a court are not retained under continuing jurisdiction of the court and will not be modified unless the complaining party shows that the distribution is invalid due to fraud, undue influence, deceit, misrepresentation, or mutual mistake. Shafmaster v. Shafmaster, 138 NH 460, 464 (1994).

Section 12(f) of the Divorce Decree indicates that the “Petitioner is awarded any stock options he may have an interest in with BT (Bottomline Technologies) free of any interest on the part of the Respondent. Regardless of whether the decree, as modified, reflected the trial court’s original intent, there was no evidence of fraud, undue influence, deceit, misrepresentation, or mutual mistake underlying the original decree that would have justified the modification. In re: Badger and Badger, Case No. 2019-0003, October 16, 2019. The trial court has made an impermissible modification of the Divorce Court’s Final Decree which had not been requested in any pleading, nor supported by the requisite facts and circumstances to enable a court to make a modification of property order.

The trial court undertook an analysis wherein it found the award of Bottomline Technology stock to Mr. Greenberg, free of all interest of Ms. Winkler, only applied to those restricted stock units awarded to Mr. Greenberg at the time of the divorce. The language of the decree makes clear that Mr. Greenberg was awarded *any* stock options he *may* have an interest in with BT.... See Appendix at page 49, Divorce Decree, *emphasis added*. Not only did the trial court undertake an analysis that had not been requested in Ms. Winkler’s pleadings, but it ignored the plain language used by the Divorce Court in its Final Decree. Furthermore the trial court modified the property decree without a showing of fraud, duress, deceit, misrepresentation or mutual mistake.

The trial court ordered that Mr. Greenberg exercise, or sell, all of his restricted stock within 14 days of the first date after release and outside the blackout period, or he shall be required to pay on the unrealized value of the restricted stock units. Stock options are not categorized as income unless and until they are exercised. In the Matter of Dolan and Dolan, 147 NH 218, 221 (2001). The primary difference between stock options and restricted stock is that the value of restricted stock is taxable to the recipient upon the grant. The recipient of restricted stock is under no obligation to liquidate the grant. Stock options are not includable as child support until they are exercised. Id. The trial court has effectively treated restricted stock units as cash, whether Mr. Greenberg sells those stocks or not, because he will now be required to pay child support based on the value of the award alone. Effectively, the trial court prohibits Mr. Greenberg from exercising any discretion whatsoever over the restricted stock because he would have to pay child support on the value of the restricted stock within 14 days after their release and outside any blackout period. The trial court's order is an abuse of discretion in that it is a plain error of law.

Ms. Winkler initiated this matter as a modification of child support based on a three year review of child support, or possibly a substantial change in financial circumstances. There was no request contained in any pleading filed in this matter suggesting a failure to pay child support. There was no suggestion in any pleading that Mr. Greenberg had violated any term of the existing orders. There was simply a request for a three year modification of child support, which the statute makes clear may only be applied prospectively from the date of notice forward. The trial court has abused its discretion by entering an award of child support that predates notice to Mr. Greenberg. The concept of "notice" is more than just service of process. Mr. Greenberg

was given no notice that Ms. Winkler was requesting the trial court to find that he had not complied with the existing support order in this case.

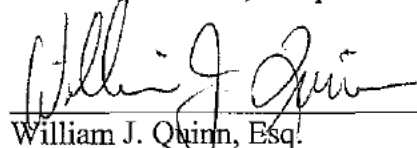
CONCLUSION

For the foregoing reasons, this Court should overturn the judgment of the trial court.

Respectfully submitted,

Michael Greenberg
By his Attorneys,
Brennan, Lenehan, Iacopino & Hickey

Dated: 5/20/20



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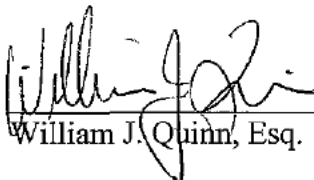
REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Michael Greenberg requests that if oral argument is heard, Attorney William J. Quinn be allowed the time allotted.

I hereby certify that this brief complies the Rule 16(11) in that it does not exceed 9,500 words.

I hereby certify that on May 20, 2020, copies of the foregoing will be forwarded to Robert M. Shepard, Esq., as counsel for Ms. Winkler.

Dated: 5/20/20



William J. Quinn, Esq.