THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case Number: 2019-0734

In the Matter of Michael Greenberg and Anne Greenberg

Rule 7 Appeal from Decision of the 9th Circuit Court-Nashua Family Division

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BRIEF OF RESPONDENT-APPELLEE, ANNE GREENBERG, n.k.a ANNE WINKLER

On the Brief:

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2. The Family Court did not err or abuse its discretion when it awarded the Appellee child support arrearages dated back to 2015 upon a finding that Appellant had not complied with section 21 of the USO. This was not a retroactive Order, but an award of arrearages.

3. The Family Court did not err or abuse its discretion when it interpreted the parties' Final Divorce Decree and Uniform Support Order as including the Restricted Stock Awards (RSA's) received through the Petitioner's employer as income calculable in child support because they were not stock options, but awards that must be treated as income.

4. The Family Court did not err or abuse its discretion when it ordered the Appellant to either liquidate or pay a percentage of the estimated value of his RSA's because despite no income being realized yet, it would be realized when received and have some value.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, OR REGULATIONS INVOLVED

RSA 458-C:7

458-C:7 Modification of Order. –

I. (a) The obligor or obligee may apply to the court or, when the department of health and human services has issued a legal order of support pursuant to RSA 161-C, to the department, whichever issued the existing order, for modification of such order 3 years after the entry of the last order for support, without the need to show a substantial change of circumstances. This section shall not prohibit the obligor or obligee from applying at any time for a modification based on substantial change of circumstances.

(b) Not less than once every 3 years the department shall provide notice to the parties subject to a child support order payable through the department informing them of their right to request a review, and, if appropriate, the right to apply for adjustment of the child support order. The notice provision may be included as part of the initial support order or any subsequent orders.

(c) Not less than once every 3 years the department shall review all child support orders in which there is an assignment to the department pursuant to Title IV-A of the Social Security Act and, if appropriate, apply for adjustment of the child support order in accordance with the child support guidelines.

RSA 458-C:2

458-C:2 Definitions. –

I. "Adjusted gross income" means gross income, less:

(a) Court-ordered or administratively ordered support actually paid to others, for adults or children.

(b) Fifty percent of actual self-employment tax paid.

(c) Mandatory, not discretionary, retirement contributions.

(d) Actual state income taxes paid.

RSA 458–C:7, II

II. 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. "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, and as long as the petitioner provides proof of acceptance by a certified mail receipt. Nothing in this subparagraph shall be construed to affect service as required by law.

RSA 458-C:2, IV

IV. "Gross income" means all income from any source, whether earned or unearned, including, but not limited to, wages, salary, commissions, tips, annuities, social security benefits, trust income, lottery or gambling winnings, interest, dividends, investment income, net rental income, self-employment income, alimony, business profits, pensions, bonuses, and payments from other government programs (except public assistance programs, including aid to families with dependent children, aid to the permanently and totally disabled, supplemental security income, food stamps, and general assistance received from a county or town), including, but not limited to, workers' compensation, veterans' benefits, unemployment benefits, and disability benefits; provided, however, that no income earned at an hourly rate for hours worked, on an occasional or seasonal basis, in excess of 40 hours in any week shall be considered as income for the purpose of determining gross income; and provided further that such hourly rate income is earned for actual overtime labor performed by an employee who earns wages at an hourly rate in a trade or industry which traditionally or commonly pays overtime wages, thus excluding professionals, business owners, business partners, self-employed individuals and others who may exercise sufficient control over their income so as to recharacterize payment to themselves to include overtime wages in addition to a salary. In addition, the following shall apply:

(a) The court, in its discretion, may consider as gross income the difference between the amount a parent is earning and the amount a parent has earned in cases where the parent voluntarily becomes unemployed or underemployed, unless the parent is physically or mentally incapacitated.

(b) The income of either parent's current spouse shall not be considered as gross income to the parent unless the parent resigns from or refuses employment or is voluntarily unemployed or underemployed, in which case the income of the spouse shall be imputed to the parent to the extent that the parent had earned income in his or her usual employment.

(c) The court, in its discretion, may order that child support based on one-time or irregular income be paid when the income is received, rather than be included in the weekly, bi-weekly, or monthly child support calculation. Such support shall be based on the applicable percentage of net income.

RSA 458-C:5

458-C:5 Adjustments to the Application of Guidelines Under Special Circumstances. –

I. Special circumstances, including, but not limited to, the following, if raised by any party to the action or by the court, shall be considered in light of the best interests of the child and may result in adjustments in the application of support guidelines provided under this chapter. The court shall make written findings relative to the applicability of the following:

(a) Ongoing extraordinary medical, dental or education expenses, including expenses related to the special needs of a child, incurred on behalf of the involved children.

(b) Significantly high or low income of the obligee or obligor.

(1) In considering an adjustment when one or both parents have high income, the court shall consider whether the child support amount derived from application of the guidelines substantially exceeds the child's or children's reasonable needs, taking into account the style of living to which the child or children have become accustomed or will experience in either party's home.

(2) In considering an adjustment when one or both parents have low income, the court shall determine how to optimize use of the parents' combined incomes to arrive at the best possible outcome for the child or children, provided that the basic support needs of the child or children are met. In making this determination, the court may consider income tax consequences, the earned income tax credit, the allocation of the right of a

parent to claim a child as a dependent for income tax purposes, and other child-related tax benefits.

(c) The economic consequences of the presence of stepparents, step-children or natural or adopted children.

(d) Reasonable expenses incurred by the obligor parent in exercising parental rights and responsibilities, provided that the reasonable expenses incurred by the obligee parent for the minor children can be met regardless of such adjustment.

(e) The economic consequences to either party of the disposition of a marital home made for the benefit of the child.

(f) The opportunity to optimize both parties' after-tax income by taking into account federal tax consequences of an order of support, including the right to claim the child or children as dependents for income tax purposes.

(g) State tax obligations.

(h) Parenting schedule.

(1) Equal or approximately equal parenting residential responsibilities in and of itself shall not eliminate the need for child support and shall not by itself constitute ground for an adjustment.

(2) In considering requests for adjustments to the application of the child support guidelines based on the parenting schedule, the court may consider the following factors:

(A) Whether, in cases of equal or approximately equal residential responsibility, the parties have agreed to the specific apportionment of variable expenses for the children, including but not limited to education, school supplies, day care, after school, vacation and summer care, extracurricular activities, clothing, health care coverage costs and uninsured health care costs, and other child-related expenses.

(B) Whether the obligor parent has established that the equal or approximately equal residential responsibility will result in a reduction of any of the fixed costs of child rearing incurred by the obligee parent.

(C) Whether the income of the lower earning parent enables that parent to meet the costs of child rearing in a similar or approximately equal style to that of the other parent.

(i) The economic consequences to either party of providing for the voluntary or court-ordered postsecondary educational expenses of a natural or adopted child.

(j) Other special circumstances found by the court to avoid an unreasonably low or confiscatory support order, taking all relevant circumstances into consideration.

II. The party relying on the provisions of this section shall demonstrate special circumstances by a preponderance of the evidence.

STATEMENTS OF THE FACTS OF THE CASE

The Family Court issued a Divorce Decree and Uniform Support Order ("USO") to the parties by a Notice of Decision dated December 12, 2015. Petitioner's ("Pet.") Appendix ("Appx.") Page ("pg.") 3. In that Order, the court granted the Appellee child support in the amount of $2,753.00 a month from the Appellant. The Order further required, "[i]n addition to regular payments of child support, [he] shall pay, as child support, 28% of any bonus he may receive within three (3) days of receipt. Payment shall be accompanied by a paystub or other evidence of the amount of the bonus." The Appellee's Petition to Change Court Order dated May 5, 2019, asked the court to consider a new Uniform Support Order based on a three (3) year review. In addition, the Appellee sought this review based on a significant change of financial circumstances, permissible under RSA 458-C:7. The Appellee could not verify the Appellant's compliance with section 21 of the USO because he refused to provide his financial information for the last three (3) years.

The case was originally scheduled for a thirty (30) minute hearing on July 31, 2019. The parties appeared before the court at that time with their attorneys and requested that the court continue the hearing and reschedule it for a three (3) hour hearing due to the issue of Appellant's Restricted Stock Awards (RSA's). At the hearing held on October 2, 2019, the court stated that the "question the parties have presented ... is whether the money Mr. Greenberg has earned by selling 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) of the December 7, 2015 Final Decree" which granted the Appellant stock options with [Bottomline Technologies (hereinafter "BT")] free of the Appellee. Appellee argued an increase in child support due to evidence of Petitioner's significant increase in income through his 1.25-A

disclosures, and requested a renewal of alimony. The Appellant had received a significant amount of money from selling Restricted Stock Awards he had received from his employer, BT, which were never disclosed as income in the 2015 Financial Affidavit. The Appellant argued that these stock awards were encompassed in the section 12(f) of the 2015 Divorce Decree and were his free and clear of any interest to the Appellee.

Following the hearing, the court issued a Notice of Decision dated November 13, 2019, with an attached USO. Section four (4) of the Order's USO found that Appellant had arrearages of $90,959.86 from RSA's dating from the original 2015 USO and had not complied with section 21 of the USO. This arrearage was ordered by the court in a new USO, to be paid by the Appellant within sixty (60) days of the Notice of Decision and transferred to the Appellee. Further, the court ordered that Appellant sell the RSA's he received in the future and pay Appellee 26% of their value in child support. The court disagreed with the Appellant and found that the RSA's the Petitioner had received from BT were more in line with bonuses that should have been included in his child support calculation pursuant to section 21 of the USO. The court noted that it was clear the Appellant relied on section 12(f) as the basis for not paying child support on the money he received from those stock awards rather than "seek a contemporaneous clarification." The Appellant had the option to raise this clarification in 2015, but never did. The court further found that because the RSA's were akin to retention bonuses and would always have some value despite market fluctuations, they fit the definition of income defined in RSA 458-C:2. The court concluded by attaching an appendix of the court's calculation of the Appellant's "*arrearages* accrued from Mr. Greenberg's failure to pay child support at 28% of the net RSA sales through September 23, 2019." (Emphasis added.) Pet. Appx. pg. 6.

The Appellant filed a Motion to Reconsider dated November 20, 2019 arguing that the court impermissibly added language regarding the requirement to liquidate Restricted Stock Units at the first possible date and provide the

Respondent with 26% of the net proceeds. The Appellant argued that the language regarding treatment of Restricted Stock Units was not part of the original Order. Pet. Appx. pg. 29. [1] However, the court added language only in regards to Restricted Stock Awards, which were never fully disclosed to the court by the Appellant in 2015. Finally, he alleged that the award by the court was a retroactive application of child support in violation of RSA 458-C:7, even though the court specifically noted that this award was due to the Appellant's arrearages in child support which he neglected to pay since the order in 2015, in violation of section 21 of the USO.

On December 5, 2019 the court issued, by Notice of Decision, an Order denying the Appellant's Motion to Reconsider and found that "Mr. Greenberg took a calculated risk when he did not pay any child support on the RSU's he received and promptly sold after the final decree." Pet. Appx. pg. 19. The court reaffirmed that they were not disclosed by the Appellant and he had sufficient notice that he would need to defend these stocks as income when he was called in the hearing on the Petition to Change Court Order. The court was entirely in its bounds to review the child support order and to determine whether a child support arrearage had accrued pursuant to section 21 of the Final USO.

This appeal follows.

SUMMARY OF ARGUMENT

At the Hearing on the Petition to Change Court Order, scheduled for October 2, 2019, Anne Winkler, the Respondent/Appellee, requested that the court modify the parties' Uniform Support Order from 2015 based on a three (3) year review and/or a significant change in financial circumstances. The Appellant attempts to argue that the issue of his Restricted Stock Awards was never pleaded

[1] The Restricted Stock Units (RSU's) and Restricted Stock Awards (RSA's) are used interchangeably throughout this Brief.

by the Appellee, and therefore the court did not have the authority to enter an Order regarding the treatment of the Appellant's RSA's. Michael Greenberg, the Petitioner/Appellant misrepresented his actual income when he did not list his RSA's on his financial affidavit in 2015. The court was entitled to review both the existing support order in the three (3) year review hearing, as well as the Appellant's compliance with the child support order, specifically Section 21 of the USO.

The Appellant further contends that the arrearage award is a retroactive modification barred by RSA 458–C:7, II. A finding of child support arrearages is not a retroactive award of child support. The arrearages accrued by the Appellant were a result of his omission of his Restricted Stock Awards in calculating his bonus income in compliance with section 21 of the USO. The court determined in its Order, as well as its Notice of Decision on Appellant's Motion to Reconsider dated December 5, 2019 that he took a calculated risk in not paying child support on the RSA's when he began profiting off of them after the Final Decree was finalized. The court was entirely within its discretion to award arrearages for the previous four (4) years of income that the Appellant paid no child support on.

As for the Restricted Stock Awards, testimony from the Appellant himself in the October 2, 2019 hearing on this matter shows that the court did not err in awarding the Appellee a percentage of the RSA's for child support. Stock options are distinct from Restricted Stock Awards. The Appellant testified on numerous occasions that these were in fact awards *given* to him by his employer, and are similar to retention bonuses or income. He conceded that it was a mistake for him not to report the RSA's as assets or income on his financial affidavit in 2015. This is clear evidence that the court did not abuse it's discretion in detailing how the Restricted Stock Awards were released to employees and that they were income to be included in a child support calculation under RSA 458-C:2, IV.

Finally, the Appellant argues that the court abused its discretion in section four (4) of the USO that requires him to liquidate his RSA's in order to pay a

percentage of that income as child support. This was not a reopening and modification of an asset in a property settlement, but a modification of child support based on income that was previously withheld and not disclosed. The court acknowledged and put in its Order how the RSA's are vested, released, and received by the Appellant and reasonably calculated the arrearage on those facts. The Appellant testified to his "typical practice" of liquidating the accounts that the awards are released into to pay expenses so long as it is after a blackout period. The court has not ordered him to do something outside his normal practice, and based the percentage on the value exercised when he receives and ultimately sells the awards. The court created a reasonable mechanism for additional child support to be calculated and paid based upon additional income to the Petitioner as a result of the RSA's.

Argument

I. The Family Court did not err when it entered its Order which included relief for failure to pay child support in the hearing on the Appellee's Petition to Change Court Order because review of the child support and child support arrearage are included in a child support hearing.

The court was entitled to review the existing child support under RSA 458-C:7 as included in the three (3) year review. *See In re Carr*, 156 N.H. 498, 501 (2007) (finding that "the right to apply for modification of a child support order every three years, without requiring the moving parent to show a substantial change of circumstances, [] entitled ex-wife to automatic review of existing support obligations by the court."). Further, the New Hampshire courts have ruled that although there is a rebuttable presumption that the existing child support is correct, that presumption may be overcome if "a party shows by a preponderance of the evidence that the Appellant did not comply with the application of the guidelines would be unjust or inappropriate because of special circumstances." *In*

re Carr, 156 N.H. at 501 (Internal citations omitted); *see also* RSA 458-C:5 (where special circumstances include significantly high or low income by the obligor).

Any review of child support necessarily includes a review of whether or not the Obligor complied with the existing support order, and if not, what arrearage is appropriate. In this case, because of section 21 of the USO, the court needed to determine whether the Appellant had complied with the provision that required him to pay additional child support based on the receipt of bonuses. In determining whether or not there was an arrearage, the court determined whether Mr. Greenberg properly paid additional child support, under section 21 of the USO, based upon bonuses received. If he properly paid and calculated the child support, then there would be no arrearage. If he did not, then there would be an arrearage. In this case, the court found that the Appellant did not comply with section 21 of the USO. This did not result in a retroactive award of child support. Rather, it resulted in a child support arrearage based upon the non-compliance with Mr. Greenberg with his obligations under section 21 of the USO.

The Appellant was not surprised or unduly burdened by this issue. The parties asked for a continuance of the hearing scheduled for July 31, 2019, in order to obtain discovery specifically on the issue of the RSA's. As of July 31, 2019, the Appellant clearly knew that the Appellee was looking at the RSA's as additional bonus income and seeking child support from the RSA's. The Appellant avoided giving his financial information to the Appellee after the Final Divorce Decree because it would have revealed significant amount of RSA's that he had received for the past three (3) years. The Appellant knew that the RSA's should not have been withheld and that they should have been included as bonus income.

In the trial court's Decision dated November 13, 2019, as well as the Decision dated December 5, 2019, the court stated that the original court was unaware of the RSA's or how they operated. It was only until the hearing in October of 2019 where the Appellant took the time to explain to the court how the

RSA's were distributed, vested, and then received by BT employees that the court became fully aware of the RSA's. The Appellant testified that he did not report the RSA's on his financial affidavit in 2015 because he did not have an interest in them *yet*, and therefore they were not to be included in the child support guidelines. Transcript pg. 51. Similarly, in *Matter of Ndyaija*, the court found that the "trial court committed an unsustainable exercise of discretion when it based its calculation of the [child] support order on the gross monthly income set forth in wife's child support guidelines worksheet, which omitted income from one of her two jobs." 2020 WL 1164585 (N.H. Mar. 11, 2020). This case is similar to the case at bar because the Appellant also omitted an asset that was considered income for purposes of child support as an award or bonus according to RSA 458-C:2.

The Appellant also confirmed in his testimony that the RSA's were in fact awards. Transcript pg. 79, 85. Because the RSA's were not listed on the Appellant's financial affidavit, the Appellee has shown by a preponderance of the evidence that the child support was inaccurate based on the Appellant's noncompliance with section 21 of the USO. Further, the Appellant refused to provide his financial information to the Appellee for the previous three (3) years, because he knew the RSA's were income that should have been included in his child support calculation under section 21 of the USO. The RSA's appear on the Appellant's paystub as taxable income. Therefore, the court was completely within its discretion to examine compliance with the existing child support order under a three (3) year review and make a finding of a child support arrearage as a result of the Appellant's non-compliance with the child support order.

II. The Family Court did not err or abuse its discretion when it awarded the Appellee child support arrearages dated back to 2015 upon a finding that Appellant had not complied with section 21 of the USO, because it was not done so as a new retroactive Order, but rather as an arrearage the Appellant had accrued. This was not a retroactive Order, but an award of arrearages.

The Family court did not abuse its discretion by applying a retroactive child support order, because it did not apply a retroactive Order, the court was accounting for the arrearages the Appellant had accrued. Similarly, in *In re Cole*, the court found that the "[s]tatute preventing child support modification from taking effect before date of service of motion to modify support did not apply to mother's motion to modify child support" because court found that this was not a modification of child support but a modification of an arrearage. 156 N.H. 609, 610 (2007). The Appellant attempted to argue that because the arrearages dated back past the Appellee's Petition to Change Court Order, then the arrearages ordered by the court on November 13, 2019 are retroactive child support in violation of RSA 458–C:7, II. However, the New Hampshire Supreme Court has made a point to distinguish between a modification of child support and a modification of the arrearages one may have accrued due to lack of compliance with the original child support order. *See id.* at 611 ("The mother did not move to alter the father's child support obligation, but rather to correct the amount the court determined that he owed under his current obligation…").

In the case at bar, the Appellee did not ask for an impermissible retroactive modification of child support dating back to 2015. The Appellee only requested a modification for child support to the date of service upon the Appellant pursuant to RSA 458–C:7, II. The court's arrearage Order consisted of unpaid child support that resulted from the Appellant's omission of RSA's from his financial affidavit in 2015 and from his child support payments under section 21 of the USO. The Appellant even testified to the fact that he never disclosed his RSA's to the court through his financial affidavit, which is why his paystubs received in discovery showed a much higher income than he reported with salary plus bonuses. Transcript pg. 84. In her Petition to Change Court Order, the Appellee asked for a change in child support due to a significantly increased income of the Appellant. Therefore her petition allowed the court, in its discretion, to review the existing

child support order to determine compliance and to calculate the arrearages dating back to 2015, in order to make an award of those arrearages. *See Wheaton-Dunberger v. Dunberger*, 137 N.H. 504, 507 (1993) (stating that New Hampshire's "deferential standard of review of child support awards evidences the discretion afforded trial courts in awarding child support.").

III. The Family Court did not err or abuse its discretion when it interpreted the parties' Final Divorce Decree and Uniform Support Order as including the Restricted Stock Awards (RSA's) received through Petitioner's employer as income calculable in child support because they were not stock options, but awards that must be treated as income.

The Appellant argued unsuccessfully at the hearing on the Petition to Change Court Order that the Restricted Stock Awards were not income to be considered under section 21 of the USO, but rather assets under section 12(f) of the Final Decree. Section 21 of the USO granted the Appellee 28% of any bonus the Appellant received as additional child support. Section 12(f) of the Decree granted the Appellant his stock ***options*** free of any claim by the Appellee, however made no mentions as to RSA's. This decision aligned with the framework of RSA 458-C:2, IV (defining gross income for purposes of child support as "all income from any source, whether earned or unearned, including, but not limited to . . . bonuses). The Appellant's W-2's, paystubs, and tax returns identify the RSA's as income. The financial affidavit signed by both parties in 2015 required that each party list their assets and income. The Appellant therefore, listed real estate, vehicles, cash accounts, retirement, life insurance, investment accounts, a trust, and inheritance. Transcript. pg. 83. However, he failed to include the RSA's he was awarded by his company, BT. Transcript pg. 84. The Appellant argued that because he did not have an interest in the shares at the time of the Final Hearing, they were not assets to be listed in his financial affidavit. He further

argued that any income received by the RSA's was an asset under section 12(f) of the Decree, and not income.

At the Final Hearing on Appellee's Petition to Change Court Order, the Appellant explained to the court how he received his RSA's and that they were, in fact, Restricted Stock Awards and not options. The Appellant received 5,000 initial shares of BT stock when he first began working at the company in the spring of 2015. Pet. Appx. pg. 40. These initial shares are gifted by his employer to those whom it considers "key players". The RSA's will then "vest" one year after employment, provided the Appellant was still working there. Once the awards vest, BT releases 25% of the original 5,000 shares to be received by the Appellant. While some shares are retained by BT in order to pay the necessary taxes on them, the rest are placed in an account for the Appellant to sell and use at his discretion. Once the initial 25% of the initial 5,000 shares are released, one-sixteenth of the initial shares are released in the same manner every quarter for the next twelve quarters, totaling the rest of the 5,000 shares. Aside from a blackout period, the Appellant was free to sell his shares as his property once he received them. Although the market value of these shares would fluctuate, the court found in its Order dated November 13, 2019, that the RSA's always have some value. Pet. Appx. pg. 6.

The Appellant admitted in his testimony that the RSA's he received were in fact awards that he did not pay for, were free to use as he wished, and that it was customary for him to sell the shares as soon as he could. Transcript pg. 76, 79. In fact, in response to a clear direct examination question that the awards were "an award," the Appellant responded with "they're an award." Transcript p. 85. The court further clarified in its November 13, 2019 Order that the RSA's were retention bonuses. The court clearly interpreted bonuses to include stock awards that the Appellant was given by his company for staying a certain number of years, unlike the employment stock-purchase plan which he voluntarily contributed his own earnings toward.

The Appellant even conceded that he "made a mistake" when he did not include the RSA's in the form of the 5,000 shares in his financial affidavit because they had not vested. Transcript pg. 84, 94. He went on to testify that "I didn't mean to not disclose them. It was very clear in the offer letter that those [the RSA's] were part of my compensation package" and the interest simply had not vested at the time of the divorce. Transcript pg. 94. This omission caused the court to grant the Appellant "any stock options he may have an interest in with BT free of any interest on the part of the [Appellee]" in section 12(f) of the Final Decree. The court was unable to interpret the RSA's as either income under section 21 of the USO or property under section 12(f) of the Final Decree, because neither the court, nor the Appellee knew about them. Further, the Appellant stated that he believed the Judge in the 2015 divorce hearing was confused and did not understand the difference between the stock options and Restricted Stock Awards, and the Appellant never took the opportunity to correct him. Transcript pg. 84. The Appellant then utilized this misunderstanding to rely upon only paying child support on the income he listed in 2015 as well as minor cash bonuses, despite acknowledging in the hearing that they were in fact an award.

A paystub from the Appellant provided in his 1.25-A disclosures listed that in 2016 he received $52,449.07 in RSA's. Transcript pg. 21. Due to his lack of reporting of those RSA's, the Appellant paid no child support on this income. In 2017, he received $142,514.34 in RSA's. Transcript pg. 22. No child support was paid on this income. The Appellant's paystub provided in his 1.25-A disclosures in 2018 showed his RSA benefit as $218,112.98. Transcript pg. 74. No child support was paid on this income. Finally, on Appellant's paystub dated August 15, 2019, he received $141,210.62 in RSA's. Transcript pg. 77. Again, none of which was disclosed as income for purposes of child support. The allegation that this must be taken into account with the uneven property distribution is irrelevant because the fact that the Appellant omitted another income would only skew it farther in the Appellee's favor. Further, the RSA's are income and not property. The

Appellant's argument that the RSA's should be treated as stock options is simply unfounded because he was gifted them after remaining at BT for a year, testified to their nature as an award, and conceded that he should have reported them as income in 2015 on his financial affidavit.

IV. The Family Court did not err or abuse its discretion when it ordered the Appellant to either liquidate or pay a percentage of the estimated value of his future RSA's because the income would be realized when received and will always have some value.

The court was well within its discretion to order a percentage of the Appellant's future RSA's be sold to pay for additional child support. This is consistent with section 21 of the original USO which requires 28% of bonus income to be paid as additional child support. According to the process by which the RSA's vested, the question is how would the additional child support be calculated and be paid. The court provided a reasonable solution to this dilemma and provided a sufficient calculation of that solution in the attached graph to the November 13, 2019 Order. Pet. Appx. pg. 8. The Appellant incorrectly argues that the court did not have the authority to modify the final property settlement because the Appellee did not meet the standard for reopening and modification of a final property settlement. The court did not reopen a property settlement by ordering the Appellant to pay a percentage of his future RSA's as child support because they are not assets in a property settlement. The RSA's are income for purposes of child support calculations.

As referenced previously, the Appellant himself testified to mistakenly not disclosing the RSA's as income, and then "took a calculated risk when he did not pay any child support on the [RSA's] he received and promptly sold after the final decree." Transcript pg. 94, Pet. Appx. pg. 19. The Appellee was therefore unaware of the RSA's as additional income. Therefore, the court did not modify the

property settlement in this case. The court calculated child support arrearages and additional child support under section 21 of the USO, as a result of the non-disclosure of the RSA's by the Appellant. *See In re Jerome*, 150 N.H. 626, 633 (2004) (where the court stated that "property division and child support serve different functions and are governed by different requirements.... [T]he child of divorced parents receives nothing from the property division[]" while he benefits from child support). Here, the court appropriately modified the child support to include the Appellant's actual income, including the RSA's, for the future benefit of the parties' children. The Appellant testified to mistakenly omitting the RSA's as income and "took a calculated risk when he did not pay any child support on the [RSA's] he received." Transcript pg. 94, Pet. Appx. pg. 19. The court accurately included this RSA's for purposes of future child support in its November 13, 2019 Order because they are income for child support, ***not*** assets as a part of a property settlement.

The Appellant's argument that requiring him to sell his Restricted Stock was impermissible is unsupported by the evidence. As the court, and the Appellee, understand the RSA's, once they are vested, a certain percentage are released to the Appellant. Then, some are kept by the company to sell in order to pay the taxes on them, and the rest are released to a brokerage account owned by the Appellant to do with what he wishes. The Appellant has testified that, unless the stock is released during a blackout period, he ordinarily liquidates them immediately upon receiving them. When questioned by the court, the Appellant confirmed that after some shares are sold to pay taxes, the rest of the RSA's the Appellant "received... go[] into a bank account available to [him]" and subject to a blackout period, "you can liquidate that account. And that's what [he's] typically done." Transcript pg. 89, 91. Further, the court clarified and recorded in its Order that although the market value of the RSA's may fluctuate, and taxes may rise on the stocks, they always have some value, which is what makes them income. Transcript, pg. 122, Pet. Appx. pg. 6.

The court ordered that the Appellant exercise his Restricted Stock fourteen (14) days outside of a blackout period in order to pay a percentage to the Appellee. As his testimony shows, it was the Appellant's normal practice to liquidate the RSA's from the account as soon as he was able to, outside of a blackout period. The court simply reiterated the Appellant's normal practice and ordered him to pay a certain percentage of that liquidation towards child support instead of for "various expenses." Transcript pg. 89. The court did not order the Appellant to pay upon vesting, or release, of the stocks, but rather when he received them. The Appellant used "received" in his testimony to indicate the time after the stocks had been vested, paid taxes on, and released into a bank account for his sole use. Transcript pg. 89. By ordering the Appellant to exercise the RSA's once received, the court is only mirroring what he characterized as his normal practice. The court apportioned a percentage of that income towards child support, as should have been done since 2015, which is well within its discretion, and a reasonable solution consistent with section 21 of the original USO.

CONCLUSION

The Appellee/Respondent, Anne Winkler, filed a Petition to Change Court Order with the Nashua Family Court on May 3, 2019. Pet. Appx. pg. 33. In the Petition to Change Court Order, the Appellee/Respondent was looking to modify the child support and alimony order. With regard to child support, the Appellee/Respondent was looking to modify the Uniform Support Order based upon a three (3) year review and upon a significant change of financial circumstances. The Appellee/Respondent noted in the petition that Michael has not provided her with his financial information for the past three (3) years. Pet. Appx. pg. 35.

After the Petition to Change Court Order was filed, the parties exchanged Rule 1.25-A disclosures. The disclosures from the Appellant/Petitioner revealed

on paystubs, W-2 statements and tax returns significant Restricted Stock Awards over the past four (4) years. Section 21 of the Final Uniform Support Order dated December 7, 2015 provided 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." Pet. Appx. pgs. 51-54.

Although the Restricted Stock Awards were clearly income to the Appellant/Petitioner, the Appellant did not pay a portion of the RSA's to the Appellee as additional child support.

After the hearing on the Petition to Change Court Order, the court determined that the Petitioner's significant RSA's over the past four (4) years and going forward should be treated as bonus income. In its Order, the court stated as follows:

"The RSA's always have some value, regardless of the stock price, so long as the stock price is more than zero. This fact militates strongly in favor of characterizing the RSA's as retention bonuses." Pet. Appx. pg. 6.

Without any support in the facts or the law, the Appellant has argued that the RSA's are a property award and not income. This is completely contrary to the testimony of the Appellant during the hearing on the Petition to Change Court Order. The Appellant admitted that the RSA's were an award and that they were taxed as income to him.

In reviewing a request to modify child support, the court invariably must also determine whether or not the parties have properly followed the existing Uniform Support Order. In this case, the court needed to examine whether or not the Appellant/Petitioner complied with section 21 of the Uniform Support Order and paid additional child support to the Appellee/Respondent based upon bonus income. Since the Appellant/Petitioner received significant RSA's and paid no additional child support based upon those RSA's, the court found that the

Appellant/Petitioner did not comply with section 21 of the Uniform Support Order. Therefore, the court calculated a significant child support arrearage that was due to the Appellee/Respondent. The court did not abuse its discretion when it made this child support arrearage calculation. An arrearage calculation is not equivalent to a retroactive child support award. The court did make the child support award retroactive, but only to the date of the service of the Petition to Change Court Order on the Appellant/Petitioner, which is consistent with the law.

In the Uniform Support Order adopted by the court after the hearing on the Petition to Change Court Order, the court crafted a mechanism to calculate additional child support based upon the Appellant/Petitioner's RSA's. Requiring the Appellant/Petitioner to liquidate his RSA's to pay a portion of the RSA's to the Appellee/Respondent as additional child support order was not an abuse of discretion. In fact, the court merely adopted the customary practice of the Appellant/Petitioner, which was to immediately liquidate the RSA's.

The court did not abuse its broad discretion when it ordered the USO following the hearing on the Petition to Change Court Order. The court did not make an error of law or fact. The appeal filed by the Appellant in this matter should be denied and the Order of the trial court should be affirmed.

ORAL ARGUMENT

The Petitioner/Appellant respectfully requests an oral argument of not more than 15 minutes.

Respectfully Submitted,
Anne M. Winkler
Through her attorneys,

July 9, 2020

/s/ Robert M. Shepard
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CERTIFICATE OF SERVICE

I hereby certify that the decision being appealed is addended to this brief.

I hereby certify that pursuant to Supreme Court Rule 16 (11), this brief does not exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters. The word count for the Statement of the Case, Summary, Argument, Conclusion and Oral Argument is 5,532.

I further certified that on July 9, 2020, copies of the within Brief have been electronically served through the Court's electronic filing system to all attorneys and to all other parties who have entered electronic service contacts in this case and to Anne M. Winkler.

/s/Robert M. Shepard
Robert M. Shepard – NH Bar #2326