THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In the Matter of James R. Britton and Patricia F. Britton

Case No. 2020-0029

DISCRETIONARY APPEAL PURSUANT TO SUPREME COURT RULE 7 FROM DECISION OF THE 10th CIRCUIT – FAMILY DIVISION – BRENTWOOD

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

This matter involves a motion filed by the Petitioner, James Britton, in June 2018 seeking to terminate his lifetime alimony obligation under the parties' Final Decree of Divorce dated November 21, 1985, and a motion by the Respondent, Patricia Britton, seeking to renew and continue alimony (A.[1] 14, 33). Mrs. Britton further filed a motion seeking to hold Mr. Britton in contempt of a 2016 stipulation that reaffirmed the lifetime alimony obligation. (A. 16).

Under the parties' Permanent Stipulation dated November 14, 1985 and incorporated into their Divorce Decree, Mr. Britton agreed to pay alimony to Mrs. Britton for the remainder of her lifetime in the amount of $400.00 per week until she reached age 65, and $200.00 per week thereafter. (A. 7). In April 2016, after having paid alimony for the past 30 years, Mr. Britton decided to stop paying. Mrs. Britton filed a motion for contempt. Prior to the contempt hearing, the parties entered into a written stipulation dated October 25, 2016, which was approved by the court, wherein Mr. Britton agreed to pay arrears totaling $5,400.00, agreed to renew and affirm his obligation to pay alimony in the amount of $200.00 per week (she was at that time 87 years old) again for the remainder of Mrs. Britton's lifetime, and agreed to pay her attorney's fees. (A. 11).

In April 2018 Mr. Britton again stopped paying alimony and in June 2018 filed a petition seeking to terminate his alimony obligation due to an alleged change in his financial circumstances leading to an inability to pay. (A. 14). On July 21, 2018, Mrs. Britton filed a Motion for Contempt and to

[1] "A." refers to Respondent's Appendix

Enforce Final Decree seeking an order compelling Mr. Britton to pay accrued arrears and that he resume paying alimony per the 1985 Divorce Decree. (A. 16).

At the August 28, 2019 Final Hearing, before the trial commenced, Mr. Britton made a verbal motion for summary judgment raising for the first time the argument that the 1983 version of the alimony statute in effect in 1985, which statute provided that alimony shall be effective for not more than three years, compelled the court to find that his alimony obligation terminated as a matter of law in 1988. (Tr.[2] 14-16). This argument was not set forth in any prior pleading, nor in Mr. Britton's pre-trial statement or his proposed order submitted by his attorney in advance of trial. (A. 30, 32). Mr. Britton not only argued that he had no obligation to pay alimony, but that he had in essence overpaid for the past 30 years and that he "should" be entitled to recoup these overpayments from Mrs. Britton. (Tr. 16). In his subsequent pleadings, including a motion for reconsideration, Mr. Britton claimed he was due money and asked for a credit of "$93,600 toward whatever the court orders as a final accounting of the amounts owed between the parties." On appeal Mr. Britton now recalculates and seeks reimbursement of $360,800.00.

In response to Mr. Britton's oral motion for summary judgment, Mrs. Britton made her own oral motion asking for renewal or extension of

[2] "Tr." refers to the transcript of the Final Hearing held August 28, 2019

alimony[3] and was granted permission to submit a written motion[4] and memorandum post-trial. On September 25, 2019 Mrs. Britton filed a Motion to Award Alimony. (A. 33). Mr. Britton filed an objection thereto on October 1, 2019. (A. 36).

After the August 28, 2019 Final Hearing, and having been briefed by both parties on the issue of the 1983 version of RSA 458:19, the trial court issued an Order dated November 7, 2019 in which it ruled that while the 1983 version of the alimony statute did indeed control the parties' Final Decree of Divorce as of 1985, the court held that the statute *also* provided that alimony could be "renewed, modified or extended if justice so requires" for three year periods at a time. (Appellant's Add.[5] 36). The trial court found that the parties' October 2016 stipulation was a renewal of the alimony obligation and could continue for three years, or until October 2019, and could be further renewed, modified or extended for additional periods of not more than three years at a time. (Appellant's Add. 36). The court further noted that there is no time frame in the 1983 statute in which a request to renew alimony must be made, unlike the current alimony statute. (Appellant's Add. 36). Accordingly, the court denied Mr. Britton's motion for summary judgment, and denied his motion for modification seeking to

[3] Mrs. Britton's own pending Motion for Contempt and to Enforce Final Decree re: Alimony had already requested that Mr. Britton be ordered to immediately commence weekly alimony payments to Mrs. Britton as required in the parties' Final Decree of Divorce. At a minimum, this pleading was a request for renewal of alimony.

[4] The court acknowledged that the written motion was the follow up to the oral motion made at the Final Hearing. November Order at 5.

[5] "Appellant's Add." refers to Appellant's Addendum to his opening brief.

terminate his alimony obligation based upon Mr. Britton's failure to establish an inability to pay and Mrs. Britton's continued need for alimony. Additionally, the court granted Mrs. Britton's motion for contempt as to Mr. Britton's failure to pay under the 2016 stipulation and order, and awarded her $6,000.00 in attorney's fees.

With regard to Mrs. Britton's motion to award alimony, the court ruled that it was prepared to decide the motion based upon the evidence presented at the August 28, 2019 hearing, unless either party requested an additional hearing within 10 days. (Appellant's Add. 39). Mr. Britton did request a further hearing and, additionally, on November 22, 2019 filed a further written response presented as a motion to dismiss Mrs. Britton's motion to award alimony. (A. 52). Mr. Britton's motion to dismiss was denied on December 18, 2019. A further hearing was scheduled for June 3, 2020, however the parties later agreed to have the court decide Mrs. Britton's motion to award alimony on the existing record from the final hearing held on August 28, 2019. (Appellant's Add. 49).

On June 8, 2020, the trial court issued a further order incorporating all of its prior findings set forth in its November 7, 2019 order and granted Mrs. Britton's motion to award alimony, applying a "justice requires" standard and finding among other factors that she had a continuing need and that Mr. Britton had the ability to pay. (Appellant's Add. 52-53). The trial court ordered that alimony was to continue in the amount of $200.00 per week from October 2019 through October 2022. The trial court also ruled, contrary to Mr. Britton's arguments, that the 2019 version of RSA 458:19, including section 19-aa, was not applicable to this case and that the

standard for modification under the 1983 version of RSA 458:19 applied. (Appellant's Add. 52).

Mr. Britton timely appealed both the November 7, 2019 order and June 8, 2020 order, which appeals were consolidated. Both the trial court and this Court denied Mr. Britton's requests for a stay pending appeal and ordered him to pay Mrs. Britton alimony at $200.00 per week.

STATEMENT OF FACTS

After 39 years of marriage James and Patricia Britton were divorced in New Hampshire pursuant to a Final Decree of Divorce issued on November 21, 1985, which Decree incorporated the terms of the parties' signed Permanent Stipulation. (A. 4). The parties had three children, James, Michael and Daniel. (Conf.[6] A. 3). The Petitioner, James R. Britton, is currently 91 years old and resides in Palm City, Florida. (Conf. A. 3). He was remarried in August 1986 to his present wife, Katharina Britton. (Tr. 149). The Respondent, Patricia Britton, is currently 92 years old and resides in Brookline, Massachusetts. (Conf. A. 6). She has not remarried.

At the time of divorce in 1985 the parties had been separated for several years, Mrs. Britton was living in Massachusetts and Mr. Britton was living in New Hampshire. (A. 406). The parties initially each had Massachusetts counsel and negotiated and executed a settlement agreement wherein Mr. Britton agreed to the lifetime alimony provision. (A. 405). After consulting with his Massachusetts attorney and being told that the courts were backed up and that it would be faster to obtain a divorce in New Hampshire, Mr. Britton obtained New Hampshire counsel and filed for divorce. (A. 407). Mrs. Britton also obtained New Hampshire counsel and the parties then executed a second settlement agreement, the Permanent Stipulation, which was approved by the court and incorporated into the New Hampshire Divorce Decree. (A. 402-408).

Paragraph 4 of the parties' Permanent Stipulation states:

[6] "Conf. A." refers to Respondent's Confidential Appendix.

> The [Petitioner] shall pay alimony to the [Respondent] in the sum of Four Hundred and 00/100 ($400.00) Dollars per week commencing on the effective date of this Permanent Stipulation and terminating upon the [Respondent's] death or her attaining the age of 65, whichever shall first occur; thereafter, assuming the [Respondent] survives 65, [Petitioner] shall pay to the [Respondent] the sum of Two Hundred and 00/100 ($200.00) Dollars per week until her death. The [Petitioner] shall have the option of substituting for the obligation to make the payments as provided above an annuity by an insurance company licensed to do business in the State in which the [Respondent] is then residing at the time said substitution is made. (A. 7).

The Permanent Stipulation, at paragraph 7, further provided that the alimony payments were to begin January 1, 1986, and that until such time Mr. Britton would continue to pay alimony under an existing Temporary Order in the same amount of $400.00 per week. (A. 9).

At his deposition held on November 4, 1985, 10 days prior to the date that the parties signed their Permanent Stipulation, Mr. Britton was questioned about his agreement to pay lifetime alimony and the durational laws applicable in New Hampshire. Mrs. Britton's attorney, Joseph A. Millimet, questioned Mr. Britton as follows:

> Q. And why did you bring the action in New Hampshire?
>
> A. Advice from two attorneys.
>
> Q. What was the reason they gave you that advice?
>
> A. It would be quicker.
>
> Q. They were sure wrong; weren't they?
>
> A. Sure were.

Q. Did they say anything about alimony in New Hampshire?

A. No.

Q. They never told you there was a limit on years alimony had to be paid in New Hampshire?

A. No.

Q. You never heard that before now?

A. I've heard it in the discussion between Mr. Gall and Bob Shaw. ***But we waived – we were willing to waive all that***. (emphasis added)

Q. Anybody ever tell you you couldn't waive it.

A. No one ever told me you couldn't waive it. (A. 403-404).

….

Q. And they never discussed with you the limitation on alimony?

A. Never. Never. ***As far as I was concerned, I was going to live up to what that agreement said. There was no other way***. (emphasis added) (A. 408).

As apparent justification for the lifetime alimony award, Mr. Britton received the lion share of the parties' marital property as outlined in Paragraph 9 of the parties' Permanent Stipulation. During his deposition, Mr. Britton was asked if he would prefer to make a lump sum payment to Mrs. Britton rather than have an ongoing alimony obligation:

Q. Wouldn't you like to get this matter over with?

A. I sure would.

Q. Wouldn't you like to clean it up once and for all so you don't have a long relationship with your wife about alimony?

A. Yeah, I would like to clean it up.

Q. Are you willing to go out and borrow money to settle with her?

A. Can't. I already got one agreement with her, and then we went to two agreements.

Q. That's why I am suggesting --

A. She doesn't live up to anything we do.

Q. That's why I am suggesting that it would be better to dispose of this matter on a payment. Once and for all and get it over rather than having a continuing agreement with your wife. (A. 399).

At the time the parties signed the Permanent Stipulation, Mr. Britton insisted that the parties' adult sons were in the room because he wanted everyone in the family to understand what was being agreed upon and that he wanted "everything to be above board." (Tr. 114-115).

As evidence of the disproportionate division of the marital assets in 1985, at trial Mr. Britton did not dispute that only 9 months after the divorce and in August 1986 he signed an Antenuptial Agreement with his current wife, Katharina, listing a net worth of $4,961,000.00, including land in Florida and the Bahamas that was not listed in the Permanent Stipulation, and a prior debt to the IRS was paid off. (Tr. 228-29). He acknowledged that the Sherwood Park mobile home park, which he built from the ground up and which consisted of more than 200 units, (Tr. 88), was valued at $4,000,000.00 in his Antenuptial Agreement, yet 9 months earlier in his

deposition he disputed that the mobile home park had a value of $2,000,000.00. (Tr. 226).[7]

In contrast, Mrs. Britton received from the divorce settlement a single-family home worth $150,000.00 (with a mortgage), an old motor vehicle, a $250,000.00 cash payment (paid over time), and the lifetime alimony award. During the marriage she performed household duties and had been the primary caretaker of the parties' three children. (Tr. 245). She also assisted Mr. Britton in running his businesses, and later worked at a bakery, did babysitting, and worked part-time at Filene's during Christmas season. (Tr. 245-48). Having only a high school education, Mrs. Britton testified that she required the lifetime alimony because she only ever had minimum-wage jobs and needed the alimony to meet her expenses. (Tr. 253-254). Following the divorce, Mrs. Britton continued to work at Filene's (thereafter Macy's) as a retail clerk until she was 82 years old. From 1985 to 2010 when she finally retired, Mrs. Britton never earned more than $16,000.00 per year. (Tr. 258).

At the time of trial, Mrs. Britton's income totaled $2,689.10 per month, consisting of her social security benefits, a pension benefit from her employment with Filene's, an IRA distribution, and a paycheck received for working for her sons' mobile park business "East Pointe Holdings" cutting out articles for the park newsletter. (Tr. 251) (Conf. A. 6). Mrs. Britton showed expenses on her financial affidavit totaling $8,558.00 per month, unchallenged by Mr. Britton, and explained that her sons help her

[7] During his testimony, Mr. Britton testified that during the 1985-1986 timeframe he had a standing offer of $5,000,000.00 for the purchase of the mobile home park. (Tr. 229).

cover some of her shortfall by paying certain bills and expenses for her. (Tr. 252) (Conf. A. 9).

Throughout the parties' marriage and continuing thereafter Mr. Britton worked managing his mobile home parks. (Tr. 88-98). He also sailed and actively fished including commercially. (Tr. 135, 173, 230). In 1990, Mr. Britton transferred the Sherwood Park mobile home park to his sons, Michael and Daniel, as a gift. (Tr. 134). Mr. Britton then received from his sons what he described as a pension benefit of $87,000.00 per year for the next 26 years, or more than $2.2 million. (Tr. 97-103; 137-139).

The payments from his sons stopped in 2016 after Mr. Britton sued both of them over a dispute with the business. (Tr. 138, 140). Mr. Britton then stopped paying alimony. (Tr. 144). Mrs. Britton filed a motion for contempt and several days before the scheduled hearing, the parties settled the dispute by written agreement dated October 19, 2016. (A. 11). The stipulation provided that Mr. Britton was to pay $5,400.00 in alimony arrears, he re-affirmed his commitment to the parties' Permanent Stipulation to paying timely future alimony payments, and he paid Mrs. Britton's attorney's fees and costs. (A. 11). Following the parties' October 2016 Stipulation, Mr. Britton resumed paying the $200.00 weekly alimony obligation until April 6, 2018, at which time he again stopped paying. (A. 18) (Tr. 161).

The evidence demonstrated that in the year before filing his petition in June 2018 to terminate his alimony obligation, Mr. Britton had significant assets which he the transferred to his current wife in what the trial court described as an attempt "to create a false picture of an inability to pay." (Appellant's Add. 38). Specifically, as of June 2017, Mr. Britton had

assets consisting of $819,393.52 in cash held in his checking account at Seacoast Bank, and $8,903.33 held in his checking account at BB&T Bank. (A. 75, 132). The funds in Mr. Britton's Seacoast Bank account included $626,880.92 in net proceeds received on June 9, 2017, when he and his wife sold their home in Hobe Sound, Florida.[8] (A. 66).

Mr. Britton then admitted that he withdrew large sums from the Seacoast Bank account and gave the money to his wife, Katharina, namely $500,000.00 by check dated July 14, 2017 which he alleged went into a trust she created, and $200,000.00 by check dated December 5, 2018. (Tr. 194-95). Mr. Britton could not recall where the $200,000.00 went and was unable to produce a copy of the canceled check. (Tr. 172).

Then in March 2018 the lawsuit filed against his sons was settled for a cash payment of $250,000.00. (Tr. 108). At trial, Mr. Britton claimed that he immediately gave all of the funds to his wife, Katharina, in exchange for her promise to take care of him for the rest of his life. (Tr. 110). Also in March 2018, Mr. Britton sold his yacht for $154,600.00, but testified he had to use the money to pay back $145,000.00 allegedly owed to his friend, Christos Stasnios, for monies Mr. Britton borrowed for what he described as "living expenses." (Tr. 174-175).

Mr. Britton further admitted that in May 2018 he withdrew additional monies from the Seacoast account and gave them to his wife Katharina to "invest", consisting of another $200,000.00 by check dated

[8] Mr. Britton and his wife had already purchased and moved into their present home by the time that they sold their Hobe Sound, Florida home.

May 14, 2018, and $80,000.00 by check dated June 21, 2018 for a CD in joint names with his wife. (Tr. 172).

In total, from July 14, 2017 to June 21, 2018, in the very timeframe that he claimed an inability to pay and in fact stopped paying, Mr. Britton transferred a total of $1,125,000.00 to his wife and his friend Christos Stasnios. (Tr. 195). Despite the provision in the Permanent Stipulation that allowed him to do so, Mr. Britton never purchased an annuity to pay the alimony due to Mrs. Britton. (Tr. 255).

SUMMARY OF THE ARGUMENT

Despite the fact that Mr. Britton never plead and did not raise the issue until the day of trial, the trial court allowed Mr. Britton to argue and in fact agreed with his position that the 1983 version of RSA 458:19 applied to this case. However, as further discussed below, the trial court then pointed out what Mr. Britton chose to ignore, namely, that the statute also allows for the renewal or extension of alimony for three year periods at a time, and that there is no timeframe in which such a renewal request must be filed. This Court's prior holdings also make clear that the renewal may be made retroactive. Even if Mr. Britton's alimony obligation expired as a matter of law three years after the 1985 Divorce Decree, he cites no authority for his position that he is entitled to reimbursement or a credit for having voluntarily paid beyond the initial three year period. Indeed, his express knowledge of the three-year durational limitation at the time of divorce and his conduct in paying for the next thirty years amounts to a waiver of any such claim and is further barred by the doctrine of *laches*.

Mr. Britton's position that the parties' 2016 stipulation is of no force and effect is contrary to law and the trial court under the circumstances of this case was permitted to treat the stipulation as a renewal for three additional years. The trial court was thus within its discretion to find Mr. Britton in contempt of the 2016 stipulation and order when he stopped paying in April 2018.

Lastly, the evidence showed that Mr. Britton transferred $1,125,000.00 to his wife and friend at the very same time he claimed a financial inability to pay Mrs. Britton $200.00 per week. The trial court was

justified in rejecting Mr. Britton's claimed inability to pay. The evidence further supported the finding that Mrs. Britton demonstrated a continuing need for alimony in consideration of her fixed income, living expenses which she could not meet without the help of her sons, and based on the parties' Permanent Stipulation that provided for lifetime alimony in consideration of a disproportionate division of the marital estate.

ARGUMENT

I. MR. BRITTON IS NOT ENTITLED TO REIMBURSEMENT FOR OVER THIRTY YEARS OF ALIMONY PAYMENTS MADE IN ACCORDANCE WITH THE PARTIES' PERMANENT DIVORCE STIPULATION.

Mr. Britton cites no case law or statutory authority entitling him to reimbursement of overpayments of alimony particularly where, as here, the payments he seeks to recover were made prior to the filing of any motion to modify or terminate the existing alimony order. Indeed, this Court in comparing New Hampshire's child support statute, which specifically limits retroactive modification to the date of notice to the adverse party (*See*, RSA 458-C:7, II (2009)), to the alimony statute, noted that although "there is no analogous statute that expressly limits the trial court's authority to grant a retroactive modification of alimony beyond the date of notice to the adverse party… our case law and our interpretation of the statutes governing the modification of alimony lead us to conclude that the trial court's authority to grant a retroactive modification of alimony beyond the date of notice to the adverse party is similarly limited. *In re Birmingham*, 154 N.H. 51, 58 (2006) (citing *Walker v. Walker*, 133 N.H. 413, 418 (1990); RSA 458:32 (2004); RSA 458:14 (2004)). *See also*, *In re Doherty*, 168 N.H. 694, 705 (2016) ("our decision in *Birmingham* effectively imported into retroactive alimony modifications the same notice requirements that are applicable to retroactive child support modifications.").

Mr. Britton did not file a request for modification until June 2018. Even if he is correct that he had no obligation to pay because the alimony

order expired in 1988, he waived the right to claim reimbursement by voluntarily paying without objection for more than thirty years. His claim is further barred by the doctrine of *laches*. Mr. Britton has also not asserted any claim of fraud, undue influence, deceit, misrepresentation or mutual mistake.

a. Mr. Britton knowingly waived the three year limitation under the 1983 version of RSA 458:19 when he signed the parties' permanent stipulation with full knowledge of existing law, agreed to make the alimony provision effective January 1, 1986, then paid alimony for the next thirty years and reaffirmed his obligation to pay by further stipulation in 2016.

"A finding of waiver must be based upon an intention expressed in explicit language to forego a right, or upon conduct under the circumstances justifying an inference of a relinquishment of it." *See*, *Village Green Condominium Ass'n v. Hodges*, 167 N.H. 497, 504 (2015).

Here, Mr. Britton specifically acknowledged at his deposition prior to signing the Permanent Stipulation that he was aware of the three year durational limitation for alimony under New Hampshire law but "was willing to waive all that." (A. 404). He further expressed, "As far as I was concerned, I was going to live up to what that agreement said. There was no other way." (A. 408). Mr. Britton was given the option to pay a lump sum in lieu of alimony, but instead chose to pay lifetime alimony.[9]

[9] Paragraph 5 of the parties' Permanent Stipulation states that Mr. Britton was required to provide Mrs. Britton with a mortgage to secure his payments under the divorce agreement. The provision further provides that after Mrs. Britton received the $250,000.00 property settlement payment – which was paid over 5 years – then her

In addition, paragraph 7 of the Permanent Stipulation expressly provides that the lifetime alimony payments were to begin on January 1, 1986, just 45 days later, and that until such time payments under an existing Temporary Order in the same amount of $400.00 per week would continue. (A. 9). It is noteworthy that an amendment to RSA 458:19, which removed the three year durational limitation, was set to take effect on January 1, 1986. Although the divorce decree was issued November 21, 1985, there is a strong inference that the parties attempted to ensure that the three year durational limit of the existing alimony law would not apply and that an agreed-upon award of lifetime alimony was within the law.

Mr. Britton suggests that it was Mrs. Britton's attorney, Joseph Millimet, who made a mistake in allowing his client to enter into an agreement that was void as a matter of law (Appellant's Br., p. 19). Yet there is no evidence of any such mistake, and in fact Attorney Millimet expressly asked Mr. Britton "anybody ever tell you you couldn't waive it?" Thus Attorney Millimet was aware of the three year durational limit, as was Mr. Britton and his counsel, and yet the parties moved forward with signing a permanent stipulation that said otherwise and asked that it be approved by the court. The parties obviously could not have been aware of this Court's later holding that the "new" alimony law would apply only to divorce *decrees* issued on or after January 1, 1986 and not to an agreed-upon effective date of the alimony obligation. *See*, *Henry v. Henry*, 129 N.H. 159 (1987).

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remaining mortgage would be subordinate to Mr. Britton's other mortgages. This language would be superfluous if the expectation was that Mrs. Britton's alimony would only last three (3) years.

In 2016 after Mr. Britton stopped paying alimony and Mrs. Britton filed for contempt, the parties signed a stipulation whereby Mr. Britton agreed to keep paying alimony on the exact same terms originally agreed upon in 1985. If there was ever a time for Mr. Britton to assert his arguments under the 1983 version of RSA 458:19 including that he should be reimbursed, it would have been in defense of a contempt action. Yet Mr. Britton never raised the issue of a three-year limitation under the statute nor sought reimbursement or a credit. Instead, he willingly agreed to continue the lifetime alimony and asked that the court approve the agreement.

It is undisputed that Mr. Britton was both expressly aware of the three year limitation under the 1983 alimony law and that he was willing to waive it. Mr. Britton then paid not only for the next 3 years, but for the next 32 years. The express intention by Mr. Britton prior to signing the Permanent Stipulation, the explicit language of the agreement itself and Mr. Britton's subsequent conduct in paying alimony over a period of more than 30 years amounts to a waiver. After thirty years of abiding by their agreement *without objection*, allowing a credit or ordering Mrs. Britton to reimburse Mr. Britton would be an unconscionable result.

b. Mr. Britton's argument for reimbursement is further barred by the equitable doctrine of laches.

"Laches is an equitable doctrine that bars litigation when a potential plaintiff has slept on his rights." *See*, *Premier Capital v. Skaltsis*, 155 N.H. 110, 118 (2007) (quotation omitted). *See also*, *Village Green Condominium Ass'n v. Hodges*, 167 N.H. 497, 504 (2015). Laches is not a mere matter of the elapsing of time, but is principally a question of the inequity of

permitting the claim to be enforced. *Id*. When the delay in bringing suit is less than the applicable statute of limitations period, laches will bar suit only if the delay was unreasonable and prejudicial. *Id*. "We consider four factors in our analysis: (1) the knowledge of the plaintiffs; (2) the conduct of the defendants; (3) the interests to be vindicated; and (4) the resulting prejudice." *Thayer v. Town of Tilton*, 151 N.H. 483, 486, 861 A.2d 800 (2004) (quotation omitted).

There was no argument ever made by Mr. Britton that he continued to pay alimony beyond 1988 due to some misunderstanding or mistake, or some wrongful conduct on the part of Mrs. Britton. Indeed, as pointed out above, Mr. Britton entered into the lifetime alimony obligation with his eyes wide open. Mr. Britton's request for reimbursement is both unreasonable and prejudicial to Mrs. Britton.

Mr. Britton took no action whatsoever for 32 years to request a modification of alimony on *any* grounds, let alone the 3-year term durational limitation of 1983 version of RSA 458:19. In fact, he did not even advance this argument in 2016 in response to Mrs. Britton's first contempt petition nor in his 2018 request for modification. It was not until *the day of trial* that he first raised the issue by an oral motion for summary judgment. This absolute failure to ever challenge his obligation to pay is highly prejudicial to Mrs. Britton because she had no notice that her receipt of alimony could be contrary to law, or that perhaps she needed to petition the court for a specific renewal or extension of the alimony obligation. Mrs. Britton certainly had no knowledge or expectation that she would be in jeopardy of having to pay any of it back, let alone the $380,600.00 now claimed by Mr. Britton.

Mrs. Britton relied upon Mr. Britton's continued payments and never had need to petition for a renewal or extension. Mr. Britton's argument that Mrs. Britton is at fault for failing to seek an extension of the alimony obligation after 1988, despite the fact that Mr. Britton was paying all along and reaffirmed his obligation in 2016, would lead to an unconscionable result. Mrs. Britton had no reason to apply to the Court for an extension of Mr. Britton's alimony obligation because he was continuing to pay per their agreement. Had Mr. Britton stopped paying after three years or at any time over the next thirty years based on the three year limit of the 1983 version RSA 458:19, Mrs. Britton would have filed the appropriate renewal petition. In fact, that is exactly what happened here – once Mr. Britton for the first time raised the three year limitation argument and her lifetime alimony award was called into question, Mrs. Britton made her request for renewal.

c. Mr. Britton is not entitled to a credit toward alimony for property given to Mrs. Britton years after their divorce.

Mr. Britton claims that the trial court erred as a matter of law in not crediting him with having given Mrs. Britton a piece of real estate in 1991 which she then sold in 2004 for a gross price of $125,000.00. (Tr. 40-45). The property given was an undeveloped lot adjacent to the marital home that had been awarded to Mrs. Britton in the divorce decree. As with the request for reimbursement, Mr. Britton did not raise this issue in his answer to Mrs. Britton's motion for contempt nor in his proposed order submitted prior to trial.

As a threshold matter, no evidence was presented to support a finding that the transfer of the real estate was related in any way to Mr. Britton's alimony obligation. In fact, during his testimony Mr. Britton testified that he never had a conversation with Mrs. Britton about the property being related to his alimony obligation. (Tr. 111). There was no evidence that the transfer was proposed by Mr. Britton or accepted by Mrs. Britton as a credit toward Mr. Britton's alimony obligation. In fact, the evidence shows just the opposite – Mr. Britton kept paying alimony for the next 27 years after the 1991 transfer which undermines any claim now made that it was to be credited toward alimony. In addition, the land was a parcel adjacent to the lot and home awarded to Mrs. Britton in the divorce decree but was not referenced in the parties' Permanent Stipulation. Mr. Britton retained this undisclosed marital asset and now wants the court to find that its subsequent transfer to Mrs. Britton constitutes the payment of alimony. The court correctly dismissed this argument as unconvincing.

At best, the transfer of this vacant land to Mrs. Britton next to her home, or rather the net proceeds from its later sale and what remains of those funds now 14 years later, is but one of the circumstances to be considered by the court in determining Mrs. Britton's need for alimony. Mrs. Britton testified that she had already used the funds to make necessary home improvements and repairs, including a new roof, siding, doors and windows. (Tr. 43).

d. The trial court has the discretion to renew alimony retroactively thus negating any claim for reimbursement or credit.

Additionally, and as a further reason to deny Mr. Britton any credit for having paid alimony beyond the three year durational limitation, the trial court would have been within its discretion to award Mrs. Britton a renewal of alimony retroactive to 1988 particularly where Mrs. Britton's circumstances had not changed over the past 30 years.

In *Walker v. Walker*, 133 N.H. 413 (1990), the trial court incorrectly determined that the three-year alimony limitation in the 1983 version of RSA 458:19 was not applicable, and thus erred in ordering the husband to pay alimony arrears with interest. However, this Court further stated:

> Although there is no express authority permitting a New Hampshire court to order retroactive alimony, ***neither is there express authority prohibiting such an order***. Indeed, the discretion conferred on courts in the family law realm is necessarily extensive, and our statute delineating the factors to be considered in making alimony decisions does not, for example, abrogate the court's discretion with regard to amount. Furthermore, the date from which alimony is payable is peculiarly within the discretion of the trial court. In general, courts make alimony payable from the date of the decree or order granting it; however, ***in a proper case, courts may make alimony awards retroactive, computed at any time subsequent to the commencement of the suit for divorce***.

Walker v. Walker, 133 N.H. 413, 418 (1990) (emphasis added).

II. THE TRIAL COURT PROPERLY HELD MR. BRITTON IN CONTEMPT OF THE 2016 STIPULATION AND ORDER AND AWARDED REASONABLE ATTORNEY'S FEES

Mr. Britton argues that the trial court could not hold him in contempt for failing to pay from April 2018 through October 2019 because the parties' 2016 stipulation reaffirming the lifetime alimony obligation was "without meaning", is "irrelevant", and is of no effect as a matter of law because there was no pending motion to renew, extend or modify at the time the stipulation was reached on Mrs. Britton's contempt petition. (Appellant's Br.[10], p. 21). This Court has held that the "shall be effective" language of the 1983 version of RSA 458:19 mandates automatic expiration of an alimony order after three years, and that no arrears can be found to exist after expiration of the order for purposes of a contempt. *See*, *Walker v. Walker*, 133 N.H. 413, 417 (1990); *Morphy v. Morphy*, 112 N.H. 507 (1972).

However, Mr. Britton's argument is unavailing because here the parties *stipulated* in 2016 that alimony would continue, which stipulation was approved and became an order of the court. RSA 458:51 provides that in any proceeding in which a party alleges, and the Court finds, that the other party has failed without just cause to obey a prior order or decree, the court shall award reasonable costs and attorney's fees to the prevailing party. At a minimum, the 2016 stipulation and order was an order renewing alimony for at least the next three years. Unlike in *Morphy*, in 2016 Mr. Britton voluntarily put the issue before the court and had notice

[10] Appellant's opening brief.

that his alimony obligation was being renewed and again made an order of the court. Mrs. Britton did not need to file a motion to renew because Mr. Britton never raised the issue of the 1983 version of the alimony statute and to allow him to hide behind that statute now would make a mockery of the order.

Mr. Britton's decision to stop paying a second time in 2018 (even after the 2016 stipulation) was done knowingly and willfully, and the court was correct to find him in contempt. Mr. Britton did not challenge that he knowingly and willfully failed to abide by the court's order, in fact in his brief when discussing fees awarded, he states he "did not dispute that he stopped paying." (Appellant's Br., p. 23).

As for the amount of fees awarded, the amount was properly supported by a detailed affidavit of counsel setting forth the tasks performed and the time spent as to both the contempt aspects and the modification aspects of the case (including time to present the relevant contempt issues at trial), and where there was overlap the fees charged were allocated 1/3 toward the contempt matter. (Appellant's Add. 57). Out of a total of $19,286.00 in fees incurred, the court used its discretion to award $6,000.00, which is less than one-third, as fair and reasonable for work related to the contempt issue. Mr. Britton's argument that Mrs. Britton's attorney need only ask one question at trial ignores that in preparing for the contempt aspect of the full-day hearing, which was contested by Mr. Britton, it is necessary to prepare for the defense of an inability to pay and thus the time spent during discovery reviewing Mr. Britton's financial history over the relevant time period was reasonable and necessary.

III. THE TRIAL COURT ACTED WITHIN ITS DISCRETION TO DENY MR. BRITTON'S REQUEST TO TERMINATE ALIMONY AND IN GRANTING MRS. BRITTON'S MOTION TO RENEW.

a. Mrs. Britton's request to renew alimony was properly before the court and Mr. Britton had a full and fair opportunity to present his case in opposition.

Mr. Britton's argument that Mrs. Britton's motion to renew alimony was not properly before the court because she did not file a "new" action, pay the court's filing fee and serve Mr. Britton with orders of notice, is without merit because he nonetheless had a full and fair opportunity to be heard on each and every issue before the court.

Procedural due process requires that parties whose rights are affected have an opportunity to be heard. *See Berube v. Belhumeur*, 139 N.H. 562, 567 (1995) (citing *Vermont National Bank v. Taylor*, 122 N.H. 442, 446 (1982)). In contrast to more significant interests that might require heightened due process protections, such as facing imprisonment or termination of parental rights, in a divorce proceeding a respondent is entitled only to the basic due process protections of notice and a meaningful opportunity to be heard. *See*, *In re Kempton*, 167 N.H. 785, 797 (2015); *In re Baby K.*, 143 N.H. 201 (1998). This right to be heard encompasses the right to call and cross-examine witnesses, to be informed of all adverse evidence, and to challenge such evidence. *See*, *Chandler v. Bishop*, 142 N.H. 404, 409 (1997) (citing *Provencal v. Provencal*, 122 N.H. 793, 797 (1982). The trial court's discretion includes in how to conduct proceedings before it. *See*, *Appeal of Morin*, 140 N.H. 515, 518 (1995). In

addition, Family Division Rule 1.2 allows the court to waive the application of any rule, except where prohibited by law, as good cause and justice require.

Here, Mrs. Britton's motion to renew alimony was made in open court at the beginning of the hearing specifically in response to Mr. Britton's oral motion for summary judgment wherein he argued that his alimony obligation had terminated as a matter of law in 1988. (Tr. 18). The trial court reserved ruling on both issues and requested that counsel file memorandum of law after trial. (Tr. 20). After the hearing held on August 28, 2019, Mrs. Britton on September 25, 2019 filed a written Motion to Award Alimony and on October 1, 2019 Mr. Britton filed a written objection. In its order of November 7, 2019, the trial court although ready to issue an order on Mrs. Britton's request based upon the evidence already submitted, specifically granted either party the right to request a further hearing and stated it keep the record open and allow a further three hour hearing for the parties to present additional evidence. Mr. Britton then requested such a hearing and further submitted a written Motion to Dismiss Mrs. Britton's motion to renew. The trial court granted Mr. Britton a further hearing, and scheduled it for June 3, 2020. Mr. Britton then chose not to go forward with a further hearing, and agreed to have the court decide the motion on the existing record.

b. The 2019 version of RSA 458:19 is not applicable to the parties' 1985 divorce decree.

Mr. Britton argues that under RSA 458:19 as it currently exists, Mrs. Britton was required to file her request to renew no later than November

1990, five years from the date of the original divorce decree. He further argues that likewise under the current statute the trial court cannot compel him to pay past age 65. Mr. Britton's argument fails because the current version of RSA 458:19 which took effect January 1, 2019, has only prospective application.

Chapter 310 of the laws of 2018 (SB 71) specifically states that the changes made to RSA 458:19 shall apply to all cases ***filed on or after January 1, 2019***. *See*, Chapter 310:6 of the Laws of 2018. Chapter 310:6, II, also provides that cases filed between the effective date of section six on June 25, 2018 and January 1, 2019 shall be controlled by the law in effect on the effective date of section six (namely June 25, 2018) unless the court in its discretion finds that adopting any or all of the provisions due to take effect on January 1, 2019 would be both equitable and consistent with the law existing as of the date of passage. Section 310:6, III, provides that parties to any case filed prior to January 1, 2019 may agree to adopt some or all of the provisions of the act.

Here, the parties' divorce case was of course filed more than thirty years prior to the passage of the 2018 amendments to RSA 458:19 and there has been no agreement between the parties to apply the current statute. The phrase "filed on or after" refers to the original filing date of the action for divorce and not the filing date of the motion for modification. *See*, *Henry v. Henry*, 129 N.H. 159 (1987).

Furthermore, notwithstanding the express effective date of January 1, 2019, there is a presumption of prospective application of a statute when a statute affects substantive rights. This presumption is reversed when the statute is remedial in nature or affects only procedural rights, which in that

case retrospective application would not be unjust. *See*, *Kenick and Bailey*, 156 N.H. 356 (2007). Substantive rights are vested rights. *See*, *In the Matter of Goldman & Elliott*, 151 N.H. 770, 774 (2005). Where an original divorce decree has not ordered either party to pay alimony, neither party has a vested right to receive it. Conversely in this case, Mr. Britton was ordered to pay alimony in the original decree. Mrs. Britton thus has a vested right to receive alimony.

Accordingly, the current version of RSA 458:19 by its express terms and the law of prospective application of statutory changes affecting substantive rights makes clear that the 2018 amendments are not applicable to this proceeding.

c. The trial court did not err in reviewing Mr. Britton's request to terminate and Mrs. Britton's request to renew alimony under the "justice requires" standard set forth in the 1983 version of RSA 458:19

Mr. Britton in seeking to terminate his support obligation arising from the 1985 divorce decree had the burden to demonstrate that a substantial change of circumstances had arisen, which is both unanticipated and unforeseeable, making the existing order improper or unfair. *See*, *Laflamme v. Laflamme*, 144 N.H. 524, 527 (1999). Indeed, Mr. Britton expressly alleged he met this standard in his motion. (A. 15).

On appeal Mr. Britton does not argue that he met his burden of proof for termination, but rather that he had no burden at all because the 1985 alimony order terminated as a matter of law in 1988. This argument, however, is moot because the trial court found that the standard for termination and for a renewal, extension or modification under the 1983

version of RSA 458:19 *is the same,* "that is, determining what is just" based upon a showing of continuing need and an ability to pay. (Appellant's Add. 37, 52-53). This is consistent with the analysis in *In the Matter of Lyon and Lyon*, 166 N.H. 315 (2014) wherein this Court stated:

> Our prior cases make clear that when an alimony order has terminated and the issue is whether it should be extended or renewed, either in modified or unmodified form, the burden is on the party in whose favor the order is to run to establish that justice requires a renewal or extension, and if so, what justice requires as to amount … in light of all the circumstances then existing.

In the Matter of Lyon and Lyon, 166 N.H. 315, 321 (2014).

In determining whether "justice requires" a renewal or extension of alimony under all the circumstances, the court is permitted to consider a number of factors, such as absence from the workforce, lack of funds for savings, contingencies or emergencies, as well as the overall needs of the party requesting renewal, the opposing party's ability to pay, and the parties' disparate economic positions. *See*, *In the Matter of Lyon*, 166 N.H., at 321. The trial court's decision is not to be disturbed unless determined to be a clear abuse of discretion. *Laflamme v. Laflamme*, 144 N.H., at 527.

d. The evidence before the trial court supports its finding that Mrs. Britton demonstrated a continuing need for alimony and that Mr. Britton has an ability to pay.

At the time of trial, Mrs. Britton was 91 years old with a monthly income of $2,689.10. (Conf. A. 6). The court found that she had a monthly deficit of approximately $4,500.00 in meeting her expenses, and that even

with the $200.00 per week in alimony she still had a monthly deficit. (Appellant's Add. 38). The court also determined that "Mrs. Britton's circumstances have not changed dramatically since her divorce in 1985." (Appellant's Add. 38). The record here is replete with evidence supporting that Mrs. Britton had a need for the lifetime alimony agreed to by Mr. Britton. Mrs. Britton worked as a retail clerk until she was 82 years old in order to supplement the alimony she received. She produced her Social Security statement at trial to demonstrate her wages received over her lifetime that evidenced her past, present and future need for alimony.

The trial court also gave due weight to the fact that Mr. Britton had agreed to pay lifetime alimony, that he paid pursuant to the parties' agreement for more than 30 years and that Mrs. Britton was entitled to rely on the lifetime alimony provision. The trial court is empowered and indeed is required to consider the terms of the permanent stipulation as part of considering all of the circumstance of the case. In *Henry v. Henry*, 129 N.H. 159 (1987), cited by Mr. Britton, this Court did not hold "that it does not matter what the stipulation says", (Appellant's Br., p. 18), but rather in remanding the matter back to the trial court stated: "While the terms of the stipulation are not controlling in this case, they are relevant circumstances to be considered by the court." *See*, *Henry v. Henry*, 129 N.H. 159, 162 (1987). *See also*, *Morphy v. Morphy*, 112 N.H. 507 (1972) ("the stipulation was a factor which the court may take into account in determining the terms of the modified decree"); *Taylor v. Taylor*, 108 N.H. 193 (1967) ("[the agreement] is one of the circumstances among all the others which may be considered by the court in determining what, if any, order should be made with respect to an extension, renewal or modification.").

The parties' Permanent Stipulation is of particular significance here because the lifetime alimony award was in consideration of the disproportionate division of the marital estate. Mr. Britton did not contest that he received a majority of the marital assets at the time of divorce and that he chose to pay lifetime alimony. "Alimony is something more than a mere substitute for support. It is also understood to include as an element for consideration, the adjustment of property rights upon an equitable division." *Stritch v. Stritch*, 106 N.H. 409, 411 (1965). Alimony payments can be a method of equalizing the parties by providing income in exchange for productive assets retained by the other party. *See*, *Laflamme v. Laflamme*, 144 N.H. 524, 527 (1999).

In his brief Mr. Britton argues that the trial court chastised him for transferring $240,000.00 to his wife but failed to find any fault with "Mrs. Britton doing the exact same thing", namely, transferring $300,000.00 from the sale of her home to an irrevocable trust for the benefit of her sons. (Appellant's Br., p. 24-25). Mr. Britton ignores, however, that Mrs. Britton transferred the house into the trust in 2010 as part of her estate planning and long before Mr. Britton first stopped paying alimony in 2016. (Tr. 49-50, 261). At the time of the transfer Mrs. Britton had every reason to believe that her alimony would continue for the rest of her life. In contrast, the transfers by Mr. Britton for which he was chastised occurred in the year prior to the filing of his request to terminate alimony. It was a deliberate attempt to minimize his financial situation so as to support his alleged inability to pay.

The evidence supports the court's findings that Mr. Britton had the ability to pay. It was undisputed that Mr. Britton transferred $1,125,000.00

to his wife and friend in the year prior to filing for modification seeking to terminate his alimony obligation. The court noted, for example, that he had received $250,000.00 cash from his sons relating to the transfer of the family business, and rather than using that money to pay his living expenses and to pay his alimony obligation, he instead gave most of it away to his new wife for an alleged verbal promise to take care of him for the rest of his life. Assessing Mr. Britton's credibility, the trial court found that Mr. Britton "created a false picture of an inability to pay Mrs. Britton the alimony he had agreed to pay …" (Appellant's Add. 38).

CONCLUSION AND REQUEST FOR RELIEF

Based upon the foregoing, there was no error in renewing Mrs. Britton's alimony award given her proven need and Mr. Britton's ability to pay. Continuing alimony for Mrs. Britton's lifetime is also consistent with the parties' Permanent Stipulation signed in 1985 and not only the expressed intentions of the parties, but the actual conduct of the parties, namely, that Mr. Britton paid alimony for 31 years and then reaffirmed his obligation by a further stipulation and order in 2016 which he then willfully violated. Mr. Britton's request for reimbursement or a credit of $360,800.00 or another other amount is contrary to the parties' agreements, Mr. Britton's own actions, and is not supported by any statute or prior decision of this Court. The trial court committed no error of law, and did not abuse its discretion in finding based upon the substantial evidence submitted as to the parties' finances that Mrs. Britton should continue to receive alimony.

For the reasons set forth above, the Petitioner respectfully requests that this Court affirm the trial court's orders dated November 7, 2019 and June 8, 2020.

REQUEST FOR ORAL ARGUMENT

The Respondent requests fifteen minutes for oral argument to be argued by Pamela A. Peterson, Esquire.

RULE 16(11) CERTIFICATION

I hereby certify that the foregoing brief complies with the word limit of Rule 16(11). The word count is 8,692 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.

Respectfully submitted,

PATRICIA F. BRITTON, Respondent

By her Attorneys,

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Dated: November 19, 2020

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CERTIFICATION OF SERVICE

I hereby certify that on the 19th day of November, 2020, a copy of the foregoing Respondent's Brief and a copy of the Appendix to Respondent's Brief and Confidential Appendix has been provided to the following through the Supreme Court's electronic filing system's electronic service or through conventional service, as indicated:

Name	Service Type
James Flagg, Esq.	eService

/s/ Pamela A. Peterson
Pamela A. Peterson, Esquire