State of New Hampshire Supreme Court

No. 1999-823

2000 TERM

NOVEMBER SESSION

IN THE MATTER OF LINDA DRISCOLL and WILLIAM DRISCOLL

RULE 7 APPEAL FROM FINAL DECISION OF
HILLSBOROUGH COUNTY (SOUTH) SUPERIOR COURT

BRIEF OF RESPONDANT/APPELLANT, WILLIAM DRISCOLL

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1. New Hampshire's divorce statute allows for modification of alimony "upon motion." The court prohibited review of alimony for ten years. Did the court err by barring William from applying for modification pursuant to the statute?

2. The New Hampshire's divorce statute allows for modification of alimony "upon motion." Linda requested alimony for only a short time. Did the court err by ordering alimony for a period of ten years, far longer than requested?

3. The New Hampshire constitution provides "Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive. . . .; completely; promptly, and without delay; conformably to the laws." The court imposed a ten-year suspension of review of alimony. Did the court unconstitutionally bar William from recourse to the laws?

4. The New Hampshire constitution provides that "The power of suspending the laws, or the execution of them, ought never to be exercised but by the legislature." The court prohibited William from seeking a modification of alimony for a period of ten years. Did the court err in unconstitutionally suspending the operation of the divorce laws as they pertain to William Driscoll?

5. New Hampshire's divorce statute requires the court to specify reasons for making its alimony award. Beyond a cursory order, the court did not specify reasons. Did the court err by failing to specify reasons for its alimony award?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

William Driscoll and Linda Driscoll were married in 1983, and separated in March 1998 when Linda filed a libel for divorce. The grounds for divorce and other matters were originally contested, but the parties entered a stipulation resolving most of them, including custody of the couple's two children. After a three day hearing, the court allowed a divorce on irreconcilable differences, scheduled visitation, split the couple's property, and ordered support. Several issues, however, have resulted in protracted litigation. This appeal concerns alimony only.

On May 26, 1999, the Hillsborough County South Superior Court (*Arthur D. Brennan*, J.) issued a final divorce decree. It provided that "William shall pay alimony of $210 weekly . . . until [Linda] has been employed full-time for six consecutive weeks. The need for alimony and the amount . . . shall be reviewed when Linda becomes employed." DECREE at ¶ 9, *Appx. to N.O.A.* at 19. The court also ordered that "alimony shall be reviewed and recalculated when Linda secures employment and then every three years." DECREE at ¶ 4G, *Appx. to N.O.A.* at 17-18.

Based upon the decree and on the statute allowing modification, RSA 458:32, on August 19, 1999, William asked the court to terminate alimony because Linda had begun a full-time job. On September 21, 1999, the court denied the request without a hearing. A few days later William filed a motion for reconsideration. On October 7, 1999, the court held a hearing, and on October 14, 1999, the court granted the motion. It ordered a reduction in alimony to $100 per week, but also wrote that "[a]limony is subject to review after ten years." ORDER ON THE RESPONDENT'S PETITION TO MODIFY, *Appx. to N.O.A.* at 39.

On October 28, 1999, William expressed his dissatisfaction with the court's order. In a

partial motion for reconsideration, he again requested termination of alimony and also objected to the 10-year non-review of alimony. On December 1, 1999, the court denied William's motion, and this appeal followed.

SUMMARY OF ARGUMENT

William Driscoll first points to the court order which bars him from seeking a modification of alimony until a period of ten years has elapsed.

Second, he notes New Hampshire's long-standing statutory and case-based policy of allowing a request for modification of alimony whenever the parties' financial or social situation changes. He argues that the court's ten-year no-review order violates that law.

Third, Mr. Driscoll cites New Hampshire's law involving remedies. He argues that because the law requires judges to be judges, and not advocates, courts may not grand a remedy not requested when the remedy is in aid of one of the litigants. Because no party asked for long-term alimony or a non-review order, he argues that the order went beyond the court's role.

Fourth, Mr. Driscoll points to the statute requiring a detailed set of findings courts must make in determining the amount of alimony awarded. He argues that because no such findings were made here, the court's order is insufficient.

Fifth, he turns to the New Hampshire constitution. He cites its article guaranteeing a right of access to the courts, and its article dis-allowing suspension of the laws except by the legislature. He notes that the court's no-review article effectively bars him from the court, and that it is a suspension of the law allowing modification upon changed circumstances. Mr. Driscoll thus argues that the court's no-review order is in violation of these provisions.

Finally, William dispels any notion that this case is not yet ripe for review.

ARGUMENT

I. The Court Bars William from Applying to Adjust Alimony for Ten Years

The Superior Court's order says: "Alimony is subject to review after ten years." "After" means later in time. *See Appeal of N.H. Dept. of Employment Security*, 140 N.H. 703, 712-13 (1996) (application of "after-acquired evidence doctrine"); *First Fed. Sav. & Loan v. Pellechia*, 656 A.2d 688, 690 (Conn.App. 1995) ("after" means "later, succeeding, subsequent to, inferior in point of time" and "subsequent in time to"); *Fisk Discount Corp. v. Brooklyn Taxicab Trans. Co.*, 60 N.Y.S.2d 453, 461 (App. Div. 1946) (where an act is not to take place until "after" a specified time or event, the entire period must elapse before it may be performed); *Edward Knapp & Co. v. Tidewater Coal Co.*, 81 A. 1063, 1066 (Conn. 1912) ("after" means not before).

The order is clear and unambiguous, and plainly means that alimony is not subject to review any time before ten years has elapsed.

II. Court's No-Review Order Violates New Hampshire's Policy Allowing Adjustment of Alimony According to Circumstances

New Hampshire law permits lengthy, and even indefinite, alimony awards. *Hoffman v. Hoffman*, 143 N.H. 514 (1999) (seven-year alimony); RSA 458:19, I (alimony may be "either temporary or permanent, for a definite or indefinite period of time"). But the alimony statute also provides that a party may request an initial or modified award of alimony "[u]pon motion" or "upon a new petition." RSA 458:19, I (initial); RSA 458:32 (modified).

New Hampshire's policy of allowing a party to petition for an adjustment of alimony is nearly one-hundred-and-fifty years old, and has been consistently applied. *Sheafe v. Laighton*, 36 N.H. 240 (1858) (can petition for alimony any time after libel is filed). *See also, Labrie v. Labrie*, 113 N.H. 255 (1973) (doctrine of *res judicata* not apply to alimony awards because of legislative policy assuring that alimony continue to reflect needs of recipient and ability to pay); *Comer v. Comer*, 110 N.H. 505, 508 (1970) (support of wife orders always open to reconsideration); *Madsen v. Madsen*, 109 NH 457, 458 (1969) (alimony always subject to review); *Taylor v. Taylor*, 108 N.H. 193 (1967); *Veino v. Veino*, 96 N.H. 439 (1951) (legislative policy of allowing modification of alimony when situation demands); *Cross v. Cross*, 63 N.H. 444 (1885) (same).

Normally, almost any change in the party's financial or social circumstances are grounds for requesting a modification. *See, e.g.,* RSA 458:19, IV (voluntary un- or under-employment grounds to modify alimony); RSA 458:19, V (changes in federal taxation grounds to modify); *In re Johnson*, 144 B.R. 209, 217 (Bkrtcy.D.N.H. 1992) (court suggesting parties may seek alimony modification to take into account bankruptcy of payor); *Bisig v. Bisig,* 124 N.H. 372 (1983)

(change in wife's financial situation grounds to modify alimony); *Roberts v. Roberts*, 371 A.2d 689 (Md.App. 1977) (wife squandering alimony grounds to modify); *Ruquist v. Ruquist*, 327 N.E.2d 742 (1975) (wife's violation of court order in absconding with children and denying father visitation grounds to modify alimony); *Rubisoff v. Rubisoff*, 133 So. 2d 534 (Miss. 1961) (wife's conviction for passing bad check grounds to modify alimony); *Dauseuel v. Dausuel*, 195 F.2d 774 (D.C. Cir. 1952) (wife's fraudulent concealment of evidence during divorce grounds to modify alimony).

In Mr. Driscoll's case, however, the court barred him from requesting a modification of alimony for a period of ten years, regardless of changed circumstances. If Linda died tomorrow, won the lottery, *Holliday v. Holliday*, 139 N.H. 213 (1994), or remarried and stopped working, *Bisig v. Bisig*, 125 N.H. 289 (1984), or if William died, under the court order William (or his estate) must still pay alimony, *Stritch v. Stritch*, 106 N.H. 409 (1965). The order works both ways, of course, and prevents Linda from applying for an increase in alimony if, for instance, she gets sick and becomes unable to earn a living. The court's order is contrary to New Hampshire law, and should be reversed.

III. Court Awarded Alimony Far Longer than Was Requested

In her request to the court for alimony, Linda asked to continue alimony, but did not specify for how long. OBJECTION AND ANSWER TO PETITION FOR MODIFICATION, *Appx. to N.O.A.* at 29. During the hearing, however, Linda's counsel told the court that alimony was necessary because Linda was "getting back into the work force," *Trn.* at 44-45, and that "alimony is needed for the short term, . . . as a transition." *Trn.* at 46.

The alimony statutes allow modification of alimony "upon motion." RSA 458:19; RSA 458:32. Linda's motion was for short-term alimony. No party ever asked for alimony for the lengthy period of ten years. And no party ever asked for the no-review order.

Courts have limited power to grant unrequested remedies. In denying a remedy not requested, this court wrote: "We note ... that [the party] did not request this remedy . . . . Under these circumstances, the court's *sua sponte* award of . . . relief is of doubtful propriety." *Dandeneau v. Seymour*, 117 N.H. 455, 461 (1977).

When courts grant relief not requested, they violate their judicial function. The role of judges is judicial. N.H. CONST. pt. 2, art. 72-a; *see also* N.H. CONST. pt. 1, art. 37. Judges must be and appear impartial, lending their knowledge and authority to neither party. "No judge of any court . . . shall act as attorney, or be of counsel, to any party . . . in matters which shall come or be brought before him as judge." N.H. CONST. pt. 2, art. 79; *Moses v. Julian*, 45 N.H. 52 (1863). Our constitution demands that it is the right of every individual to have "impartial interpretation of the laws, and administration of justice." N.H. CONST. pt. 1, art. 35; *State v. LaFrance*, 124 N.H. 171 (1983).

In some limited circumstances, such as when a litigant is un-represented, judges are

required to wear extra-judicial robes. *See e.g., State v. Brodowski*, 135 N.H. 197 (1991) (duty to explain relevant law to *pro se* criminal defendant); *Austin v. Ellis*, 119 N.H. 741 (1979) (court's duty to *pro se* civil litigant). However, "the judge's constitutional obligations to remain impartial and refrain from aiding litigants in the substance of a case are paramount." *Exeter Hospital v. Hall*, 137 N.H. 397, 401 (1993) (*Johnson* J., dissenting) (citations omitted) (citing N.H. CONST. pt. 1, art. 35). Nonetheless, both parties here were represented.

In Mr. Driscoll's case, the superior court awarded alimony far longer than any party requested, and ordered that it cannot be reviewed for ten years. In doing so, it aided, rather than judged, a litigant. Accordingly, its award must be reversed, or limited to the relief requested.

IV. Court Did Not Specify the Reasons for its Alimony Award

In order to award *any* alimony at all, the court must make a set of statutory findings. It must determine that the paying party is able to afford alimony while also supporting himself, that the recipient party lacks sufficient means of support, and that the recipient is incapable of self-support. RSA 458:19, I (a, b & c). These three requirements are connected in the statute by the conjunctive "and," indicating that all three conditions must be met. The court is required to specify these findings in writing. RSA 458:19, VI.

The court must make a second set of findings concerning the *amount* of alimony. It can justify the amount of alimony based on any relevant consideration, *see e.g., Henry v. Henry*, 129 N.H. 159 (1987) (recipient had debilitating disease), including those listed in the statute. RSA 458:19, IV (length of marriage; age, health, social or economic status, occupation, amount and source of income, property division in divorce decree, vocational skills, employability, estate, liabilities, needs of each party; opportunity for each for future acquisition of assets and income; fault of either party; and tax consequences); *Marsh v. Marsh*, 123 N.H. 448 (1983). Whatever the grounds for the amount of alimony, the court is required to specify them in writing. RSA 458:19, VI.

In William Driscoll's case, the court did not make either set of findings. In its decree, the court merely stated that William must pay alimony, and specified the amount and term. DECREE at ¶¶ 4G & 9, *Appx. to N.O.A.* at 17-18, 19. In its order on William's motion for reconsideration, the court stated, in totality: "The court finds that the petitioner is in need of the payments listed above and that the respondent is able to pay them." ORDER ON THE RESPONDENT'S PETITION TO MODIFY, *Appx. to N.O.A.* at 39.

The purpose of the written findings requirement is so that the litigants and the appellate court can ascertain the reasons for the lower court's order. *Magrauth v. Magrauth*, 136 N.H. 757, 763 (1993) (construing identical written reasons language in RSA 458:16-a). In *Hoffman v. Hoffman*, 143 N.H. 514, 518-19 (1999), for example, the lower court wrote a lengthy paragraph setting forth the reasons for the award there. In William Driscoll's case, however, the reasons for the court's award are unascertainable from the court's terse conclusory order.

Even though Linda sought only short-term alimony as a transition to becoming self-sufficient, the court also failed to make its order contingent upon employment, remarriage, cohabitation, an increase in assets, *Madsen v. Madsen*, 109 N.H. 457 (1969), death, or any other event.

The remedy for such an insubstantial order is remand. *Magrauth*, 136 N.H. at 763.

V. The Court Unconstitutionally Restricted William Driscoll's Access to the Court

The New Hampshire constitution provides:

> The New Hampshire constitution provides "Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely; promptly, and without delay; conformably to the laws."

N.H. CONST., pt. I, art. 14.

The purpose of the provision is to "make civil remedies readily available, and to guard against arbitrary and discriminatory infringements on access to the courts." *Cargill v. City of Rochester*, 119 N.H. 661, 665 (1979), *appeal dismissed*, 445 U.S. 921 (1980); *Gould v. Concord Hospital*, 126 N.H. 405, 409 (1985) ("Our constitution provides that all citizens have a right to the redress of their actionable injuries."). The right to go to court to procure a remedy is "an important substantive right." *Opinion of the Justices*, 134 N.H. 266, 274 (1991). Restrictions imposed on the right are subjected to "rigorous judicial scrutiny." *Id.*; *Carson v. Maurer*, 120 N.H. 925, 931-32 (1980). In *City of Dover v. Imperial Cas. & Indem. Co.*, 133 N.H. 109, 120 (1990), this court found that New Hampshire's municipal immunity statute was unconstitutional because it denied people injured on city sidewalks "a right to recover as provided in" the constitution.

This court has upheld alternative recovery schemes, such as workers' compensation, because even though such systems take away a person's right to sue, it is replaced with some meaningful alternative process or remedy. *Estabrook v. American Hoist & Derrick, Inc.*, 127 N.H. 162, 171 (1985) ("an abolition of the rights of a class of persons to recover damages for their injuries in full would contravene the plain language of article 14, part I of the New

Hampshire constitution, in the absence of provision of a satisfactory substitute") (quotations and ellipses omitted).

Many states have constitutional provisions similar to New Hampshire's. The Oklahoma constitution, for instance, provides that: "The court of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay or prejudice." OKLA. CONST., art. II, § 6. In *Peck v. Jones*, 878 P.2d 390 (Okla. 1994), parents were divorced in Texas, but both separately later moved to Oklahoma. The father requested a modification of child support based on changed financial situations of the parents, but the Oklahoma trial court dismissed it because it believed jurisdiction lie in Texas. In fact, a Texas statute specifically barred that state's jurisdiction. On appeal, the Oklahoma Supreme Court held that the trial court's dismissal of the father's petition for modification was unconstitutional because he was effectively barred from access to the courts, and he had no viable alternative remedy.

In William Driscoll's case, he has been blocked from using the courts to modify the alimony award. Although the alimony statute provides that a party may request a modification "upon motion," no court is open to his motion, and no substitute process is available. No party requested the no-review order, and nothing exists in the record to support it. The order is precisely the type of arbitrary infringement on access to the courts warned of in *Cargill*, 119 N.H. at 665.

Accordingly, the order is unconstitutional and must be reversed.

VI. The Court Unconstitutionally Suspended RSA 458

The New Hampshire constitution provides that

> "The power of suspending the laws, or the execution of them, ought never to be exercised but by the legislature, or by authority derived therefrom, to be exercised in such particular cases only as the legislature shall expressly provide for."

N.H. CONST., pt. I, art. 29.

A law is suspended when there is the "temporary displacement of a valid legislative enactment." *King v. Sununu*, 126 N.H. 302, 306 (1985). When a branch of government suspends a law without the legislature's authorization, the suspension is unconstitutional. *See State v. Rogers*, 105 N.H. 366 (1964).

Several states have constitutional provisions similar to New Hampshire's. The Kentucky constitution provides: "No power to suspend laws shall be exercised unless by the General Assembly or its authority." KY. BILL OF RIGHTS, § 15. In *Gering v. Brown Hotel Corp.*, 396 S.W.2d 332 (Ky.Ct.App. 1965), the trial court issued an injunction to postpone the enforcement of that state's minimum wage law. The appeals court wrote:

> "If a court should purport to change the effective date of a valid law or administrative order other than in the form of provisional relief to parties in a lawsuit, it would certainly be suspending the law in violation of section 15 of the Kentucky Constitution."

Gering v. Brown Hotel, 396 S.W.2d at 337. It is thus apparent that a court order suspending a validly enacted statute is a violation of the constitution.

The New Hampshire Legislature has not provided authority for the courts to suspend RSA 458, which allows modification of alimony "upon motion." Yet the court in Mr. Driscoll's case effectively suspended that law for a period of ten years. The order is accordingly unconstitutional, and must be reversed.

VII. William Driscoll's Claims are Ripe for Review

The Superior Court prospectively limited William Driscoll's right to go to court to modify the alimony award. The appellee may therefore allege that this appeal is not ripe. In *Appeal of State Employees' Association of New Hampshire, Inc*, 142 N.H. 874 (1998), this court wrote:

> Although we decline to adopt a formal test for ripeness at this time, we find persuasive the two-pronged analysis used by other jurisdictions that evaluates the fitness of the issue for judicial determination and the hardship to the parties if the court declines to consider the issue.

Appeal of State Employees' Association, 142 N.H. at 878.

The issue in this case is squarely presented for judicial determination. Whether the court's no-review rule is lawful does not depend upon facts that are not present in the record, and there is nothing absent on the current record that might be developed in a later proceeding. As to hardship, the no-review rule chills Mr. Driscoll's ability to seek modification of alimony regardless of how changed the circumstances are. He is justly concerned that if he requests a modification, a judge will rely on law of the case to deny him entrance into the courtroom. His doubt concerning whether he can even *ask* for modification colors his ability to plan his finances. The order may also prevent him from requesting financial documents from Linda to evaluate her alimony need before the ten years has elapsed.

Accordingly, the issues presented in this case are ripe for review.

CONCLUSION

In accordance with the foregoing, William Driscoll respectfully requests this court to reverse the no-review rule imposed by the court below, and to remand this case for revision of the alimony order so that it is in compliance with the law and our constitution.

Respectfully submitted,

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By his Attorney,

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Dated: November 17, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for William Driscoll requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on November 17, 2000, copies of the foregoing will be forwarded to Elizabeth Cazden, Esq., and Honey Hastings, Esq.

Dated: November 17, 2000

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