State of New Hampshire
Supreme Court

NO. 2021-0282

2022 TERM

MARCH SESSION

In the Matter of

Dr. Mary (Bates) Braun and Terry Braun

RULE 7 APPEAL OF FINAL DECISION OF THE
CANDIA FAMILY DIVISION COURT

BRIEF OF PETITIONER/APPELLEE, DR. MARY (BATES) BRAUN

March 3, 2022

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Was the family court correct in rejecting, years after divorce, Terry Braun's venture to reopen the stipulated property decree and to resurrect alimony?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Terry Braun and Dr. Mary (Bates) Braun[1] were married in 1991, and had two children, now adults. After a 23-year marriage, they divorced by mediated stipulation in 2015 in which Terry was awarded his share of the value of the marital home, a portion of Mary's retirement accounts, and alimony ending in 2019. Now, seven years later, Terry seeks revision of the property settlement and resurrection of alimony. Because Mary was forthright in her asset disclosures at the time of divorce, and because all the grounds upon which Terry seeks alimony were known and foreseeable, the family court correctly determined that Mary owes him no longer.

I. Mary Grew Tired of Terry's Financial Mismanagement, and Divorced Him

A. Terry Quits Work, Becomes Dependant on Benefits and Mary's Money

Terry Braun was 66 years old in 2015 at the time of the parties' divorce, and is now 73. PETITION FOR DIVORCE (Dec. 1, 2014), *Appx*. at 20. He lived in Exeter, New Hampshire, later moved to Dover, and more recently to northern Maine. CHANGE OF ADDRESS NOTIFICATION (Oct. 9, 2015) (omitted from appendix); CHANGE OF ADDRESS NOTIFICATION (Nov. 14, 2018) (omitted from appendix); CHANGE OF ADDRESS NOTIFICATION (Dec. 14, 2020) (omitted from appendix).[2]

Before retiring in 2005, Terry had a well-paid career in computer programming and management. TERRY'S ANSWER AND CROSS PETITION FOR DIVORCE ¶¶ 4 (Dec. 24, 2014), *Appx*. at 32; TERRY'S FINANCIAL AFFIDAVIT (Mar. 24, 2020), *Sealed Appx*. at 50. Since then, Terry turned his energy toward

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[1]Because the parties shared a surname, they are referred to herein by their forenames.

[2]Citations to the record are as follows: to the appendix filed herewith, "*Appx.*"; to the sealed appendix also filed herewith, "*Sealed Appx.*"; to the transcript of the March 3, 2021 Final Hearing, "*Trn*." No effort has been made to cross-reference citations to the appellant's four appendices filed with his brief.

his other interests – he describes his job skills as "metalwork artist"– and spent significant family resources equipping his studio.[3] *Id.*

During the last several years of the marriage, and at the time of separation, Terry earned very little. In his divorce-era financial affidavit, he reported $2,600 monthly from his and the parties' then-underage child's social security benefit, $2,000 in support from Mary, and just $150 of earned income. TERRY'S FINANCIAL AFFIDAVIT (Jan. 23, 2015), *Sealed Appx*. at 39; MARY'S FINANCIAL AFFIDAVIT (Jan. 28, 2015), *Sealed Appx*. at 13. At the time of divorce he conceded he "has very limited income in that he only receives Social Security income." TERRY'S OBJECTION TO MOTION RELATIVE TO APPOINTMENT OF GAL ¶ 4 (Jan. 5, 2015), Mary's Exh. 1B, *Appx*. at 36.

Between 2007 and 2013, Terry was not otherwise employed. His studio's records show one year he earned about $2,000, but in the other years he lost between about $9,000 and $19,000. PROFIT AND LOSS SUMMARY (Feb. 10, 2015) at 7, Mary's Exh. 1D, *Appx*. at 62. In the same period, he claimed monthly expenses of $6,590. TERRY'S FINANCIAL AFFIDAVIT (Jan. 23, 2015), *Sealed Appx*. at 39.

Terry admits that at the time of divorce he was unemployed, and that he considered himself unemployable. In 2014 he wrote his "working years are behind him," and in 2015 noted his "full-time job prospects are minimal." TERRY'S OBJECTION TO MOTION RELATIVE TO APPOINTMENT OF GAL ¶ 4 (Jan. 5, 2015), *Appx*. at 36; TERRY'S ANSWER AND CROSS PETITION FOR DIVORCE ¶¶ 5, 9 (Dec. 24, 2014), *Appx*. at 32.

Following the divorce, Terry's situation is largely unchanged. In 2019, upon the youngest child becoming an adult, the family court found that Terry "does not work." ORDERS (Jan. 14, 2019) at 1, *Appx*. at 87. At that time, he

[3]Terry's website showcases the copper vessels he creates. *See* <https://tabraun.com/>.

reported monthly income of $1,300 received as child support, $700 in alimony, about $2,600 in social security, and zero earnings. TERRY'S FINANCIAL AFFIDAVIT (Jan. 7, 2019), *Sealed Appx*. at 45. He also claimed around $3,000 in monthly expenses, and no significant assets. *Id.*

By 2020, in his current application for further support, Terry shows about $1,800 in social security benefits, no other income, negligible assets, about $5,300 in credit card debt, and about $2,100 in monthly expenses. TERRY'S FINANCIAL AFFIDAVIT (Mar. 10, 2021), *Sealed Appx*. at 55; TERRY'S FINANCIAL AFFIDAVIT (Mar. 24, 2020), *Sealed Appx*. at 50. Terry admits avoiding work:

> I considered seeking employment, but reasoned that at the age of 67, even if full time employment was possible, I would be not be able to continue working long enough to build an adequate retirement.

PETITION TO CHANGE COURT ORDER (Mar. 24, 2020) at 6, *Appx*. at 91.

Regarding his health, Terry has had a heart condition for decades. TERRY'S MOTION TO CONTINUE (Nov. 26, 2018) at 2, *Appx*. at 85 ("I have a twenty year history of atrial fibrillation"). He has several other maladies, and his health continues to decline, as appears not inconsistent with his age. TERRY'S MEDICAL RECORDS (Dec. 15, 2020) (omitted from appendix).

B. Mary's Second Career as a Doctor

Mary was 50 at the time of divorce and is now 57, sixteen years younger than Terry. PETITION FOR DIVORCE (Dec. 1, 2014), *Appx*. at 20. Although she brought financial resources to the marriage, she was not satisfied with being an unpaid bookkeeper at Terry's technology company. MARY'S ANSWER TO TERRY'S CROSS PETITION FOR DIVORCE (Jan. 12, 2015), *Appx*. at 38.

In 1997, Mary commenced medical school. While Terry helped support her, tuition was financed through student loans, which form a continuing obligation. TERRY'S ANSWER AND CROSS PETITION FOR DIVORCE ¶ 6 (Dec. 24, 2014), *Appx*. at 32; MARY'S ANSWER TO TERRY'S CROSS PETITION FOR DIVORCE (Jan. 12, 2015), *Appx*. at 38. She then began a career as a medical doctor, and had been working at Dartmouth-Hitchcock, in Manchester, New Hampshire, for about eight years when the parties separated in 2014. During her tenure at Dartmouth-Hitchcock, Mary contributed to its employer-sponsored retirement plan, to which she paid little attention. *Trn*. at 82.

Since 2016, Mary has practiced internal medicine and geriatrics at a federally-funded community health center in Newmarket, and at the Rockingham County Nursing Home in Brentwood. INTERROGATORIES, Terry's Exh. 1 (omitted from appendix); *Trn*. at 84. While she enjoys a good salary, Mary is aware she could earn much more by joining a private medical practice. *Trn*. at 83-84; MARY'S FINANCIAL AFFIDAVIT (Mar. 10, 2021), *Sealed Appx*. at 29.

Mary got remarried in 2018. While her present husband paid for half their home in Nottingham, New Hampshire, Mary financed the remainder, arranging in the transaction to incorporate her remaining medical school loans into her mortgage. *Id.; Trn*. at 44, 83; UNIFORM RESIDENTIAL LOAN APPLICATION (Aug. 20, 2018), Terry's Exh. 5 (omitted from appendix).

Mary is generally not motivated by money, does not consider herself

financially savvy, and does not regularly keep track of her automatic investments. She knows her retirement account is overly-conservative, but is comfortable with that because while she understands bonds, she is not comfortable with the stock market. *Trn*. at 54, 78, 83-84; *See, e.g.,* TRP QUARTERLY ACCOUNT STATEMENT (Mar. 31, 2015), *Sealed Appx*. at 9 ("market return & risk analysis" is "preservation").

C. Financial Discord in the Marriage

Mary married Terry in 1991, and they had two daughters, now adults. For the first decade of the marriage, Terry was the primary earner. After Mary became a doctor and Terry quit working to pursue art, Mary became the family's provider. If they needed more money, Mary increased her hours. *Trn*. at 81, 95; MARY'S ANSWER TO TERRY'S CROSS PETITION FOR DIVORCE (Jan. 12, 2015), *Appx*. at 38.

During the marriage, "[t]housands upon thousands of dollars … were invested into creating and equipping a studio for [Terry]," based on his promise that he would "create pieces of art, sell them, and help support the family." *Id.* ¶¶ 7. In the year or two before the divorce, over Mary's objections, Terry insisted on a new kiln and modifications to the studio, at the same time rejecting a gallery's offer to market his work. *Trn.* at 82; RESPONSE TO OBJECTION ¶ 2 (Jan. 29, 2015), *Appx*. at 52.

Terry says that he and Mary agreed to give the studio three years to become "a financially viable enterprise." OBJECTION TO RECONSIDERATION ¶ 3 (Jan. 23, 2015), *Appx*. at 49. Mary says there was no such agreement, and in any event the studio had negligible earnings in its seven-year existence. *Trn.* at 42; RESPONSE TO OBJECTION ¶ 2 (Jan. 29, 2015), *Appx*. at 52; PROFIT AND LOSS SUMMARY (Feb. 10, 2015) at 7, Mary's Exh. 1D, *Appx*. at 62 (studio earned less than $2,000 between 2007 and 2013).

Mary observed that Terry commonly squandered their money, both on his studio and other things. After Mary was diagnosed with leukemia in 2012, her health required she work less. She also realized that more of her salary should go into retirement planning, especially given Terry's age and profligacy. Mary confronted Terry, and urged him to curb spending, but he refused. Because Terry was in control of the couple's accounts, Mary was unable to exert prudence on the family budget. *Trn*. at 81-83; MARY'S ANSWER TO TERRY'S

CROSS PETITION FOR DIVORCE ¶ 7 (Jan. 12, 2015), *Appx*. at 38; RESPONSE TO OBJECTION ¶ 2 (Jan. 29, 2015), *Appx*. at 52; MARY'S MOTION FOR *EX PARTE* RELIEF ¶ 4 (Dec. 2, 2014), *Appx*. at 24.

After she left Terry, Mary spent carefully, lived in a tiny apartment, got remarried, and has greatly improved her personal and financial situation. *Trn*. at 83; *see* MARY'S FINANCIAL AFFIDAVIT (June 29, 2020), *Sealed Appx*. at 20.

II. Terry Knowingly Bargained For and Received His Due Portion of Mary's Retirement Plan

A. Mary's Divorce Petition and the Parties' Stipulated Decree

In Summer 2014, Mary moved out of the marital home. In December 2014, she petitioned for divorce, to which Terry cross-petitioned. PETITION FOR DIVORCE (Dec. 1, 2014), *Appx*. at 20; TERRY'S ANSWER AND CROSS PETITION FOR DIVORCE (Dec. 24, 2014), *Appx*. at 32.

The parties, both represented by experienced family-law attorneys, entered mediation, exchanged without objection or comment the financial disclosures required by family court rules, and settled. The family court entered a decree of divorce based on irreconcilable differences, which became effective on June 1, 2015. *Trn.* at 44; DECREE OF DIVORCE (May 26, 2015), *Appx*. at 70.

In their stipulated decree, Mary agreed to pay Terry $700 per month in alimony for four years, ending in June 2019. FINAL DECREE ¶ 6 (May 28, 2015), *Appx*. at 71; UNIFORM SUPPORT ORDER (May 1, 2015), *Appx*. at 64. Both parties waived future claims to alimony. FINAL DECREE ¶ 21 (May 28, 2015), *Appx*. at 71.

Having already sold the house and split the proceeds, the parties' stipulated decree gave each their own business interests, assets, cars, debts, and personal property. *Id.* ¶¶ 9-16. Both certified that the other complied with discovery obligations and disclosed all assets. *Id.* ¶21.

Mary and Terry agreed to shared parenting, with Mary paying Terry $1,300 per month in child support until the youngest daughter aged out in September 2019. USO (May 1, 2015), *Appx*. at 64.

B. Terry Bargained for $55,000 of Mary's Retirement Plan

In the divorce, the parties agreed Terry would get a portion of Mary's retirement account, which was sponsored by her employer and managed by T. Rowe Price ("TRP").

In January 2015, a month after her divorce petition, and again a few months later, Mary filed financial affidavits, which showed the value of her TRP "401K" was $157,000. MARY'S FINANCIAL AFFIDAVIT (Jan. 28, 2015), *Sealed Appx*. at 13; MARY'S FINANCIAL AFFIDAVIT (May 1, 2015), *Sealed Appx*. at 16. The TRP statement for third-quarter 2014 shows Mary's retirement account was valued at $157,308.43, roughly what she reported. TRP QUARTERLY STATEMENT (Sept. 30, 2014), Terry's Exh. 3 at 8-10, *Sealed Appx*. at 3. It appears that in her subsequent financial affidavit, Mary merely repeated the retirement plan value she first stated; no apparent effort was made to reflect continuing contributions.

Terry filed three financial affidavits around the same time, which disclosed he believed the value of "Mary's 401K" was $170,000. TERRY'S FINANCIAL AFFIDAVIT (Dec. 12, 2014), Mary's Exh. 2A, *Sealed Appx*. at 36; TERRY'S FINANCIAL AFFIDAVIT (Jan. 23, 2015), *Sealed Appx*. at 39; TERRY'S FINANCIAL AFFIDAVIT (May 1, 2015), *Sealed Appx*. at 42. The TRP statement for fourth-quarter 2014, after three months of additional contributions, shows it was valued at $176,937.96, roughly corroborating Terry's understanding of the value expressed in his financial affidavits. TRP QUARTERLY ACCOUNT STATEMENT (Dec. 31, 2014), Terry's Exh. 3 at 11-13, *Sealed Appx*. at 9. As with Mary, in his subsequent financial affidavits, Terry repeated the retirement plan value he first stated.

In Mary's and Terry's respective financial affidavits, and in the negotiated decree, Mary's retirement plan was referred to as a "401K."

Although the parties differed somewhat on the plan's exact value (possibly because marital separation occurred between quarterly statements), it is apparent they agreed Terry would get less than half. Their stipulated decree – signed after mediation by the parties, their lawyers, and the family court judge – provided:

> [Terry] is awarded the sum of $55,000.00 of [Mary's] 401(k)…. A Qualified Domestic Relations Order (QDRO) shall be prepared by [Terry].

FINAL DECREE ¶ 11 (May 28, 2015), *Appx*. at 71.

C. Mistaken Account Nomenclature Was Promptly Rectified

After the decree became effective in June 2015, Terry's lawyer delegated preparation of the QDRO to Attorney Linda Mayrand, of Somersworth. As Mayrand began work in August 2015, she noticed that, despite the parties and counsel referring to Mary's retirement plan as a "401K," Mary's employer was a health care provider, whose retirement benefit plan, Mayrand knew, would not typically be a "401K."[4] *Trn*. at 53-54, 71.

Mayrand thus queried Mary's lawyer, Attorney Gail Bakis, about the nature of Mary's retirement plan. *Id.*; MAYRAND'S FILE NOTE (Aug. 17, 2015), Mary's Exh. 5 at 12, *Appx*. at 136.

Mayrand's query prompted Mary to look closely at her TRP statements and to contact TRP. She learned that there was no "401K," and that what she actually had was called "Dartmouth-Hitchcock Employee 403(b)/401(a) Plans." Mary also learned that her two accounts – the 403(b) and the 401(a) – were combined in one sum on TRP's statements, and that the statements did not specify separate balances for the two components. *Trn.* at 52, 54-55, 69-70, 74, 77; TRP QUARTERLY ACCOUNT STATMENTS (Sept. 30, 2014) (Dec. 31, 2014) (Mar. 31, 2015), *Sealed Appx*. at 3, 6, 9. Mary requested that TRP provide disaggregated account balances for both accounts, both as of the date she left Terry and as of the date the decree became effective. *Trn.* at 54-55.

Mayrand's query and Mary's investigation prompted Attorney Bakis to immediately – the same day – notify Terry's lawyer, Attorney Heidi Ames.

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[4]Generally, 401(k) plans are offered by private companies, whereas 403(b) plans are available to nonprofit organizations and government employers. *Compare* RETIREMENT PLANS FAQS REGARDING 403(b) TAX-SHELTERED ANNUITY PLANS, https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-403b-tax-sheltered-annuity-plans; 401(k) PLANS, https://www.irs.gov/retirement-plans/401k-plans. *See also*, 2015 IRS FORM 990, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (filed by Dartmouth-Hitchcock Medical Center) (May 13, 2016), https://projects.propublica.org/nonprofits/display_990/222715483/2016_08_EO%2F22-2715483_990_201506.

Trn. at 54. In an email, Bakis wrote to Ames:

> It has just come to my attention (and my client's) that she had 2 separate retirement accounts; a 401(a) and a 403(b). Dr. Braun, while an extremely talented doctor, is not a sophisticated investor and understood that she had only 1 account – a 401(k). She is in the process of obtaining statements for both accounts which I will provide upon my receipt. I apologize for this oversight, and will do my best to straighten this out as soon as possible.

EMAIL FROM BAKIS TO AMES (Aug. 17, 2015), Mary's Exh. 3B, *Appx*. at 77.

Mary's request that TRP provide separate balances apparently caused it some difficulty, and Ames prodded Bakis about the delay. *Trn*. at 55; EMAIL FROM AMES TO BAKIS (Sept. 1, 2015), Mary's Exh. 3D at 2, *Appx*. at 78-79 ("Any update on this?"). Bakis replied the same day, disclosing her knowledge at the time:

> What we were able to find out is that T. Rowe Price combined the totals of both accounts, the 403(B) and 401(A), on their statements which contributed to the confusion. My client is having difficulty securing the statement that reflects the balances at the end of September 2014 which was the combined balance upon which the negotiations were based. I don't believe this will change anything, other than the fact that the transfer to Terry will not be made from a 401(k) but from a 401(A) which is the larger of the two accounts Mary has.

EMAIL FROM BAKIS TO AMES (Sept. 1, 2015), Mary's Exh. 3D at 1, *Appx*. at 78.

Mayrand's office contemporaneously explained the situation to Terry. EMAIL FROM COOLIDGE LAW FIRM TO TERRY (Aug. 11, 2015), Mary's Exh. 5. at 4, *Appx*. at 128.

D. Disaggregated Account Balances Were Promptly Disclosed

On September 2, 2015, instead of statements, TRP faxed Mary's lawyer two letters – one for each of Mary's two retirement accounts – specifying the separate balances for each account. LETTER FROM TRP TO MARY, "Plan Name: … 401(a)" (Sept. 2, 2015), Mary's Exh. 3F at 3, *Appx*. at 83; LETTER FROM TRP TO MARY, "Plan Name: … 403(b)" (Sept. 2, 2015), Mary's Exh. 3F at 4, *Appx*. at 84; *Trn*. at 60. On the same day, in compliance with her ongoing disclosure duties, FAM.CT.R. 1.25-A.B(3), Bakis forwarded the letters to Ames, with a cover-email, which said:

> Please see attached communication*s* from T. Rowe Price regarding the balance*s* in Dr. Braun's retirement account*s*. We used the account balance*s* from September 2014 for settlement purposes at mediation.

EMAIL FROM BAKIS TO AMES (Sept. 2, 2015), Mary's Exh. 3F at 3, *Appx*. at 81 (emphases added).

It is clear from the language of the email that Bakis forwarded both faxed letters to Ames, as Bakis's email uses plurals: "communications," "balances," "accounts," and Ames made no comment. It is also apparent from the email that the parties were in agreement that Mary's retirement account was to be valued at the date of separation. *Id.*

The body of the two faxed letters provide the account balances on two separate dates as Mary had requested – September 1, 2014, which was shortly after Mary moved out of the marital home, and June 1, 2015, which was the effective date of the divorce decree. LETTERS FROM TRP TO MARY (Sept. 2, 2015), Mary's Exh. 3F at 3 & 4, *Appx*. at 84 & 84.

Regarding the earlier of those dates, the 401(a) letter says that Mary's retirement plan was worth $161,197, and the 403(b) letter says its balance was zero. *Id.* This total is roughly between the $157,000 Mary stated in her financial

affidavits and the $170,000 Terry stated in his.

That Bakis shared this information with the parties is confirmed by contemporaneous notes made by Mayrand of a phone call she had with Bakis, in which Mayrand named both accounts and one of the balances. MAYRAND'S FILE NOTE (Aug. 17, 2015), Mary's Exh. 5 at 12, *Appx*. at 136.

Regardless of the parties' mistaken "401K" nomenclature and its later rectification, the total balance of Mary's retirement accounts were the same as TRP initially reported on its combined summary statement. *Trn*. at 77. Ultimately, Terry was paid from the larger of the two accounts, the 401(a), as the 403(b) did not have enough to cover the $55,000 specified in the parties' stipulation. *Trn.* at 72; MAYRAND'S FILE NOTE (Aug. 17, 2015), Mary's Exh. 5 at 12, *Appx*. at 136.

The QDRO was signed by Terry in December 2015, and by Mary and both parties' lawyers in January 2016. Terry corrected his address on the second page, but otherwise accepted the QDRO as Mayrand drafted it. The QDRO (accurately) provides that the "'Plan' shall mean the Dartmouth-Hitchcock Retirement Plan 401(a)," and that "[Terry] shall be entitled to receive $55,000.00 of [Mary's] vested accrued benefit under the Plan." QDRO (Feb. 3, 2016) at 2, *Sealed Appx*. at 58.

From the email record between Terry and Mayrand, it is apparent he was impatient with information and disbursement delays; Terry even suggested "filing a motion to compel" "[i]f they are not being forthcoming," though none was ever filed. Terry does not dispute that Mayrand was fully informed about all the account details, or that he received the $55,000 payment for which he bargained. EMAILS BETWEEN TERRY AND MAYRAND'S OFFICE (June 22, 2015) (Aug. 11, 2015) (Aug. 19, 2015), Mary's Exh. 5 at 2-5, 12 *Appx*. at 127-29; *Trn*. at 70-72.

III. When the Money Ran Out, Terry Sought More From Mary

The parties were back before the family court in 2018 to adjust the parenting plan as their daughter matured, and again in 2019 to dissolve it and terminate child support when she aged out. ORDERS (Jan. 14, 2019), *Appx*. at 87; ORDER (Apr. 18, 2019), *Appx*. at 89. Also, alimony terminated in June 2019, requiring for the first time since the divorce that Terry be self-supporting, and closing the parties' remaining association.

In March 2020, about a year after alimony ended and nine months after the child turned 18, Terry attempted to reopen the divorce, claiming entitlement to further alimony and revision of the property settlement. Mary objected. PETITION TO CHANGE COURT ORDER (Mar. 24, 2020), *Appx*. at 91; MOTION TO AMEND PETITION (June 15, 2020), *Appx*. at 107; MARY'S OBJECTION AND MOTION TO DISMISS (June 5, 2020), *Appx*. at 103.

In the months following, Terry filed dozens of *pro se* pleadings generally repeating his health and financial woes. In them and in his brief, it appears Terry has built a grudge from the retirement account nomenclature confusion, and alleges that Mary, her lawyer, his own lawyer, and the QDRO lawyer cheated him by hiding Mary's actual assets. At the same time however, Mary has forgone collection of money Terry indisputably owes her, and continues to tolerate storage of his possessions in her basement. *Trn*. at 78, 84.

The court cautioned Terry about penalties for profuse and frivolous pleadings. OBJECTION TO MOTION TO FURTHER AMEND AND MOTION FOR SANCTIONS (July 20, 2020) (margin order, July 28, 2020), *Appx*. at 112. Having disregarded the warnings:

> The court sanctions [Terry] for his last barrage of filings in December and awards [Mary] reasonable attorney's fees for having to respond to the December pleadings.

PRETRIAL ORDER AND ORDER ON SANCTIONS (Dec. 22, 2020), *Appx*. at 117.[5]

On March 16, 2021, the Candia Family Division (*David G. LeFrancois*, J.) held a 3-hour hearing on Terry's underlying request for extension of alimony and revision of the property settlement. Both parties were sworn, and presented offers of proof and testimony. *Trn.* at 4 *et seq*. During the hearing, Mary explained:

> I would like to see an outcome today that … would allow me to be free from further harassment. Our divorce was five years ago. Our children are adults. It is long since time for all the litigation about our divorce to be done with.

Trn. at 84.

In its final order, the court found that both parties had counsel when they negotiated a settled divorce, that neither Mary nor her lawyer misrepresented anything or deceived anyone, that the valuation of Mary's retirement account was fully disclosed, and that the confusion regarding its identity was timely clarified. The court held that the grounds Terry advanced for extension of alimony – aging, poor health, low income – did not meet the non-foreseeability standard established for alimony modification, and that there was no fraud. It thus denied Terry's requests to reopen the property decree and resuscitate alimony. ORDER ON TERRY'S PETITION TO CHANGE COURT ORDER REGARDING PROPERTY AND ALIMONY (May 25, 2021), *Addendum* at 40.

Terry's appeal followed.

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[5]The court later approved fees in the amount of $1,843.75. AFFIDAVIT OF ATTORNEY'S FEES (Jan. 8, 2021) (margin order, Jan. 27, 2021) (omitted from appendix); MOTION TO RECONSIDER ATTORNEY'S FEES (Jan. 25, 2021) (margin order Feb. 17, 2021) (omitted from appendix). Terry has not tendered the fees.

SUMMARY OF ARGUMENT

Seven years after they separated, Terry Braun claims entitlement to more of Mary Braun's retirement accounts, which were the subject of settlement negotiations, and resurrection of alimony, which she paid to him until 2019. Terry's alleges fraud based on a misreading, or a deliberate misconstruction, of divorce-era communications between his and Mary's respective lawyers, which the evidence shows were diligent and prompt. Terry's claims are nothing more than a profligate man's futile last grasp at his former spouse.

ARGUMENT

I. Terry Was Fully Informed About the Value of Mary's Retirement Accounts, and There Was no Fraud to Reopen Their Divorce

The premise of Terry's argument appears to be a claim – difficult to discern but invented perhaps from a cut-off fax number – that Bakis did not disclose both letters faxed from TRP, and that Bakis therefore perpetrated a fraud. TERRY'S BRF. at 7, 14-15.

The claim is not supported by any evidence.

While Mary was inattentive about the exact nature of her retirement plan, she accurately reported its value on her financial affidavit. Terry's financial affidavit shows similar values. When Mayrand pointed out that both parties were inaccurately referring to Mary's account as a "401K," Mary promptly inquired, and learned she actually had two accounts – a 403(b) and a 401(a) – and nothing called a "401K."

Immediately upon receiving the information from TRP, Bakis disclosed to both lawyers the nature of the two accounts and their balances at the relevant dates. This was corroborated by an email to Ames and phone notes by Mayrand. Ames, who presumably could have told the court what she knew and when, did not testify.

The prompt disclosure was further corroborated by Terry's email discussion with Mayrand's office threatening to file a motion to compel "[i]f they are not forthcoming." As no such motion was filed, and Terry having shown himself an enthusiastic court filer, it is likely Mary and Bakis were "forthcoming."

By the time Terry signed the QDRO in December 2015, everybody involved was fully informed, giving Terry plenty of time to address any amendments to the decree. As the family court found, there was no concealment, no alteration, and no fraud.

> Property distributions or stipulations decreed by a court … will not be modified unless the complaining party shows that the distribution is invalid due to fraud, undue influence, deceit, misrepresentation, or mutual mistake. Having alleged fraud, the plaintiff must prove that the defendant made a fraudulent representation for the purpose or with the intention of causing the plaintiff to act upon it.

Shafmaster v. Shafmaster, 138 N.H. 460, 464 (1994) (quotations and citations omitted).

> To establish fraud, a plaintiff must prove that the defendant made a representation with knowledge of its falsity or with conscious indifference to its truth with the intention to cause another to rely upon it. In addition, a plaintiff must demonstrate justifiable reliance.

Snierson v. Scruton, 145 N.H. 73, 77 (2000) (citation omitted).

Despite Terry's claims throughout his brief, the family court did not make any finding of falsification or misrepresentation. But even if Terry could show the fraud he alleges, all the supposed errors he identifies are not material. They made no difference and did not induce reliance.

First, the value of the 403(b) was zero when the parties separated. The disaggregated balances did not change the total value of the plan.

Second, because the parties had agreed to valuation as of the date of separation, the fact that neither endeavored to track the plan's increasing value (as Mary made continuing contributions) had no effect on the amount Terry bargained for. Unlike *Shafmaster*, where a party intentionally refused to provide material financial information, failure to update did not induce Terry to any action or result.

Third, because the value of the 403(b) at the time of the QDRO was less than $55,000, Terry got paid from the 401(a), rather than a non-existent

"401K." This made no difference, as Terry received his bargained-for amount.

Among the purposes of a divorce decree is that "the parties develop independent economic lives." *See Calderwood v. Calderwood*, 114 N.H. 651, 654 (1974). Terry and Mary have been separated since 2014; as Mary testified, "[i]t is long since time for all the litigation about our divorce to be done with."

The family court found neither fraud, fraudulent intent, nor reliance, and this court should affirm.

II. Mary Denied Terry's Request for Inaccurate Admissions of Fact

Terry claims that he filed a request for admissions, which allegedly included an admission that Bakis did not disclose both letters. TERRY'S BRF. at 15-16.

During this litigation, in October and November 2020 alone, Terry filed over two dozen pleadings, with numerous additional filings before and after. CASE SUMMARY (current as of Sept. 17, 2021), *Appx*. at 4. Among them were three requests for admissions. Lost in the "barrage" of filings, for which the court sanctioned Terry, Bakis overlooked the first request and therefore did not answer. Under the rules, that may constitute admission. FAM.CT.R. 1.25(F).

Bakis realized the existence of the "First Request for Admission," filed in November 2020, only after she received a filing captioned "Second Request for Admission" in January 2021. *Trn*. at 39; FIRST REQUEST FOR ADMISSION (Nov. 2, 2020), *Appx*. at 115; SECOND REQUEST FOR ADMISSION (Jan. 29, 2021), *Appx*. at 121; *see also* RESPONSES TO SECOND REQUEST FOR ADMISSION (Feb. 5, 2021) ("Petitioner does not recall having received a 'First' Request for Admission. It is possible that, given the number of pleadings the Respondent has filed, oftentimes filed several at a time without a cover letter to identify what is being filed, a pleading might have been overlooked."), *Appx*. at 178; RESPONSES TO THIRD REQUEST FOR ADMISSION (Feb. 11, 2021), *Appx*. at 182 (same).

This prompted Bakis to file a Motion to Allow Late Entry for Mary's response to the first request, which the court allowed, along with her Response. MOTION TO ALLOW LATE ENTRY TO FIRST REQUEST FOR ADMISSION (Feb. 24, 2021), *Appx*. at 185; RESPONSES TO FIRST REQUEST FOR ADMISSION (Feb. 24, 2021), *Appx*. at 187; ORDER ON TERRY'S PETITION TO CHANGE COURT ORDER REGARDING PROPERTY AND ALIMONY (May 25, 2021) at 4, *Addendum*

at 40.[6]

Beyond this filing history (which seems insignificant except that Terry focuses on it, TERRY'S BRF. at 15-16), Terry had an underlying thing he desired Bakis to admit as fact: the accuracy of his version of the email in which Bakis disclosed the existence of two TRP accounts to Ames. In her response, Bakis denied that Terry's version of the email was accurate, and pointed to details differing from the original. RESPONSES TO FIRST REQUEST FOR ADMISSION (Feb. 24, 2021), *Appx*. at 187; *Trn*. at 68.

Terry appears to use this series of events to claim that Bakis did not disclose to Ames and Mayrand the nature and value of Mary's retirement account, and that Mary falsified her financial affidavit. Bakis promptly and fully disclosed, however, and Mary's affidavit was truthful. There is no evidence for Terry's contention.

[6]Bakis timely answered Terry's other requests for admissions.

III. Value of Retirement Accounts Was Correctly Calculated

A. $182,459.89 Transaction History Total

In his brief, Terry cites the amount "$182,459.89." He appears to claim that Mary at some point asserted that that was the value of her retirement plan, and therefore her financial affidavit showing less was fraudulent. TERRY'S BRF. at 12-13.

The number appears to arise from a website printout that, although lacking account identifiers, identifies it as a TRP document encouraging the reader to "invest for retirement." "HISTORY," *Terry's Appx*. 1 at 7-8. The printout was provided to Terry as part of Mary's mandatory disclosures, in which Mary identified the document as "Retirement account - see printout." MARY'S MANDATORY DISCLOSURES (Jan. 21, 2015), *Appx*. at 45.

Despite Terry's claim, Mary at no time asserted that the document represented a value. Rather, she identified it as "a year's worth of transaction history in satisfaction of Rule 1.25," *Trn*. at 51, which Ames accepted on Terry's behalf as fulfillment of disclosure requirements. RESPONSES TO THIRD REQUEST FOR ADMISSION ¶¶ 3 & 4 (Feb. 11, 2021), *Appx*. at 182.

In Terry's pleadings, he agreed that the document was a "transaction history," which "does not identify any assets," and "does not disclose the value of any asset as it contains no balances." THIRD REQUEST FOR ADMISSION ¶¶ 2-5 (Feb. 4, 2021), *Appx*. at 171.

Terry's argument appears to be that the transaction list was somehow misleading or fraudulent. As he explains in his brief, the total transactions for the 12-month period included in the list add to "$182,459.89," which is not an account balance. TERRY'S BRF. at 12-13.

It is apparent that the number at the bottom of the list is not an account balance, and that Terry never believed it was. It is also apparent that if Terry had questions about the nature or value of Mary's plan, his lawyer had enough

information to inquire. Terry's position is also nonsensical; if a person were trying to hide assets, it is likely they would offer documents showing their accounts are worth *less* not *more* than actual value. Accordingly, Terry was not and could not have been misled. There was no fraud, and no fraudulent intent.

B. $182,537.48 Value at Effective Date of Divorce

There is another dollar figure in this matter, confusingly close to the one just discussed.[7] In the ultimate order denying Terry's demand for additional property and alimony, the court wrote that the evidence showed that Mary's total retirement plan balance as of June 1, 2015 was $182,537.48. ORDER ON TERRY'S PETITION TO CHANGE COURT ORDER REGARDING PROPERTY AND ALIMONY (May 25, 2021) at 2, *Addendum* at 40.

In his brief, Terry asserts that because that figure is greater than the amounts both parties reported in their divorce-era financial affidavits, Mary and Bakis are guilty of fraud. TERRY'S BRF. at 7.

This issue is not mentioned in either Terry's notice of appeal or amended notice of appeal, and it is therefore unpreserved. *Halifax-American Energy Co., LLC v. Provider Power, LLC*, 170 N.H. 569, 574 (2018) ("An argument that is not raised in a party's notice of appeal is not preserved for appellate review.").

Regardless, it is true that the total value of Mary's two accounts amounted to what the court recited on the date it noted, which was the effective date of the decree. The value on the effective date, however, is not material to any issue, and the court made no finding that anything hinged on that value.

If Terry is nonetheless suggesting that the value at the effective date is relevant, there is no basis for that in the record.

The parties attended a private mediation in March 2015, LETTER FROM

[7]During the hearing it appears Bakis momentarily conflated the figures. *Trn*. at 50-51.

ECKER TO COURT (Feb. 18, 2015), *Appx*. at 63; *Trn.* at 52, after which a stipulation was signed on May 1. Though the content of the parties' negotiations is not in the record, *Trn.* at 53, several items show that the agreed date of valuation was when the parties separated, not the date the decree became effective.

First, while Mary's and Terry's 2014 and 2015 financial affidavits show differing numbers, as Mary cited the third-quarter statement and Terry cited the fourth, both used values from close to the end of 2014.

Second, in Bakis's September 2015 email to Ames discussing the two TRP letters, Bakis stated that valuation was at "the end of September 2014 which was the combined balance upon which the negotiations were based." EMAIL FROM BAKIS TO AMES (Sept. 1, 2015), Mary's Exh. 3D at 1, *Appx*. at 78.

Third, Ames did not dispute that understanding, which she surely would have, had it been inaccurate.

Fourth, while the court recited the value at the effective date, it made no finding that that was the figure upon which the parties based their calculation of Terry's share of Mary's retirement.

Fifth, stipulating to valuation of an asset on the effective date would make the order conditional or a decree *nisi*, because valuation would occur after the court approved the stipulation. Decrees *nisi*, common at other times in other jurisdictions, are not countenanced in New Hampshire divorce practice. *See, e.g.*, *Smith v. Smith*, 99 N.H. 362 (1955) (order *nisi* in Massachusetts divorce); *Drake v. Drake*, 76 N.H. 32 (1911) (same).

The figure reported by the court was at the effective date. There is nothing in the record suggesting, however, that the parties intended valuation then or an order *nisi*. Thus the value at the effective date is immaterial, and Terry's citation to it is evidence of nothing.

IV. There Has Been No Unforeseeable Change of Circumstances Suggesting Resurrection of Alimony

While Terry mentions alimony in the final paragraph of his brief, there is no discussion of the standard for resurrecting alimony, no effort to show the facts of this case meet such standard, and no grounds upon which to set aside the waiver of future alimony included in the stipulated decree. Thus, Terry appears to have abandoned the issue, and this court need not reach it. *See In re J.P.*, 173 N.H. 453, 469 n. 2 (2020) (court did not reach issue because a single "sentence is inadequate to sufficiently brief this issue").

Regardless, to modify alimony, Terry would have to prove that there has been a substantial change in his circumstances that was not foreseeable.

> [A] change in circumstances that is both anticipated and foreseeable at the time of the decree does not constitute a substantial change in circumstances warranting a change in alimony.

In the Matter of Arvenitis, 152 N.H. 653, 656 (2005); *see Laflamme v. Laflamme*, 144 N.H. 524, 528 (1999) (age and retirement generally foreseeable).

As the family court noted, there is nothing about Terry's current circumstances that was not foreseeable. He is still underemployed, continues to support himself on benefits, and has the same medical issues. Accordingly, this court should affirm.

V. There is No Evidence of Judicial Bias

In his brief, Terry asserts that because the court ruled against him on a number of occasions, the judge was biased. TERRY'S BRF. at 11, 19.

This issue is mentioned in neither Terry's notice of appeal nor his amended notice of appeal, and is therefore unpreserved. *Halifax-American Energy Co.,* 170 N.H. at 574. Nonetheless:

> The Code of Judicial Conduct requires a judge to disqualify herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which the judge has a personal bias or prejudice concerning a party or a party's lawyer. The party claiming bias must show the existence of bias, the likelihood of bias, or an appearance of such bias that the judge is unable to hold the balance between vindicating the interests of the court and the interests of a party. The test for the appearance of partiality is an objective one, that is, whether an objective, disinterested observer, fully informed of the facts, would entertain significant doubt that justice would be done in the case.

In the Matter of Wolters, 168 N.H. 150, 153 (2015) (quotations and citations omitted).

> Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

In re C.M., 166 N.H. 764, 776 (2014). Accordingly, "adverse rulings against a party in the same or a prior judicial proceeding do not render the judge biased." *In the Matter of Greenberg*, 174 N.H. 168 (2021) (quotations omitted).

Because Terry cites nothing more than adverse rulings, he has not stated bias.

Undermining his claim of bias, the court actually ruled in Terry's favor at a crucial point in Terry's effort to reopen the property decree and resurrect alimony – denying Mary's motion to dismiss. *See* ORDER ON MOTION TO DISMISS (July 29, 2020) (Margin order: "Motion to dismiss is denied. The pleadings are sufficient to make a claim upon which relief may be granted."), *Appx*. at 106. Likewise, at trial Terry made numerous evidentiary objections, many of which were sustained. *See, e.g., Trn.* at 53, 56, 60, 79.

Accordingly, even if the issue were preserved, there was no demonstration of bias.

VI. Court Should Disregard Terry's Reference to Scheduling Conference

In his brief, Terry purports to relate events that transpired at a scheduling conference held on June 30, 2020. TERRY'S BRF. at 7. It is unclear what point Terry is making about the scheduling conference that he has not made elsewhere.

This court should nonetheless disregard the scheduling conference because no error related to it was preserved below nor in Terry's notice of appeal, and because he did not otherwise provide a transcript of it. *See In the Matter of O'Neil*, 159 N.H. 615, 625-26 (2010) (citing Supreme Court Rules 13(2) and 15(3): "moving party responsible to ensure all portions of record necessary to decide issues are provided on appeal [and] moving party challenging evidentiary support for a ruling required to provide transcript of all evidence relevant to such ruling.").

Moreover, the occurrence Terry alleges to have transpired at the scheduling conference is merely Bakis offering to the court the two September 2, 2015 TRP faxed letters, which both parties ultimately submitted as exhibits during the later trial. Terry's reference to the scheduling conference is redundant and therefore superfluous. It is also in bad faith, as this court recently denied Terry's eve-of-brief motion to have the scheduling conference transcribed.

VII. Court Should Disregard Terry's Reference to Settlement Negotiations

In his brief, Terry discusses his view of the parties' mediation and settlement negotiations. TERRY'S BRF. at 18. This court should disregard the discussion because no error related to it was preserved below nor in the notice of appeal, because "[e]vidence of conduct or statements made in compromise negotiations is … not admissible," N.H.R.EVID. 408, and because Terry was successful below in preventing Bakis from discussing the parties' settlement negotiations. *Trn.* at 53; *see In the Matter of Carr*, 156 N.H. 498, 502 (2007) ("[J]udicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.").

VIII. Terry Misstates the Standard of Review

In his brief, Terry misstates the standard of review. *See, e.g.*, TERRY'S BRF. at 14 ("There is evidence, sufficient as a matter of law to find [Terry's version of facts]"). That is the reverse of the actual standard of review:

> We will not overturn the trial court's rulings on [factual] matters absent an unsustainable exercise of discretion. This standard of review means that we review only whether the record establishes an objective basis sufficient to sustain the discretionary judgment made, and we will not disturb the trial court's determination if it could reasonably have been made. We defer to the trial court's judgment in matters of conflicting testimony and evaluating the credibility of witnesses. As the trier of fact, the trial court could accept or reject, in whole or in part, the testimony of any witness or party, and was not required to believe even uncontroverted evidence. We also defer to the trial court's judgment as to the weight to be accorded evidence.... If the trial court's findings could reasonably have been made on the evidence presented at trial, they will stand.

In the Matter of Braunstein, 173 N.H. 38, 47 (2020) (quotations and citations omitted).

The family court made reasonable findings of fact, which are supported in the record. This court should therefore affirm.

CONCLUSION

Terry Braun gave up working a long time ago. Mary (Bates) Braun is a second-career doctor practicing internal medicine at a health clinic who has worked hard to stabilize her finances. Divorced nearly seven years ago, Terry now seeks revision of their property settlement and resurrection of alimony through thinly constructed claims and excessive filings.

Because Mary was forthright in her asset disclosures at the time of divorce, and because the grounds upon which Terry seeks alimony were known and foreseeable, the family court appropriately denied his demands. This court should affirm.

WAIVER OF ORAL ARGUMENT

The issues in this appeal are "not novel, … involve no more than an application of settled rules of law to a recurring fact situation" and attack merely the "sufficiency of the evidence." N.H. SUP.CT. R. 18(1). Accordingly, while counsel will present oral argument if offered, argument is otherwise waived. N.H. SUP.CT. R. 16(3)(h); N.H. SUP.CT. R. 18(2).

Respectfully submitted,

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By her Attorney,
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Dated: March 3, 2022

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief. I further certify that this brief does not exceed 9,500 words, exclusive of portions which are exempted.

I further certify that on March 3, 2022, the foregoing is being provided to Terry Braun, via the New Hampshire Supreme Court e-filing system.

Dated: March 3, 2022

Joshua L. Gordon, Esq.

ADDENDUM

THE STATE OF NEW HAMPSHIRE

JUDICIAL BRANCH

NH CIRCUIT COURT

COUNTY OF ROCKINGHAM

10TH CIRCUIT – FAMILY DIVISION - CANDIA

In the Matter of:
Mary Bates (formally Braun) and Terry Braun
Case No. 618 – 2014 – DM – 511

ORDER ON RESPONDENT'S PETITION TO CHANGE COURT ORDER REGARDING PROPERTY DISTRIBUTION AND ALIMONY (INDEX NUMBER 100)

Both parties appeared telephonically on March 16, 2021 for the final hearing on respondent's petition to change court orders regarding property distribution and alimony (Index number 100). Petitioner, Ms. Bates, was represented by counsel. Respondent, Mr. Braun, represented himself. Based on the offers of proof and evidence presented, the court denies Mr. Braun's request to reopen the property distribution and denies his request for additional alimony for the reasons set forth below.

Property distribution.

The parties were divorced in May 2015 based upon an agreed to final decree, parenting plan, and uniform support order. A qualified domestic relations order was approved in February 2016 relating to Ms. Bates's retirement account under which Mr. Braun received a fixed amount of $55,000.

Mr. Braun requests that the property distribution agreed to as part of the final decree be reopened because Ms. Bates filed a fraudulent financial affidavit relied upon by Mr. Braun in that she undervalued the amount of her retirement accounts.

Shafmaster v. Shafmaster, 642 A.2d 1361, 1364–65 (N.H. 1994) sets out the basis for reopening property distributions of a final divorce decree:

*Property distributions or stipulations decreed by a court are not retained under the continuing jurisdiction of the court and will not be modified unless the complaining party shows that the distribution is invalid due to fraud, undue influence, deceit, misrepresentation, or mutual mistake. Leary v. Leary, 137 N.H. 161, 165, 623 A.2d 1346, 1348 (1993). Having alleged fraud, "the plaintiff must prove that the defendant made a fraudulent representation for the purpose or with the intention of causing the plaintiff to act upon it." Proctor v. Bank of N.H., 123 N.H. 395, 399, 464 A.2d 263, 265 (1983). Each party to an agreement covenants by implication that he or she "will deal in good faith and deal fairly with the other." Bursey v. Clement, 118 N.H. 412, 414, 387 A.2d 346, 347 (1978) (quotations omitted). "One who makes a representation that is true when made is under a duty to correct the statement if it becomes erroneous or is discovered to have been false before the transaction is consummated." Id., 387 A.2d at 348; Bergeron v. Dupont, 116 N.H. 373, 374, 359 A.2d 627, 628 (1976); see also **1365 Centronics Corp. v. Genicom Corp., 132 N.H. 133, 139, 562 A.2d 187, 190–91 (1989). In contract negotiations, "equity imposes a duty to speak when one knows or ought to know that his silence is misleading and will induce another to act upon it to his damage." Decatur v. Cooper, 85 N.H. 250, 257, 157 A. 706, 710 (1931).*

Mr. Braun argues that Ms. Bates financial affidavit dated May 1, 2015 lists her retirement account funds as $157,000 when the actual amount was more than $180,000. Mr. Braun is correct in that the credible evidence established that as of May 1, 2015 when Ms. Bates signed the financial affidavit, her retirement accounts totaled approximately $180,000 rather than $157,000. Although the evidence did not include any retirement account statement as of May 1, 2015, the evidence did include an account statement as of June 1, 2015 showing the retirement account balance at $182,537.48.

What Mr. Braun failed to prove, however, is that Ms. Bates made a misrepresentation for the purpose or with the intention of causing Mr. Braun to act on it; or that Ms. Bates failed to deal in good faith and deal fairly with Mr. Braun; or that Ms. Bates failed to correct a statement discovered to have been false before the transaction was consummated; or that Ms. Bates failed to speak and remained silent to induce Mr. Braun to act upon false information to his damage.

Under the Shafmaster standard, Mr. Braun has to prove Ms. Bates provided inaccurate information regarding her retirement account, had an intent to deceive Mr. Braun, and failed to correct the erroneous information. The credible evidence shows the opposite.

The evidence included information that the $157,000 value listed on the May 1, 2015 affidavit was based on the valuation of the retirement funds from September 2014. The monthly statement ending September 2014 lists the retirement account value at $157,308.43. Ms. Bates failed to update the amount when she signed the May 1, 2015 affidavit, which was based on a previously filed financial affidavit which had used the September 2014 retirement account value.

More importantly, the evidence also includes substantial communications between counsel for Ms. Bates and counsel and successor counsel for Mr. Braun from January 2015 shortly after Ms. Bates filed the petition for divorce in December 2014 through October 2015 regarding the value of Ms. Bates retirement account, the confusion about the type of accounts, and the preparation of a qualified domestic relations order to transfer Mr. Braun's share of the account. Those communications included disclosure in January 2015 that the value of the accounts was $182,459.89. As well, the communications explained that Ms. Bates mistakenly referenced her account as a 401(k) rather than two accounts, being a 401(a) and a 401(b). The communications also detail that the parties hired another attorney to prepare the qualified domestic relations order who was in communication with both parties' counsel to ensure the correct valuation of the accounts.

As well, the correspondence shows there were changes in the value of the retirement account because of additional contributions made by Ms. Bates and her employer as well as fluctuations in the market during the pendency of the divorce. Mr. Braun's own financial affidavit at one point lists the value of Ms. Bates retirement account at $170,000. The fact that the value of the retirement account fluctuated over time during the pendency of the divorce does not establish an intentional misrepresentation of the value.

During the course of the pending divorce, both parties were represented by counsel. The final decree specified that Mr. Braun was to receive a fixed sum of $55,000 from Ms. Bates retirement account. The evidence does not establish that Ms. Bates deceived Mr. Braun about the value of her retirement account or that Mr. Braun solely relied on the value listed on the May 1, 2015 financial affidavit as the basis for agreeing to the property settlement. As early as January 2015, Ms. Bates provided a value of the retirement account of $182,459.89. The evidence established that the

confusion about the retirement account was clarified before the execution of the qualified domestic relations order. Both parties and their respective counsel reviewed and signed the proposed qualified domestic relations order which was approved by the court in February 2016.

Looking at the totality of the evidence, Mr. Braun failed to prove fraud and his petition to reopen the property distribution of the final decree is denied.

Alimony.

The Final Decree in paragraph 6 awarded alimony to Mr. Braun in the amount of $700 per month from May 16, 2015 to June 19, 2019. Mr. Braun in his proposed order requests alimony of $7786 per month for the remainder of his life.

The request for an extension and modification of the original alimony order issued in 2015 is governed by the alimony statute in effect in 2015, which requires Mr. Braun to prove that there has been a substantial and unforeseeable change of circumstances since the effective date of the initial alimony order that would warrant a modification or extension of that order.

Alimony may be modified if there is a substantial change in circumstances which makes the original alimony award unfair or improper; however, changes which are both foreseeable and actually anticipated are not considered substantial. Laflamme v. Laflamme, 144 N.H. 524 (1999); Arvenitis and Arvenitis, 152 N.H. 653 (2005) ("We therefore reiterate that under Laflamme, a change in circumstances that is "both anticipated and foreseeable at the time of the decree" does not constitute a substantial change in circumstances warranting a change in alimony. A determination that a change of circumstances was "actually anticipated" is a factual finding that must be based on evidence.")

Mr. Braun argues that the substantial unforeseeable change of circumstances include that the original decree was based on fraudulent misrepresentation of Ms. Bates retirement funds, Mr. Braun's deteriorating health, Ms. Bates under-employment, and a fraudulent property settlement.

The credible evidence does not establish a substantial unforeseeable change in circumstances. Mr. Braun's December 29, 2014 answer and cross petition for divorce alleged that he was 66 years old and that his working years were behind him. His income consisted primarily of Social Security. In his pleadings relative to the appointment of a guardian ad litem on January 5, 2015, Mr. Braun again represented that he has limited income, he only receives social security, he was 66 years old and his full-time job prospects are minimal. In Mr. Braun's January 23, 2015 limited objection to petitioner's motion for partial reconsideration, Mr. Braun again reiterates that he is 66 years old, receives very limited income and that his full-time job prospects are minimal. Mr. Braun's financial affidavits submitted during the pendency of the divorce show Social Security benefits income and a small amount of self-employment income. As part of his Rule 1.25 –A mandatory disclosures, Mr. Braun noted that he was disabled. Mr. Braun also noted in his November 26, 2018 motion to continue that he has had a 20 year history of atrial fibrillation.

Based on Mr. Braun's own representations, he acknowledged that at the time of the final decree that he had limited income, limited ability to work, and was in ill health. There has been no substantial unforeseeable change in those circumstances regarding his income, ability to work, and health condition. Those circumstances existed and were known at the time of the divorce decree and therefore Mr. Braun cannot now argue that his current circumstances were unforeseeable or are

substantially different from what they were in 2015. Therefore, they cannot form a basis for an extension or modification of alimony.

In addition, based on the above findings that Ms. Bates did not commit fraud, Mr. Braun's arguments that alimony should be modified or extended because of fraud have no validity.

Finally, Mr. Braun's argument that Ms. Bates is under-employed, could increase her work hours and have an ability to pay additional alimony is not a basis to extend or modify alimony since Mr. Braun has not established any basis for a modification or extension of the now expired original alimony order. Accordingly, Mr. Braun's petition to extend or modify alimony is denied.

Additional orders.

There have been numerous pleadings filed in this case. Mr. Braun has been sanctioned for excessive and repetitive filings. Although the number of filings have diminished, there are still a number of filings that have been submitted.

Mr. Braun's Motion for Rulings or Immediate Hearing regarding Petitioner's Response to Respondent's Second Request for Admission (Index number 182) is denied.

Ms. Bates's Motion to Allow Late Entry of Petitioner's Responses to Respondent's First Request for Admission (Index number 185) is granted.

Mr. Braun's Motion for Default Judgment and Damages (Index number 186) is denied.

Mr. Braun's Motion to Amend Respondent's Motion for Default (Index number 193) is denied.

Ms. Bates's Motion to Supplement/Clarify the Record (Index number 195) is granted.

Any other requests by either party are denied.

So Ordered

May 25, 2021
Date

Judge David G. LeFrancois