State of New Hampshire
Supreme Court

NO. 2023-0443

2024 TERM

APRIL SESSION

In the Matter of Christopher Taylor
and Therese Taylor

RULE 7 APPEAL OF FINAL DECISION OF THE
BRENTWOOD FAMILY COURT

BRIEF OF PETITIONER/APPELLANT, CHRISTOPHER TAYLOR

April 17, 2024

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QUESTIONS PRESENTED

I. Did the court err in ruling that the increase in amount and extension of time was an alimony "renewal" rather than a "modification"?

Preserved: MOTION TO RECONSIDER (July 5, 2023), *Appx*. at 74.

II. Did the court err in awarding payment of alimony for a total of 19 years, after a 16-year marriage?

Preserved: MOTION TO RECONSIDER (July 5, 2023), *Appx*. at 74.

III. Given that Christopher is already of retirement age, by requiring payment of alimony until he is 78, did the court err in ruling that he is voluntarily unemployed, in imputing income to him, and trebling his alimony obligation?

Preserved: MOTION TO RECONSIDER (July 5, 2023), *Appx*. at 74.

IV. [Question waived.]

V. [Question not accepted for review by this court.]

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Christopher Taylor conceded below that he has the ability to pay some alimony. He now also defers to the family court's finding that Therese Taylor demonstrated need, in accord with the requirements of the applicable alimony statute. RSA 458:19.

Thus, the issues in this appeal are purely legal: whether trebling the amount of alimony, and prolonging its term beyond the actual length of the marriage, constitutes a statutory "modification" rather than "renewal"; whether the trebling and prolongation is unreasonable; and whether Chris can be deemed voluntarily unemployed even though he has passed the age of retirement.

I. Marriage and Divorce

Therese met Chris in 1985 when she was 19, and he a decade older. They were married in 1997, had three (now adult) daughters, and were divorced in 2013 after a 16-year marriage. *2023-Hrg*. at 309; FINAL ORDERS (June 19, 2013), *Appx*. at 3. Chris is now 69 years old, and fully eligible for social security. *2023-Hrg*. at 284. Therese is 59.

Although Chris's tenure at any one employer tended to be for only a few years, and he went through multiple periods of unemployment, he had a generally successful career in information technology, for which he earned commensurate salaries and commissions. *2023-Hrg*. at 256-57; FINAL ORDER (June 23, 2023) at 7-13, *Addendum* at 39 (detailing employment history). In November 2022, Chris was laid-off from his most recent and final job. *2023-Hrg*. at 257, 267-68; LETTER FROM SECURONIX TO CHRIS (Nov. 30, 2022), *Appx*. at 70 ("[W]e regret to inform you that your position at Securonix has been eliminated as part of our recent restructuring."). He recognizes his occupation is a "young man's game," *2023-Hrg*. at 257, and considers himself at the end of his working career. *2023-Hrg*. at 284. Chris has not been able to

secure re-employment despite many applications, which he attributes to his age. *2023-Hrg*. at 257, 283-84. He currently lives with and supports his second wife and two of the parties' daughters (one adult, one minor) in Brentwood, New Hampshire. *2023-Hrg*. at 249.

Therese may have some higher education, has held a variety of jobs, played in a rock-and-roll band, *2023-Hrg*. at 228, 242-43, and had a long-term post-marriage relationship with a successful author who, from about 2016 through 2022, supported her in an urbane lifestyle. *2023-Hrg*. at 210-22, 230-35; TEMPORARY ORDER (Mar. 4, 2018) at 2, *Appx*. at 34; MARK DAGOSTINO WEBSITE (Jan. 4, 2021), *Appx*. at 46. Currently Therese is neither employed nor self-supporting, and is sustained by loans and a variety of government benefits. FINANCIAL AFFIDAVIT (Apr. 4, 2023), *Sealed Appx*. at 3; MOTION ALIMONY (Nov. 29, 2022), *Appx*. at 69; MOTION TO CHANGE COURT ORDER (Apr. 14, 2021), *Appx*. at 52; FINAL ORDER (Jan. 27, 2016), at 4, *Appx*. at 17. Although her testimony is vague, it appears that for most of the year Therese lives in a condominium owned by others in Gilford, New Hampshire, and during the summer at a camp-cottage she owns in Alton Bay. *2023-Hrg*. at 215-17.

II. Alimony and Child Support at Divorce and After

Upon their irreconcilable-differences divorce in 2013, the court ordered Chris pay Therese $2,219 per month in child support, and $800 per month in alimony. FINAL ORDERS (June 19, 2013), *Appx*. at 3;DECREE OF DIVORCE (July 19, 2013), *Appx*. at 5; UNIFORM SUPPORT ORDER (Sept. 18, 2014), *Appx*. at 11.

In 2016, upon the oldest daughter approaching majority, the Rochester Family Court (*Robert J. Foley*, J.) modified child support and alimony. It noted Therese's rehabilitative intent to attain further education and employment, and ordered payment of arrearages to account for Chris misreporting commission income. The court upped Chris's child support obligation to $3,927 per month, and his alimony payment to $1,000 per month, for 5 years, ending on December 31, 2020. FINAL ORDER (Jan. 27, 2016), at 5-7, *Appx*. at 17. Chris appealed the order, which this court affirmed. *In the Matter of Christopher Taylor & Therese Taylor*, Slip.Op. 2016-0093 (Nov. 15, 2016) (omitted from appendix).

In 2017, due to changes in where the two then-still-minor daughters were residing, the court reduced child support to $2,026 per month, but left the amount and duration of alimony unchanged. UNFORM SUPPORT ORDER (Jan. 25, 2017), *Appx*. at 28.

In 2018, the daughters' residences had changed, prompting a reduction in child support to $1,410 per month. The court again left alimony unchanged – $1,000 per month ending in December 2020. TEMPORARY ORDER (Mar. 4, 2018), *Appx*. at 34; UNIFORM SUPPORT ORDER (Mar. 14, 2018), *Appx*. at 39.

Alimony lapsed at the end of 2020 by the terms of the 2016 order.

In 2021, in response to both parties' requests to address existing orders, the Brentwood Family Court (*Mark F. Weaver*, J.) held a hearing, during which Chris acknowledged: "I'm never going to say that I can't afford alimony. I

certainly can."[1] *2021-Hrg* at 84. The court recognized some discovery violations, but declined changing the parties' financial obligations. ORDER ON MOTION TO MODIFY (July 2, 2021), *Appx*. at 58.

In 2022, both parties filed motions to adjust their obligations. Therese sought "permanent alimony" on the grounds she has been "unable to become self-supporting." MOTION ALIMONY (Nov. 29, 2022), *Appx*. at 69.[2] The court ruled Therese's request would be "treated as a … renewal of her prior alimony award." ORDER REGARDING RESPONDENT'S "MOTION: ALIMONY" (Jan. 5, 2023), *Appx*. at 73; FINAL ORDER (June 23, 2023) at 3, 40, *Addendum* at 39; *2023-Hrg*. at 186. After numerous pleadings, the Brentwood Complex Family Division (*Jennifer A. Lemire*, J.) held a hearing over three afternoons in April 2023.

Although not asked about any particular amount, during the hearing Chris reiterated his 2021 testimony that he still had the ability to pay some alimony. *2023-Hrg*. at 306. In addition, because the last minor child was residing with him, child support was suspended. ORDER (June 14, 2022), *Appx*. at 67.

Year	Child Support	Monthly Alimony	Alimony End Date
2013	$2,219	$800	unspecified
2016	$3,927	$1,000	December 31, 2020
2017	$2,026	$1,000	December 31, 2020
2018	$1,410	$1,000	December 31, 2020
2021	$1,410	$0	Already Ended
2022	$0	$3,000	January 12, 2033

In June 2023, the court issued orders, from which this appeal stems. The 53-page narrative mostly focused on

[1]Because all the exhibits and the hearing transcripts which Therese has associated with this matter were directed toward proof of Chris's ability to pay alimony, they are largely irrelevant to this appeal. Similarly, because Chris paid arrearages in accord with this court's order dated October 23, 2023, they are also moot.

[2]The motion was initially denied based on the statute of limitations, but subsequently reversed upon recalculation of filing dates. ORDER REGARDING RESPONDENT'S "MOTION: ALIMONY" (Jan. 5, 2023), *Appx*. at 73.

calculating Chris's income over the course of several preceding years for the purpose of determining arrearages. FINAL ORDER (June 23, 2023) *passim*, *Addendum* at 39. It also repeated Chris's acknowledgment of his ability to pay some alimony, and Therese's continued paucity of resources. *Id.* at 42-43; *see* AFFIDAVIT OF NO CHANGE (Dec. 31, 2020), *Appx*. at 45. The court attached a half-dozen uniform support orders reflecting arrearages, which are not challenged on appeal. USO #1 (June 23, 2023); USO #2 (June 23, 2023); USO #3 (June 23, 2023); USO #4 (June 23, 2023); USO #5 (June 23, 2023); USO #6 (June 23, 2023) (all omitted from appendix).

While Chris's position was restructured out of existence, the court did not credit his unsuccessful job hunt. It found that he "is presently voluntarily unemployed, and impute[d] the income to him that he was most recently earning, $11,250 gross per month." FINAL ORDER (June 23, 2023) at 47, *Addendum* at 39.

Based on these findings, the court trebled Chris's alimony obligation from $1,000 to $3,000 (retroactively effective to January 12, 2022) and protracted it for 10 additional years, until January 12, 2033, when Chris will be 78 years old. *Id.* at 50; UNIFORM ALIMONY ORDER (June 23, 2023), *Addendum* at 37. This appeal addresses the alimony order going forward.

SUMMARY OF ARGUMENT

The history of New Hampshire's alimony statute, and decisions pursuant to it, show that renewal and modification are separate concepts. Renewal affects duration, while modification affects amount. Here, the family court erred by applying the lower renewal standard and trebling Chris's alimony obligation, a change which was actually a modification.

The court also unreasonably prolonged alimony, resulting in an obligation longer than the marriage, which will not terminate until Chris is 78 years old.

ARGUMENT

I. Trebling the Amount of Alimony Constitutes a Statutory Modification Rather than Renewal

The alimony statute, RSA 458:19,[3] recognizes both renewals and modifications, which the statutory history shows are conceptually distinct. Renewal, as demonstrated by a long line of decisions by this court, is an extension of alimony after it has lapsed. Modification, which until recently was defined only by opinions of this court, is a change in its amount.

Although here the family court said it was a merely renewing, it trebled Chris's alimony obligation, which should have been treated as a modification.

The standard for renewing alimony, which the family court erroneously applied here, is relatively undemanding. The modification standard is much higher, and would require Therese to prove a substantial and unforeseeable change of circumstances, which she cannot because Chris's retirement was foreseeable.

This court should accordingly reverse.

A. Alimony Statute Separately Recognizes Renewal and Modification

In New Hampshire's early divorce statutes, when a married woman could not own property and fault was the only basis for divorce, alimony was not mentioned specifically. A wife might nonetheless have been awarded, for the purposes of support, a portion of her husband's estate. *See, e.g., Fowler v. Fowler*, 97 N.H. 216 (1951); *Kennard v. Kennard*, 87 N.H. 320 (1935).

> Upon any decree of nullity or divorce, the court may restore to the wife all or any part of her lands, tenements and hereditaments, and may assign to

[3]The family court established, and the parties have not challenged, that this case is governed by the pre-2019 alimony statute. RSA 458:19 (effective until Dec. 31, 2018).

> her such part of the real and personal estate of her husband, or order him to pay such sum of money, as may be deemed just and expedient.

RS 148:13 (1842), *Appx*. at 79; *see generally*, *Wallace v. Wallace*, 74 N.H. 256 (1907).

A wife was "not entitled to an allowance for her support," *Wallace v. Wallace*, 75 N.H. 217, 218 (1909), but if alimony were granted, her "sum" was based on general equity and the egregiousness of marital misbehavior. *Kennard*, 87 N.H. at 327 ("[P]roof of inhuman or brutal treatment on his part may serve to make the court less considerate of his situation, and more liberal in its view of the necessities of the wife.") (quotation omitted); *Kennard v. Kennard*, 81 N.H. 509, 512-13 (1925) ("If the husband's conduct has been reprehensible, then this will augment the amount of alimony that should be awarded to the wife."); *Janvrin v. Janvrin*, 59 N.H. 23, 23 (1879) ("Evidence as to the conduct of the parties toward each other, and the value of the husband's estate, was competent on the question of alimony."); *Parsons v. Parsons*, 9 N.H. 309, 314 (1838) ("[M]aintenance and support … proceedings generally may be according to the usage of courts of equity, which differs not essentially from that of the ecclesiastical courts, both taking cognizance of suits for alimony."); *see generally*, *Wolfe v. Wolfe*, 350 N.E.2d 413, 417 (Ohio 1976); *Phelan v. Phelan*, 12 Fla. 449, 449 (1868); 3A Charles Douglas, *New Hampshire Practice Series: Family Law* § 18.02, at 18-2 (4th ed. 2014); 1 Lloyd T. Celso, *North Carolina Family Law Practice*, History of Alimony Laws § 7:2 (2024).

In 1937, New Hampshire's divorce statute for the first time specifically addressed alimony. Awards were limited to three years in duration, and the wife could triennially petition to renew or extend:

> Upon a decree of nullity or divorce, the court may restore to the wife all or any part of her estate, and may assign to her such part of the estate of her husband, or order him to pay such sum of money, as may be deemed just, provided that in cases in which no children are involved, or in which the children have reached the age of majority, said order shall be effective for not more than three years from the date thereof, but *such order may be renewed, modified or extended* if justice requires for periods of not more than three years at a time.

LAWS 1937, 154:1 (eff. July 7, 1937), *Appx*. at 82 (emphasis added); RSA 458:19 (1955) (emphasis added), *Appx*. at 84.

For divorced couples, this required recurring renewals and extensions. *Calderwood v. Calderwood*, 112 N.H. 355, 358 (1972) ("The evident legislative purpose of the three-year provision … is to provide a periodic review of the needs and resources of the parties."); *Lund v. Lund*, 96 N.H. 283 (1950) (three-year limit inapplicable where there are minor children); *Bradley v. Bradley*, 92 N.H. 70 (1942) ("The effect of the statute is to bring up such orders for reconsideration every three years."); *Sheafe v. Laighton*, 36 N.H. 240, 243 (1858) ("Further petitions may be presented for these purposes at any time after the libel for the divorce is filed.").

Extensions generally appear as a continuation of alimony under a then-existing order. *See, e.g., In the Matter of Lyon*, 166 N.H. 315 (2014); *Madsen v. Madsen*, 109 N.H. 457 (1969). Renewals are reinstatements when an alimony order has expired by operation of the former three-year rule, *see, e.g., Walker v. Walker*, 133 N.H. 413 (1990), by agreement of the parties, *see, e.g., Kidder v. Kidder*, 135 N.H. 609, 611 (1992) (alimony "reinstated"), or by its own terms. *Lyon*, 166 N.H. at 315. Probably because the standards of proof for extensions and renewals are the same, they often appear interchangeable. *See, e.g., Morphy v. Morphy*, 114 N.H. 86, 86 (1974) ("[T]he order for payment of $75 weekly was

extended and renewed as of November 1971."); *Madsen*, 109 N.H. at 457 ("Plaintiff's motion to renew and extend alimony payments … for an additional period of three years … was granted.").

By the 1980s, it was apparent that for many families periodic litigation and court appearances were excessive and unbeneficial. *Healey v. Healey*, 117 N.H. 618, 621 (1977) ("justice may often require that alimony orders be renewed after three or six years").

> [T]here are many cases where people need … alimony payments for longer than three years…. [I]f it is only three years and we are in a case where the parties need the payment at the end of three years there is still a need … for continuation of alimony payments yet that party has to go back to court to see if the judge will allow continuance.

1985 SENATE JUDICIARY COMMITTEE, HEARING ON HB 583, RELATIVE TO ALIMONY (MAY 7, 1985), *testimony of sponsoring Representative Lown* (typographic errors corrected), *Appx*. at 87.

> [T]he three year rule makes it very difficult both financially and emotionally for those women without minor children who are forced to litigate every three years to continue.

1985 SENATE JUDICIARY COMMITTEE, HEARING ON HB 583, RELATIVE TO ALIMONY (MAY 7, 1985), *testimony of Barbara Desaires for N.H. Women's Lobby* (typographic errors corrected), *Appx*. at 87.

In 1985, the Legislature eliminated the three-year limitation. LAWS 1985, 175:1 (eff. Jan. 1, 1986), *Appx*. at 92. A year later, however, this Court ruled the repeal was inapplicable to old divorces. *Henry v. Henry*, 129 N.H. 159 (1987).

In response, in 1988 the Legislature ensured retroactivity by removing limitations on the duration of an award. Alimony could be "either temporary or permanent, for a definite or indefinite period of time." LAWS 1987, 278:2 (eff.

Jan. 1, 1988), *Appx*. at 97; LETTER FROM N.H. BAR ASSOCIATION (L. Jonathan Ross, signatory) TO SENATE JUDICIARY COMMITTEE, *regarding HB 36, Relative to Alimony* (Apr. 6, 1987) (referencing *Henry* decision), *Appx*. at 94. This applied to all alimony proceedings:

> Upon a decree of nullity or divorce, or upon the renewal, modification, or extension of a prior order for alimony, the court may order alimony to be paid for such length of time as the parties may agree or the court orders.

LAWS 1987, 278:2 (eff. Jan. 1, 1988).

At that time, "a spouse could seek alimony for the first time or could seek a renewal of a prior alimony award at any time after the divorce became final." *Lyon*, 166 N.H. at 320; *In the Matter of Kenick & Bailey*, 156 N.H. 356, 357 (2007). In 2001, the Legislature added a "statute of limitations," requiring petitions for alimony within five years of divorce, LAWS 2001, 246:2, *Appx*. at 100; *Lyon*, 166 N.H. at 319, and simultaneously made clear the limitations period applied to renewals. LAWS 2001, 246:3, *Appx*. at 100.[4]

This statutory history demonstrates several points. First, while renewals were once routine, they now occur only in old divorces that still require triennial alimony review, *see In the Matter of Britton*, 174 N.H. 702 (2022), and where, as here, alimony has expired and a party seeks to resurrect it. *See In the Matter of Hoyt*, 171 N.H. 373 (2018); *In the Matter of Lyon*, 166 N.H. 315 (2014).

Second, there is nothing in RSA 458:19 suggesting that renewal is anything more than a "continuation," *In the Matter of Canaway*, 161 N.H. 286, 291 (2010) or "reinstatement," *Kidder*, 135 N.H. at 611, of a prior alimony order.

Third, while the alimony statute mentions modification, and

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[4]Subsequently, the alimony statute was made gender-neutral in 1996, LAWS 1996, 32:4 & 32:5, and the entire alimony statute was revamped in 2018. LAWS 2018, 310:1; RSA 458:19 (eff. Jan. 1, 2019); RSA 458:19-a (eff. Jan. 1, 2019); RSA 458:19-aa (eff. Jan. 1, 2019).

distinguishes it from renewal, the term is nowhere defined, and has instead been developed by case-law. *See Lyon*, 166 N.H. at 315; *Clevesy v. Clevesy*, 118 N.H. 112 (1978).[5]

[5]Legislative amendments in 2018 for the first time statutorily define "modification," and expressly change the prior judicial understanding. RSA 458:19, VIII (eff. Jan. 1, 2019) ("'Modification' means any increase or decrease in the amount or duration in alimony, other than because of the cohabitation, remarriage, or death of the payee, or the retirement of the payor."). The new statute does not apply to this case.

B. Renewal is Different From Modification

The statutory standard for renewal, as it has been since 1937, is relatively undemanding:

> 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 upon 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 the light of all the circumstances then existing.

In the Matter of Lyon, 166 N.H. 315, 321 (2014) (quotations omitted); *see also Britton*, 174 N.H. at 710; *Hoyt*, 171 N.H. at 378; *Kidder*, 135 N.H. at 611; *Healey v. Healey*, 117 N.H. 618, 621 (1977); *Morphy v. Morphy*, 114 N.H. 86, 88 (1974); *Taylor v. Taylor*, 108 N.H. 193, 195 (1967); *Madsen v. Madsen*, 106 N.H. 267, 269 (1965).

The standard for modification, however, is far higher. *In the Matter of Hoyt*, 171 N.H. 373, 378 (2018). To modify alimony, the party seeking modification must prove "a substantial change in circumstances warranting a change in alimony," and that the change is equitable. *In the Matter of Arvenitis*, 152 N.H. 653, 657 (2005); *Laflamme v. Laflamme*, 144 N.H. 524, 527 (1999).

Moreover, not all types of changes count. "[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." *Arvenitis*, 152 N.H. at 656 (quotation and emphasis omitted).

While unanticipated changes in a party's fortunes, such as becoming disabled or encountering unavoidable and unexpected expenses, may justify modification, *Walker v. Walker,* 133 N.H. 413 (1990); *Hoyt*, 171 N.H. at 373, predictable life events, such as subsequent cohabitation or age-based retirement, are foreseeable, *Bisig v. Bisig*, 124 N.H. 372 (1983); *Arvenitis*, 152

N.H. at 653; *Laflamme*, 144 N.H. at 524, and therefore not a basis to modify.

This court has not heretofore been asked to explicitly distinguish between renewal and modification. It is nonetheless apparent from this court's relatively large jurisprudence that this court has acted with the understanding that renewal is time-based and modification is amount-based.

In this court's opinions where there was a discernable renewal or extension of alimony, the amounts were kept level while extending duration. The modification cases changed the amount while leaving duration unaffected.

C. Renewal Is Continuation Of Alimony In The Same Amount

There are seven known reported cases in which renewals and extensions occurred. In each, the amount of alimony is identical to the obligation in the prior award.

In *Taylor v. Taylor*, 108 N.H. 193 (1967), the original decree ordered alimony of $40 weekly. Later, the husband sought to modify the amount, which the trial court denied, but instead renewed alimony in the same amount. This court reversed on other grounds.

In *Madsen v. Madsen*, 109 N.H. 457 (1969), the prior decree provided for $300 monthly alimony. The renewal was in the same amount.

In *Calderwood v. Calderwood*, 112 N.H. 355 (1972), the prior alimony was $930 monthly. The wife's petition for renewal appears to have requested that the same amount be extended.

In *Morphy v. Morphy*, 114 N.H. 86 (1974), both the original alimony and the renewal amount were $75 weekly, which this court affirmed.

In *Kidder v. Kidder*, 135 N.H. 609, 611 (1992), the parties' decree provided for $500 per month in alimony, which was "reinstated" at the same amount.

In *In the Matter of Lyon*, 166 N.H. 315 (2014), the decree provided for $3,000 per month for the first year after divorce, and then $5,000 per month for five additional years. At renewal, it appears alimony was continued in that same amount.

In *In the Matter of Britton*, 174 N.H. 702 (2022), the prior decree set alimony at $200 weekly. At renewal, the obligation remained $200, which this court affirmed.

Outside of the alimony context, "renewal" similarly means a continuation or an extension. In *Proctor v. MacDonald*, 141 N.H. 621 (1997), a commercial lease allowed for commissions on periodic renewals. The parties

disputed whether the updated lease was a "renewal" on which commissions would be due. This court ruled that while a new lease "need not incorporate terms identical to the original lease in order to be considered a renewal," *id.* at 626, "the subsequent agreement must be *substantially similar* to the original one to be considered a renewal." *Id*. at 627 (emphasis added). Likewise, the dictionary definition of "renewed" is "revived, re-established." OXFORD ENGLISH DICTIONARY 447.

Accordingly, alimony renewal is durational, meaning a continuation or reinstatement of alimony, not a substantial change in the amount of the alimony obligation.

D. Modification Is a Change In Alimony Amount

Distinct from renewal, this court's record of thirteen known reported cases over 120 years in which modification occurred, shows that the *amount* of alimony owed was routinely adjusted. In some, the magnitude of change was small; in a few, substantial.

In *Mullin v. Mullin*, 60 N.H. 16 (1880), the original decree granted alimony of $1,500 in a lump sum. This court approved a modification a year later to zero – a 100 percent reduction.

In *Le Beau v. Le Beau*, 80 N.H. 139 (1921), the original decree provided for a $1,000 one-time alimony payment. This court approved a modification to $1,319.44 – a 32 percent increase.

In *Lund v. Lund*, 96 N.H. 283 (1950), this court considered a reduction in alimony from $25 per week to $20 a modification – a 20 percent reduction.

In *Madsen v. Madsen*, 109 N.H. 457, 459 (1969), the original decree provided for $350 monthly alimony. There was a later "modified decree" in the amount of $300 – a 14 percent reduction.

In *Calderwood v. Calderwood*, 112 N.H. 355 (1972), this court appears to have approved a modification in alimony from $1,000 per month to $930 – a 7 percent reduction.

In *Hamblett v. Lewis*, 114 N.H. 258 (1974), this court approved as a modification a change in alimony from $1,967 per year to $2,000 per year – a 2 percent increase.

In *Labrie v. Labrie*, 113 N.H. 255 (1973), there was no alimony order, but when the wife later became incapacitated due to illness, this court approved a modification resulting in alimony of $18 per week.

In *Clevesy v. Clevesy*, 118 N.H. 112 (1978), the parties' original stipulation was alimony in the amount of $125 per week for three years, and then $100 for three additional years. The court modified the second of those

amounts to $75 – a 25 percent reduction.

In *Bisig v. Bisig*, 124 N.H. 372 (1983), this court ruled that a modification in alimony from $1,500 per month to $1,000 per month was sustainable – a 33 percent reduction.

In *Kayle v. Kayle*, 132 N.H. 402 (1989), this court ruled that a modification from $1,400 per month to $2,000 per month was sustainable – a 43 percent increase.

In *Walker v. Walker*, 133 N.H. 413 (1990), the original decree awarded wife $1,100 in monthly alimony, which was subsequently modified to $1,265. When Husband later requested termination of alimony, the court modified the obligation to $575 – a 55 percent reduction.

In *In the Matter of Lurvey*, 148 N.H. 469 (2002), the original decree specified a gradual reduction in alimony over time: $1,000 per month for several months, then $750 for two years, then $500 for two years, then $250 for two final years. At the time the first reduction was to go into effect, the court modified the order to eliminate the gradual reductions, and set alimony at $1,000 for an indefinite period. Although it reversed on other grounds, this court appears to have approved the modification – thus eliminating a step-down 75 percent reduction.

In *In the Matter of Canaway*, 161 N.H. 286, 291 (2010), this court approved a modification in alimony from $1,000 to $750 per month – a 25 percent reduction.

In *In the Matter of Britton*, 174 N.H. 702 (2022), alimony at the time of divorce was $400 weekly, which was later modified to $200 – a 50 percent reduction.

In all this court's known cases in which alimony modification occurred, the *amount* of alimony was changed. Some adjustments were modest, but several were as much as 55, 75, and 100 percent.

E. Renewals and Modifications in the Same Proceeding

In *Healey v. Healey*, 117 N.H. 618 (1977), the prior order provided for $75 monthly alimony. On renewal, the trial court reduced it to $45 monthly – a 40 percent reduction – which this court affirmed. However, it appears that by the time of the renewal proceedings, both parties' financial situations had substantially and unforeseeably changed – wife's income increased from nothing during the marriage to $6,200 post-divorce; husband's increased from $4,000 to $11,000 in the same period – suggesting the case was both a renewal and a modification, and that the modification standard had been met.

In *Clevesy v. Clevesy*, 118 N.H. 112 (1978), an alimony order, which had been previously modified, automatically expired by operation of the old three-year rule. The husband ceased paying, which the wife alleged was a contempt. The question was whether modification automatically resulted in renewal. *Id.* at 114. If so, the husband would have still been under the obligation. This court emphasized "issues relevant to the granting of an extension might be inadequately considered on a petition to modify," *id.*, and that because the statute specifies both "extension" and "modification," the legislature intended different meanings. Accordingly, this court determined that modification does not automatically result in renewal. *Id.* at 115. It is apparent from *Clevesy* that modification is separate from extension and renewal, and that modification pertains to the amount of an alimony order, rather than its duration.

In *In the Matter of Lyon*, 166 N.H. 315 (2014), wife requested extension of an alimony order that was soon to lapse. This court ruled that the lower court erroneously applied the higher modification standard, which would require wife prove a substantial and unforeseeable change in circumstances. *Id.* at 321. In reaching its decision, this court noted that an alimony order can be "extended or renewed, either in modified or unmodified form," *id.,* thus reiterating the *Clevesy* principle that extensions and renewals are different and separate from

modifications. In addition, by recognizing that renewals can come in "modified or unmodified form," this court also suggested that a renewal and a modification can occur in parallel or simultaneous proceedings, so long as the respective standards applied to duration and amount.

In *In the Matter of Hoyt*, 171 N.H. 373 (2018), the original decree did not provide for alimony. Post-divorce, alimony was established in the amount of $150 monthly for 18 months. By the time that expired, the youngest child, who was living with wife, had developed a debilitating medical condition, resulting in wife's unforseen expenses; she thus requested an increase in alimony to $600 per month. This court noted that "the trial court issued an order renewing alimony," *id.* at 375, in the amount of "$200 per month for 12 months," *id.* at 376, which this court affirmed. As wife's unforseen expenses were a substantial change in circumstances, and his court twice termed the increase from $150 to $200 – a 33 percent increase – a "modification," *id.* at 378, it appears the modification standard had been met.

F. Trebling of Alimony Is a Modification

In the instant case, Therese sought "permanent alimony," based on an order that had lapsed by its own terms. The family court construed her request as a renewal. Therese did not seek modification, and did not allege any substantial and unforeseen change in circumstances.

The court nonetheless increased Chris's alimony obligation from $1,000 to $3,000. That is a *300 percent* hike. That change is neither durational nor *de minimis*, making it a modification and not merely a renewal.

This court has already made clear that renewals are not subject to the higher modification standard. *Lyon*, 166 N.H. at 315. Likewise, modifications should not be allowed based on the less demanding renewal standard – which the family court misapplied here. FINAL ORDER (June 23, 2023) at 41, *Addendum* at 39.

Accordingly, this court should vacate the family court's order and remand to allow the family court to apply the modification standard to this case. *Lyon*, 166 N.H. at 321. In the alternative, because Chris's age-based retirement was inherently foreseeable, *Arvenitis*, 152 N.H. at 653; *Laflamme*, 144 N.H. at 524, and Chris has already reached retirement age and retired – whether by choice or layoff – it is apparent Therese cannot be awarded alimony. This court should thus simply reverse. *Laflamme*, 144 N.H. at 527 (reversing where party could not meet standard).

II. 19 Years of Alimony, After 16-Year Marriage, Which Ended 11 Years Ago

The parties were married for 15 years and 10 months. The original alimony order, which issued at the time of divorce 11 years ago in 2013, was for 7½ years, to expire at the end of 2020.

In addition to trebling the amount, the current order, issued as a "renewal," extends alimony for 11 more years, from January 2022 to January 2033. That is half-again as long as the original order, and results in almost 19 years of alimony – nearly three years *longer* than the marriage.

Such prolongation is unreasonable and inconsistent with the purposes of alimony.

A. Duration of Alimony Unreasonably Long

Following the repeal of the 3-year limitation, this court noted that the duration of alimony must be "reasonable." *Hoyt*, 171 N.H. at 377. Duration must take into account the length of the marriage. RSA 458:19, IV(b); *Hoffman v. Hoffman*, 143 N.H. 514 (1999).

In decisions of this court in which both the duration of marriage and duration of alimony is discernable, only one known reported case has allowed alimony longer than the marriage. That exception is *In the Matter of Hampers*, 154 N.H. 275 (2006), where a 6-year marriage resulted in 13 years of alimony. Not only was there a $15 million discrepancy in wealth, but unlike here, *Hampers* was a fault-based divorce; alimony was based on husband's conduct, including threats against the wife and the child which "compromised [their] safety."

Most awards are *much* shorter than the marriage. *See In the Matter of Merrill*, 174 N.H. 195 (2021) (12-year marriage; 8 years alimony); *In the Matter of Dow*, 170 N.H. 267 (2017) (30-year marriage; 3 years alimony); *In the Matter of Kempton*, 167 N.H. 785 (2015) (25-year marriage; 8 years alimony); *In the Matter of Raybeck*, 163 N.H. 570 (2012) (42-year marriage; 10 years alimony); *In*

the Matter of Nassar, 156 N.H. 769 (2008) (23-year marriage; reversal of lifetime alimony where wife was in good health, had marketable skills, was not supporting any children, and had a modest standard of living); *In the Matter of Harvey*, 153 N.H. 425, 427 (2006) (15-year marriage; 3 years alimony); *In the Matter of Gronvaldt*, 150 N.H. 551 (2004) (16-year marriage; 5 years alimony); *In the Matter of Sutton*, 148 N.H. 676 (2002) (31-year marriage; 13 years alimony assuming retirement at age 65); *In the Matter of Gordon*, 147 N.H. 693 (2002) (15-year marriage; 5 years alimony); *In the Matter of Levreault*, 147 N.H. 656 (2002) (26-year marriage; 7 years alimony) (award reversed because court did not sufficiently justify amount and duration); *In the Matter of Fowler*, 145 N.H. 516 (2000) (24-year marriage; 6 years alimony); *Hoffman v. Hoffman*, 143 N.H. 514 (1999) (14-year marriage; 7 years alimony); *Dombrowski v. Dombrowski*, 131 N.H. 654 (1989) (30-year marriage; 1 year alimony).

Although it is not applicable to this case, in the current alimony statute, the Legislature recognized that the appropriate starting place to determine duration is half the length of the marriage. RSA 458:19-a ("The maximum duration of term alimony shall be 50 percent of the length of the marriage, unless the parties agree otherwise or the court finds that justice requires an adjustment.").

By ordering alimony longer than the marriage, especially when the parties' no-fault divorce was over a decade ago, the family court's order was unreasonable, and this court should reverse.

B. Duration of Alimony Order Inconsistent With Purposes of Alimony

By ordering alimony for such a long period, the family court acted unlawfully outside of the purposes for which alimony is intended.

This court considers alimony "something more than a mere substitute for support." *Stritch v. Stritch*, 106 N.H. 409 (1965).

> It has long been recognized that the primary purpose of alimony is rehabilitative. This principle is based upon the realization that modern spouses are equally able to function in the job market and to provide for their own financial needs. Alimony should, therefore, generally be designed to encourage the recipient to establish an independent source of income.

In the Matter of Nassar, 156 N.H. 769, 777 (2008) (quotations and citations omitted).

While in appropriate circumstances other considerations may "override the rehabilitative principle," *Hoyt*, 171 N.H. at 377, the purpose of alimony "is not to provide a life-time profit-sharing plan." *Calderwood v. Calderwood*, 114 N.H. 651, 653 (1974).

The family court already awarded Therese rehabilitative alimony in 2016, with which she did little to rehabilitate a career, but instead moved in with a successful author. In the current order, the prolonged alimony award will not end until Chris is 78 years old and Therese will be turning 68. Under these conditions, Therese has little reason or incentive to reenter the job market. UNIFORM ALIMONY ORDER (June 23, 2023), *Addendum* at 37.

As the family court's order does not align with the general rehabilitative purpose of alimony, and Therese did not use her divorce-era period of alimony for any career rehabilitation, this court should reverse. *In the Matter of Nassar*, 156 N.H. 769 (2008).

III. Alimony Should Not Extend Past Retirement Age

Chris is currently 69 years old and will turn 70 in December 2024. He was laid off from his most recent job, timely prompting his retirement. The family court nonetheless ruled that he "is presently voluntarily unemployed, and impute[d] the income to him that he was most recently earning." FINAL ORDER (June 23, 2023) at 45, 47, *Addendum* at 39. Under the order, alimony will terminate when Chris is 78 years old.

The age at which it may be anticipated that one retires is not neatly defined.

- In determining whether voluntary retirement constitutes a substantial change of circumstances, this court noted "the widespread acceptance of sixty-five as the normal retirement age." *In the Matter of Arvenitis*, 152 N.H. 653, 657 (2005).

- Retirement age for judicial officers in New Hampshire is 70. N.H. CONST. pt. 2, art. 78 ("No person shall hold the office of judge … after he has attained the age of seventy years."). It is understood that a constitutional amendment will be on the New Hampshire ballot in 2024, to raise that age to 75. CACR 6, 30 SENATE JOURNAL 287 (Mar. 2023).

- In the post-2019 version of the alimony statute (which does not apply to this case), the Legislature determined that "'[f]ull retirement age' means the age when the payor is eligible to receive full retirement benefits under the federal Old Age, Survivors, and Disability Insurance Social Security program."

  For Chris, who was born in 1954, under those programs, eligibility begins at age 66. *See* Securing Today and Tomorrow, Social Security Administration, Publication No. 05-10035, Retirement Benefits at 2 (Jan. 2024).

- According to the Boston College Center for Retirement Research, using the most recently available data from 2021, the nationwide average retirement age for men with a college degree is 65.7 years. FORBES ADVISOR (Jan. 26, 2024) <https://www.forbes.com/advisor/retirement/average-retirement-age>.

By these measures, Chris has already reached retirement age. By any measure, he will have attained retirement age long before his alimony obligation ends. By finding him voluntarily unemployed, the family court has ignored both reasonable retirement age, and Chris's actual retirement. This court should accordingly reverse.

Moreover, the family court made its voluntary unemployment ruling in the course of what it deemed was a "renewal" proceeding rather than a modification. Whether Chris's retirement was voluntary, *Arvenitis*, 152 N.H. at 653, or involuntary, *Laflamme*, 144 N.H. at 524, the family court erred by not using the required standard – proof of a substantial and unforeseeable change of circumstances. This court should thus reverse and remand. *Lyon*, 166 N.H. at 321.

Finally, it is evident that the amount of money available to most divorced couples is less after retirement, and that even if alimony is to be paid, the obligor cannot be held to pre-retirement earnings. *See Pierce v. Pierce*, 916 N.E.2d 330, 345-46 (Mass. 2009); *Bogan v. Bogan*, 60 S.W.3d 721, 729 (Tenn. 2001) ("At some point, parties must recognize that just as a married couple may expect a reduction in income due to retirement, a divorced spouse cannot expect to receive the same high level of support after the supporting spouse retires.") (quotation omitted).

By "imput[ing] the income to [Chris] that he was most recently earning," FINAL ORDER (June 23, 2023) at 45, 47, *Addendum* at 39, long beyond the time that he could conceivably earn at his former level, the family court ignored the obvious. Had the family court employed the modification standard – requiring proof of a substantial and unforeseeable change of circumstances – it would have addressed the foreseeability of less money available post-retirement. This court should thus reverse and remand. *Lyon*, 166 N.H. at 321.

CONCLUSION

Christopher and Therese were divorced in 2013, after a marriage lasting about 16 years. The purpose of alimony is rehabilitative, and the original divorce decree provided for 7½ years of alimony, which ended in 2020.

Since their divorce in 2013, Therese has made little effort to become self-supporting, although she had an extended cohabitative relationship. When it recently ended, she sought a resumption of support from her former husband.

The original 2013 decree provided for alimony of $1,000 per month. In 2023, however, the family court trebled Chris's obligation to $3,000. The court erroneously called the change a mere "renewal," which employs a lower standard. It should have been considered a "modification," which demands a much higher standard, and requires Therese prove a substantial and unforeseeable change in circumstances. This court should reverse outright, or reverse and remand for application of the appropriate modification standard.

Chris will soon turn 70 and has already retired. The family court nonetheless unreasonably prolonged his alimony obligation well into retirement, ordering Chris to pay alimony for a total of 19 years – 3 years longer than the marriage. While the court credited Chris's career-long financial success, it deemed him voluntarily unemployed, and unreasonably imputed earnings to him which he cannot possibly attain. This court should reverse.

Respectfully submitted,

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Dated: April 17, 2024

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CERTIFICATIONS & REQUEST FOR ORAL ARGUMENT

A full oral argument is requested.

I hereby certify that the decision being appealed is addended to this brief. I further certify that this brief contains no more than 9,500 words, exclusive of those portions which are exempted.

I further certify that on April 17, 2024, copies of the foregoing will be forwarded to Therese Taylor, via this court's e-filing system.

Dated: April 17, 2024

Joshua L. Gordon, Esq.

ADDENDUM