State of New Hampshire
Supreme Court

NO. 2023-0128

2023 TERM

SEPTEMBER SESSION

In the Matter of Deborah Dascenzo

and Brian Paul

RULE 7 APPEAL OF FINAL DECISION OF THE
NEWPORT FAMILY COURT

BRIEF OF PETITIONER/APPELLANT, DEBORAH DASCENZO

September 26, 2023

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QUESTIONS PRESENTED

I. Did the court err in holding that Ms. Dascenzo's Petition to court Order was a request for modification, rather than an establishment, of alimony, given that there was no prior order to pay alimony?

Preserved: DEBORAH'S MEMORANDUM OF LAW (Sept. 28, 2022), *Appx*. at 231; MOTION TO RECONSIDER (Dec. 27, 2022), *Appx*. at 239.

II. Did the court err in finding, for purposes of deciding whether to "modify" alimony, that it was foreseeable that Mr. Paul would acquire a medical license and secure a high paying job, despite revelations of his criminal conduct of forging a judge's signature?

Preserved: MOTION TO RECONSIDER (Dec. 27, 2022), *Appx*. at 239.

STATEMENT OF FACTS

I. Deborah and Brian Meet in Philadelphia and Move to New Hampshire

Deborah Dascenzo grew up and went to photography school in Philadelphia. In her early 40s, she was bartending there when she met and developed a relationship with Brian Paul, then in his late 20s and a waiter at the same restaurant.[1] *Div.Hrg.-1* at 4, 54; INTERROGATORIES ¶ 2 (July 8, 2022), Exh. A, *Appx*. at 208.[2]

Having no living family, Deborah agreed when Brian suggested they move to Delaware for him to pursue a teaching degree, which he achieved. *Div.Hrg.-1* at 5, 18, 39, 52; INTERROGATORIES ¶ 6. They were married in 2002 and lived briefly in Maine when Brian secured a teaching job. *Div.Hrg.-1* at 7-8; INTERROGATORIES ¶ 6. Deborah continued working in restaurants, and during that period the couple had modest financial expectations. *Div.Hrg.-1* at 5-6.

After a short time, Brian decided he wanted to go to medical school. Upon being accepted at Dartmouth, in 2002 Deborah and Brian moved to New Hampshire, first to Lebanon and then Claremont. *Div.Hrg.-1* at 8-10, 13, 18; INTERROGATORIES ¶ 6. A son was born in 2003, and Deborah became a stay-at-home mother while Brian was a medical student. *Div.Hrg.-1* at 10, 13-14; INTERROGATORIES ¶ 6; DEBORAH'S REQUEST FOR FINDINGS & RULINGS ¶¶ 5-7 (Jan. 6, 2017), *Appx*. at 93. Due to several "sabbaticals," substandard performance in certain areas, and a fluctuating focus of medical interests, Brian's degree took longer than usual. *Div.Hrg.-1* at 9-15; *Div.Hrg.-2* at 114;

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[1]To ease confusion over sometimes shared surnames, the parties are referred to herein by their first names, Deborah and Brian.

[2]This appeal comprises four transcripts. The first two, which were the final divorce hearing, occurred on August 2, 2016 and January 6, 2017; they are cited herein as *Div.Hrg.-1* and *Div.Hrg.-2*. The third and fourth, which concern the current request for alimony, occurred on August 5 and November 14, 2022; they are cited herein as *Almny.Hrg.-1* and *Almny.Hrg.-2.*

INTERROGATORIES ¶ 6.

In 2014, when Deborah petitioned for an irreconcilable-differences divorce, Brian was a second-year resident at Dartmouth in psychiatry. PETITION FOR DIVORCE (Oct. 10, 2014), *Appx*. at 4; DEBORAH'S REQUEST FOR FINDINGS & RULINGS ¶ 12; ORDER at 1 (Apr. 30, 2015), *Appx*. at 35; NARRATIVE ORDER at 1 (Mar. 30, 2017), *Addendum* at 33. At that time, Deborah was a part-time photographer for a local newspaper. *Div.Hrg.-1* at 31, 53.

As a medical resident, Brian was making a salary of "approximately $50,000 per year." ORDER at 1 (Apr. 30, 2015), *Appx*. at 35. By 2017, Brian had just one more year of residency to complete, *Div.Hrg.-2* at 114; *Almny.Hrg.-1* at 9, 23; BRIAN'S MOTION TO MODIFY CHILD SUPPORT ¶2 (June 13, 2017), *Appx*. at 135, and it was expected he would then become a physician. *Div.Hrg.-1* at 58. Consequently, it was anticipated he would soon earn the ample income of a licensed psychiatrist, *Div.Hrg.-1* at 56-58; INTERROGATORIES ¶ 6, and that Deborah would be able to resume pursuing her professional interests. INTERROGATORIES ¶ 6.

II. Brian Forges Judge's Signature, Goes to Jail, Loses Medical Residency and Income

Meanwhile, during the temporary phase of the divorce proceeding, a dispute arose regarding the child's education. The boy, then in seventh grade, had been doing well at a private school which was clearly beyond the family's means. The temporary order had granted school residency to Deborah in Claremont. When they separated, Brian moved to a nearby town which did not have its own school, in an apparent effort to get public funding for the private school. *Div.Hrg.-1* at 13-14, 30, 33-34; *Div.Hrg.-2* at 99, 103; TEMPORARY PARENTING PLAN (Apr. 24, 2015), *Appx*. at 15; BRIAN'S MOTION TO MODIFY TEMPORARY ORDERS (Oct. 21, 2015), *Appx*. at 39; BRIAN'S MOTION TO AMEND TEMPORARY PARENTING PLAN (June 20, 2016), *Appx*. at 41.

The final hearing on divorce commenced in August 2016 with testimony by Deborah regarding various issues, but abruptly ended upon the testimony of the Superintendent of the Newport School District. The school official revealed her discovery that Brian had submitted to the District documents purporting to be court orders granting Brian's town as the child's legal residence for school purposes, but which contained forged signatures of the presiding judge. *Div.Hrg.-1* at 81-90; GAL REPORT (Oct. 24, 2021), *Sealed Appx*. at 4. Judge Yazinski was predictably affronted, and indicated the court would refer the matter to the county attorney. *Div.Hrg.-1* at 89; *see* RECUSAL ORDER (June 9, 2021), *Sealed Appx*. at 3.

In May 2017, Brian was charged with and pleaded guilty to two misdemeanors: Tampering with Public Records, RSA 641:3, and Unsworn Falsification, RSA 641:7. He was sentenced to three months in jail, which he

served.[3] CASE SUMMARY No. 462-2017-CR-0438 (June 20, 2017), Exh. 1, *Appx*. at 133.

At first, it was unclear what Dartmouth's reaction would be, but in July 2017, three months after the divorce decree, Brian's medical residency was rescinded, along with his salary and benefits. LETTER FROM DARTMOUTH-HITCHCOCK TO BRIAN PAUL (July 28, 2017), *Appx*. at 148. Upon claiming he was then involuntarily unemployed, the court allowed Brian to reduce his child support to the statutory minimum of $50 per month. RSA 458-C:2, V; *see* MOTION TO MODIFY CHILD SUPPORT ¶¶ 5-7 (June 13, 2017), *Appx*. at 135; OBJECTION TO CHILD SUPPORT MODIFICATION (June 16, 2017), *Appx*. at 138; MOTION FOR RECONSIDERATION ¶¶ 2-4 (June 27, 2017), *Appx*. at 140; OBJECTION TO RECONSIDERATION ¶¶ 1-2. (June 30, 2017), *Appx*. at 142; NOTICE OF DECISION (July 12, 2017), *Appx*. at 144.

Brian was released from incarceration in September 2017, about six months after the divorce decree. He took a series of relatively menial jobs, first for a building contractor and then at a printing company, for wages in the range of $11 to $15 per hour. BRIAN'S PROPOSED DECREE ¶3 (Nov. 2, 2017), *Appx*. at 156; UNIFORM SUPPORT ORDER (Nov. 14, 2017), *Appx*. at 159; NOTICE OF REEMPLOYMENT (Mar. 20, 2018), *Appx*. at 167; UNIFORM SUPPORT ORDER (Mar. 27, 2018), *Appx*. at 168. The court revisited Brian's child support obligation, and made it diminutive in proportion to his pay. MOTION FOR IMMEDIATE MODIFICATION OF CHILD SUPPORT (Sept. 7, 2017), *Appx*. at 145; OBJECTION TO IMMEDIATE MODIFICATION OF CHILD SUPPORT (Sept. 18, 2017), *Appx*. at 150; REPLY TO OBJECTION (Sept. 27, 2017), *Appx*. at 153;

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[3]The sentence was 12 months committed to the Sullivan County Jail, to commence on June 20, 2017, all but 275 days suspended for 3 years on condition of good behavior, and a fine of $2,480. CASE SUMMARY No. 462-2017-CR-0438 (June 20, 2017), Exh. 1, *Appx*. at 133; *but see* BRIAN'S MOTION FOR RECONSIDERATION ¶¶ 2-4 (June 27, 2017), *Appx*. at 140 (referencing slightly different dates of commitment).

NOTICE OF DECISION (Sept. 21, 2017), *Appx*. at 152; NOTICE OF DECISION (Nov. 2, 2017), *Appx*. at 155; UNIFORM SUPPORT ORDER (Nov. 14, 2017), *Appx*. at 159; NOTICE OF DECISION (Mar. 8, 2018), *Appx*. at 166; UNIFORM SUPPORT ORDER (Mar. 27, 2018), *Appx*. at 168.

With Brian's criminal convictions and consequent forfeiture of his medical track, expectations for his future earnings deflated. INTERROGATORIES ¶ 14.

III. Divorce Decree Denied Alimony

The August 2016 divorce hearing, which terminated upon the superintendent's revelations, continued a few months later in January 2017 with Brian's criminal attorney in attendance. At that point, Brian was in plea negotiations with the county attorney. *Div.Hrg.-2* at 119. The parties addressed a range of standard divorce matters, including the marital home, personal property, parenting, health and life insurance, and child support. *Div.Hrg.-2 passim*. The court issued final orders on those matters. STIPULATED DECREE (Jan. 6, 2017), *Appx*. at 102; FINAL PARENTING PLAN (Jan. 6, 2017), *Appx*. at 83; UNIFORM SUPPORT ORDER (Jan. 6, 2017), *Addendum* at 27; NARRATIVE ORDER (Mar. 30, 2017), *Addendum* at 33; NOTICE OF DECISION (Mar. 30, 2017), *Appx*. at 124.

Also among the matters addressed was alimony.

In her court-form petition for divorce, Deborah had checked the alimony box, but specified no term or amount. PETITION FOR DIVORCE (Oct. 10, 2014), *Appx*. at 4. In her initial proposed order filed a few months later, Deborah suggested $1,200 per month. PROPOSED TEMPORARY DECREE (Feb. 26, 2015), *Appx*. at 11. In his answer, Brian did not mention alimony, ANSWER (Feb. 26, 2015), *Appx*. at 8, and in his proposed temporary order he suggested "[n]o alimony shall be paid by either party." BRIAN'S PROPOSED TEMPORARY DECREE (Apr. 24, 2015), *Appx*. at 22.

In one of its scheduling conference orders during the proceeding's temporary phase, the court listed alimony among the open issues, SCHEDULING CONFERENCE ORDER (Apr. 29, 2015), *Appx*. at 27, but in another ignored it. SCHEDULING CONFERENCE ORDER (Aug. 28, 2015), *Appx*. at 37. The court's narrative order and uniform support order for the temporary period make no mention of alimony. TEMPORARY NARRATIVE ORDER (Apr. 31, 2015), *Appx*. at 35; UNIFORM SUPPORT ORDER ¶ 4.4 (Apr. 29, 2015), *Appx*. at 29 (alimony

box unchecked).

Leading up to the first day of the divorce hearing, Deborah requested alimony in the amount of $1,000 per month for 20 years. DEBORAH'S PROPOSED UNIFORM SUPPORT ORDER (Aug. 1, 2016), *Appx*. at 56; DEBORAH'S PROPOSED FINAL DECREE (Aug. 2, 2016), *Appx*. at 66. In Brian's pre-hearing proposed order, the alimony box was unchecked, and his proposed decree indicated "N/A" for alimony. BRIAN'S PROPOSED UNIFORM SUPPORT ORDER (July 29, 2016), *Appx*. at 50; BRIAN'S PROPOSED FINAL DECREE (July 29, 2016), *Appx*. at 46.

During the first hearing, before the criminal revelations, Deborah asked for $1,000 per month alimony but only until the child's majority, then about five years hence. *Div.Hrg.-1* at 55-56. A few months later, after the revelations, Deborah tempered her alimony request to $500 per month for 3 years, and argued that amount was reasonable in light of Brian's newly reduced circumstances. DEBORAH'S PROPOSED FINAL STIPULATION (Jan. 5, 2017), *Appx*. at 73; DEBORAH'S PROPOSED UNIFORM SUPPORT ORDER (Jan. 6, 2017), *Appx*. at 110; DEBORAH'S REQUEST FOR FINDINGS & RULINGS ¶¶ B, C, & D (Jan. 6, 2017), *Appx*. at 93.

At the same time, Brian's proposal left the alimony box unchecked, and argued that his prospects left him no ability to pay. BRIAN'S PROPOSED UNIFORM SUPPORT ORDER (Jan. 6, 2017), *Appx*. at 116; BRIAN'S REQUEST FOR FINDINGS & RULINGS ¶¶ 13, 32 (Jan. 6, 2017), *Appx*. at 97. In their proposed joint stipulation on other matters, the parties indicated alimony was "to be determined by the court." STIPULATION (Jan. 6, 2017), *Appx*. at 102.

During the second session of the final divorce hearing in January 2017, which was conducted by offers of proof, Deborah argued that it would be inequitable for her to rely on public assistance for her basic needs, and that because of her age, limited remuneration for newspaper photography, and

having been out of the full-time labor market for so long, Brian had greater employability. *Div.Hrg.-2* at 96-98, 120. Brian argued that although Deborah had need for alimony, their standard of living was already meager, and he did not have the ability to pay. *Div.Hrg.-2* at 110-15.

In its final orders, the Claremont Family Court (*John J. Yazinski*, J.) wrote that Brian "does not have sufficient income to support himself and to pay alimony" and therefore Deborah "has not carried her burden under RSA 458:19 to show that she should be awarded alimony." NARRATIVE ORDER (Mar. 30, 2017), *Addendum* at 33. The court's resulting uniform support order left the alimony box unchecked. UNIFORM SUPPORT ORDER ¶ 4.4 (Jan. 6, 2017), *Addendum* at 27; NOTICE OF DECISION (Mar. 30, 2017), *Appx*. at 124.

Deborah filed a motion to reconsider the order on alimony, arguing that she had need and Brian had ability to pay, to which Brian objected and which the court denied. DEBORAH'S MOTION FOR RECONSIDERATION (Apr. 14, 2017), *Appx*. at 125 (margin order); OBJECTION TO RECONSIDERATION (Apr. 20, 2017), *Appx*. at 127; NOTICE OF DECISION (May 2, 2017), *Appx*. at 132. Deborah filed a timely notice of appeal directly addressing the alimony issue, NOTICE OF MANDATORY APPEAL, Dkt.No. 2017-0230 (Apr. 26, 2017), *Appx*. at 129,[4] but later forfeited it by not filing a brief. SUPREME COURT ORDER (Feb. 6, 2018), *Appx*. at 165. The Supreme Court's mandate, which did not address any merits, issued in February 2018. MANDATE (Feb. 20, 2018), *Appx*. at 165.

Brian's fraud was revealed in 2016, eight months before the decree of

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[4]The questions on appeal, as posed in the Notice of Appeal were:

> 1. Whether the trial court erred in finding that [Deborah] has the ability to be self-supporting where she had not worked outside the home in 13 years.
>
> 2. Whether the trial court erred in finding that [Brian] was unable to pay alimony, where [his] pending criminal matters resulted in his in-ability to obtain his physician's license and thus restricted his earning potential.

NOTICE OF MANDATORY APPEAL (Apr. 26, 2017), *Appx*. at 129.

divorce, and formal charges were brought in May 2017, about seven weeks after the decree. Brian was sentenced in June 2017, lost his medical residency in July, and was released from incarceration in September, all during the pendency of Deborah's later-abandoned alimony appeal. CASE SUMMARY No. 462-2017-CR-0438 (June 20, 2017), Exh. 1, *Appx*. at 133.

IV. Surprise! Brian Gets a Lucrative Job as a Psychiatrist

The first post-divorce proceedings concerned child support, which – as noted – was minimal due to Brian's convictions, loss of medical residency, and hourly pay at humble jobs.

In May 2018, however, about 14 months after the divorce decree, Brian got a job in the medical field as a staff psychiatrist for a regional mental health agency, and his earning suddenly increased to $22,516 per month, or about $270,000 per year. NOTICE OF CHANGE OF EMPLOYMENT (May 22, 2018), *Appx*. at 174; *Almny.Hrg.-1* at 7-8, 23. While no hearing was held, child support was commensurately increased within the guidelines. NOTICE OF DECISION (May 30, 2018), *Appx*. at 175. The court-form order, although it contains a block regarding alimony, was silent on that issue; the "spousal support" box is unchecked. UNIFORM SUPPORT ORDER ¶ 4.4 (May 30, 2018), *Appx*. at 176.

The parties were in court several times after 2018, but not regarding alimony. The disputed issues were Brian's complaint that, as of 2021, he had not seen the child for "almost two years," BRIAN'S MOTION FOR CONTEMPT (Mar. 9, 2021), *Appx*. at 180; GAL REPORT (Oct. 24, 2021), *Sealed Appx*. at 4, and problems regarding sale of the house. ORDER (Nov. 4, 2021), *Appx*. at 187; MOTION FOR CONTEMPT (June 8, 2022), *Appx*. at 299; OBJECTION TO CONTEMPT (June 21, 2022), *Appx*. at 205; NOTICE OF DECISION ON CONTEMPT (June 17, 2022), *Appx*. at 204.

STATEMENT OF THE CASE

In March 2022, procrastinating until two days before the statutory deadline, Deborah petitioned for alimony, indicating that because Brian was a well-compensated doctor, he could afford to help support her. PETITION TO CHANGE COURT ORDER (Mar. 28, 2022), *Addendum* at 35. Alimony may be established when "[t]he party in need lacks sufficient income, property, or both, … to provide for such party's reasonable needs." RSA 458:19, I(a) (2002).[5]

Brian objected and filed a motion to dismiss. He asserted that Deborah's request was for modification of alimony, and that alimony was unmodifiable because, despite his crimes at the time of divorce, his subsequent high earning was foreseeable. RSA 458:19, III (2002). ANSWER AND MOTION TO DISMISS (May 19, 2022), *Appx*. at 194; OBJECTION TO DISMISS (June 3, 2022), *Appx*. at 197. The parties' financial affidavits showed Deborah's continuing poverty and Brian's substantial income. BRIAN'S FINANCIAL AFFIDAVIT (May 28, 2022), *Sealed Appx*. at 8; DEBORAH'S FINANCIAL AFFIDAVIT (Aug. 5, 2022), *Sealed Appx*. at 13.

In August, the Newport Family Court (*Daniel J. Swegart*, J.)[6] held a hearing, based on offers of proof. The court initially ruled that "[a]s no alimony order was ever issued, it appears that this request is not truly a modification request but rather a request for establishment of alimony." ORDER (Aug. 19,

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[5]The appropriate alimony statute is the statute in effect at the time the divorce was filed. *In the Matter of Britton*, 174 N.H. 702 (2022). The statute thus relied upon herein, RSA 458:19, I & III (2002), and the cases construing it, is that which was effective in 2014. It is contained in the addendum to this brief at 45. The current statute, RSA 458:19-aa, X (2018), provides that it may be applied in older cases only if the parties agree. The standards for alimony in the current statute, RSA 458:19-aa, I (2018), appear to be largely a codification of the former statute, RSA 458:19 (2002), and the cases construing it.

[6]In June 2021, the Claremont Family Court (*John J. Yazinski*, J.) transferred the matter to Newport. There is no indication in the record of what prompted the *sua sponte* recusal, but it occurred shortly after the parties' parenting dispute arose. ORDER (June 9, 2021), *Sealed Appx*. at 3; ADMINISTRATIVE ORDER 2021-034 (June 25, 2021), *Appx*. at 186.

2022), *Addendum* at 41. The court asked the parties for memoranda of law, which both filed. BRIAN'S MEMORANDUM (Sept. 26, 2022), *Appx*. at 223; DEBORAH'S MEMORANDUM (Sept. 28, 2022), *Appx*. at 231.

In November, the court held a further hearing, and indicated it was reversing its August ruling:

> I agree that the request at the time when Judge Yazinski issued the denial for alimony, that that was a request made on the record in the case for establishment of alimony. It was made within the time frames required by the statute. I am treating this now as a modification.

Almny.Hrg.-2 at 2.

Because the court understood that establishment of alimony requires only a consideration of the parties' relative needs and ability to pay, RSA 458:19, I(a) (2002), while modification depends upon whether Brian's present circumstances were foreseeable at the time of the divorce, *In the Matter of Arvenitis*, 152 N.H. 653 (2005), the parties briefly presented argument on that issue and then discussed other matters. *Almny.Hrg.-2* at 3-7.

In December, the court issued a written order on alimony. It reiterated that it was treating Deborah's petition as a modification, rather than an establishment, of alimony. It then held that Brian's earnings as a medical doctor were foreseeable at the time of the divorce, and thus dismissed Deborah's petition. ORDER (Dec. 7, 2022), *Addendum* at 42.

Deborah filed a motion for reconsideration, to which Brian objected and which the court denied. MOTION TO RECONSIDER (Dec. 27, 2022), *Appx*. at 239; OBJECTION TO RECONSIDERATION (Jan. 4, 2023) (margin order), *Appx*. at 244; NOTICE OF DECISION (Jan. 26, 2023), *Appx*. at 250. This appeal followed.

SUMMARY OF ARGUMENT

At the time of the parties' divorce, the court denied alimony, finding that Brian could not afford it. Five years later, after Deborah learned of Brian's unlikely high earning as a doctor, she requested alimony. Because there was never an alimony order, her request was for initial establishment of alimony, and the family court's ruling that it was a modification was in error.

Even if it were a modification, Brian forged a judge's signature on a purported court document, making his future high earning as a doctor unanticipated and unforeseeable. Therefore, revisiting alimony was warranted, and this court should reverse.

ARGUMENT

I. Deborah's Petition was for Establishment, Not Modification, of Alimony

Whereas establishment of new alimony involves a comparison of the parties' financial situations, RSA 458:19, I(a) (2002), modification of an existing alimony order requires proof that there was a change in circumstances that was unanticipated and unforeseeable at the time of the decree. *In the Matter of Arvenitis*, 152 N.H. 653 (2005).

The statute in effect at the time of the parties' petition for divorce provided that a motion for alimony may be "made within 5 years of the decree of nullity or divorce." RSA 458:19, I (2002). Deborah filed her petition on March 28, 2022, two days before the five-year deadline[7] from the March 30, 2017 decree of divorce.

There is no known law requiring that for an order to be considered *establishment* of alimony, as opposed to modification, it has to be in response to the very first time alimony is requested. In compliance with the law at the time, Deborah requested alimony in her original petition for divorce. *See In the Matter of Maynard*, 155 N.H. 630, 636 (2007) (suggesting wife should have sought alimony in original divorce proceeding); *but see Sheafe v. Laighton*, 36 N.H. 240, 243 (1858) (unnecessary to plead alimony in libel for divorce). Deborah's requests declined in amount and duration after the revelations of Brian's criminal conduct.

Upon considering Brian's then inability to pay, in the divorce proceeding the court denied Deborah alimony, and in its support order, the court accordingly left the alimony box unchecked. NARRATIVE ORDER (Mar.

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[7]Before 2001, "a party could seek alimony at any time after a divorce became final.… In 2001, the legislature amended RSA 458:19, I, by requiring that motions for alimony be brought within 5 years of the decree of nullity or divorce." *In the Matter of Kenick*, 156 N.H. 356, 358 (2007) (quotations and citations omitted). That is the same statute that was in effect in 2014 when the petition for divorce was filed in this case. RSA 458:19, I (2002).

30, 2017), *Addendum* at 33; UNIFORM SUPPORT ORDER ¶ 4.4 (Jan. 6, 2017), *Addendum* at 27. It did not, for instance, grant alimony, but for zero dollars. Rather, the court wholly denied alimony, and no alimony was ever established. *See Laflamme v. Laflamme*, 144 N.H. 524, 529 (1999) (requiring "extraordinary facts [to] justify looking behind the original decree").

Thus, because there was never an alimony order, there was no alimony order to modify, and Deborah's 2022 Petition cannot be a modification. It was, rather, a request for establishment of alimony. The family court's ruling that Deborah's post-divorce request for alimony was a modification is therefore in error.

As this court reviews "the trial court's application of the law to the facts *de novo*," *In the Matter of Lyon*, 166 N.H. 315, 317 (2014), it should remand for the family court to consider whether alimony should be established in accord with the statutory considerations. *In the Matter of Routhier*, 175 N.H. 6, 15 (2022).

II. If Deborah's Petition is Treated as a Modification, Brian's Lucrative Career Was Unforeseeable

The revelations of Brian's criminal conduct augured an end to his medical career. That Brian nonetheless became a highly-compensated psychiatrist was "astonishing." INTERROGATORIES ¶ 14.

A. To Avoid Modification of Alimony, Change in Circumstances Must Be Anticipated and Foreseeable

The family court's authority to modify a support order is as prescribed by statute. *Taylor v. Taylor*, 108 N.H. 193 (1967). The statute in effect when the petition for divorce was filed in 2014 provided for modification:

> 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.

RSA 458:19, III (2002); *see also* RSA 458:14 ("[T]he court, upon proper application and notice to the adverse party, may revise and modify any order made by it.").

The burden of proof to modify alimony is upon the party seeking modification. *In the Matter of Hoyt*, 171 N.H. 373, 378 (2018); *Lyon*, 166 N.H. at 321; *In the Matter of Canaway*, 161 N.H. 286, 290 (2010); *Laflamme*, 144 N.H. at 527; *Morphy v. Morphy*, 114 N.H. 86, 88 (1974). The movant must prove a "substantial change in circumstances warranting a change in alimony," and that the modification is equitable. *Arvenitis*, 152 N.H. at 656.

"[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." *Id.* (quotation omitted, emphasis in original). A court order that is silent on a matter does not mean the matter was anticipated. *Id*. at 657.

In modifying alimony, the court "must take into account all of the

circumstances of the parties." *Id.* at 655. A change in a party's fortunes is a sufficient reason to modify alimony. *Walker v. Walker,* 133 N.H. 413 (1990); *Calderwood v. Calderwood*, 114 N.H. 651 (1974); *Madsen v. Madsen,* 109 N.H. 457 (1969). Courts normally award alimony when one party is in need and the other has the ability to pay. *See, e.g., In the Matter of Gronvaldt,* 150 N.H. 551 (2004) (alimony granted to 57-year-old wife with no pension who recently entered job market, while husband enjoyed successful career); *In the Matter of Letendre*, 149 N.H. 31 (2002) (alimony granted to 48-year-old wife who had not graduated from high school and was employed as retail sales clerk without pension, retirement or benefits, while husband earned high salary); *Hoffman v. Hoffman*, 143 N.H. 514 (1999) (alimony granted to 50-year-old wife with limited employment opportunities, while husband had sufficient earnings).

While predictable life events are generally considered foreseeable, *Laflamme*, 144 N.H. at 524 (retirement), even retirement, children's college tuition, failing health, and a party's increased expenses may be unforeseeable given individual circumstances. *See Canaway*, 161 N.H. at 290; *Arvenitis*, 152 N.H. at 656.

A determination that a change in circumstances was actually anticipated "is a factual finding that must be based on evidence." *Id.* at 656-57 (citation omitted).

B. Anticipation That Criminal Conduct Would Terminate Brian's Medical Career

Brian's attorney acknowledged that "it was questionable whether or not [Brian] would be able to secure a job given his incarceration," *Almny.Hrg.-1* at 12, and that attempting to finish his residency immediately after the revelations would have defeated his "chances of getting his license." *Div.Hrg.-2* at 118-19. "People with records have limited employment opportunities in the healthcare industry for a myriad of reasons." NATIONAL EMPLOYMENT LAW PROJECT, *A Healthcare Employer Guide to Hiring People with Arrest and Conviction Records* 4 (2016). Dartmouth rescinded Brian's residency upon learning of his criminal conduct, signaling the doubt about his future medical career.

Apparently, however, Judge Yazinski was involved in plea negotiations, had the felony charges "knocked … down to a misdemeanor," *Almny.Hrg.-1* at 12, 16, 20-22, and may have assisted in reducing Brian's 90-day sentence to just 60 days served. *Compare* CASE SUMMARY No. 462-2017-CR-0438 (June 20, 2017), Exh. 1, *Appx*. at 133 *with Almny.Hrg.-1* at 12, 26; *see also* BRIAN'S PROPOSED ORDER ¶ 8 n. 2 (Aug. 5, 2022), *Appx*. at 219 ("At the time of the parties' divorce, the Court was fully aware of [Brian's] medical residency status and of his intention of becoming a practicing doctor upon the completion of his residency. The Court was also aware of the pending criminal matter and made certain that its ruling would not adversely affect [Brian's] employability.… The Court reduced the charges to misdemeanors, imposed a sentence of only 60 days of incarceration, and ruled that the incarceration would begin after [Brian] completed his residency."). According to Brian's attorney:

> Everybody jumped through hoops to ensure that whatever jail time he did and whatever charges would not adversely affect his ability to secure a job.

Almny.Hrg.-1 at 12.

Deborah, however, was not made aware of these efforts apparently made by Brian, his attorney, the County Attorney, the medical school, and the court, to help Brian save his career; she would not reasonably expect such a rarity, and expressed that "[i]t was astonishing that he had become a practicing doctor." INTERROGATORIES ¶ 14.

When the criminal charges were unfolding, Deborah and Brian were separated, and as Deborah pointed out, he had no obligation to apprise her of events in his life. *Div.Hrg.-1* at 49. Brian's criminal attorney would have considered Deborah a witness and would have eschewed any consultation with her. *Almny.Hrg.-1* at 17; *Div.Hrg.-2* at 119. As Brian acknowledged, Deborah was not a victim, and therefore no State or County agency had an interest in keeping her abreast of plea negotiations. *Almny.Hrg.-1*. Deborah would not have been made privy to the court's intervention on Brian's behalf, *Almny.Hrg.-1* at 17, as the judge's recusal did not occur until 2021 and the order revealing the court's efforts was sealed. RECUSAL ORDER (June 9, 2021), *Sealed Appx*. at 3.

Moreover, Deborah had no practical opportunity to learn about Brian's fortunes. They separated before the divorce, and because the child had become estranged from Brian starting soon after the divorce, there was no regular visitation that might have kept them in contact. *See* BRIAN'S MOTION FOR CONTEMPT (Mar. 9, 2021), *Appx*. at 180; GAL REPORT (Oct. 24, 2021), *Sealed Appx*. at 4.

Without inside information about the extraordinary efforts to save Brian's medical career, and no avenue to gain later information about his success, a reasonable person would retain the view formed upon the criminal revelations – that Brian earning a doctor's high salary was no longer a foreseeable outcome.

Because it was only through extraordinary efforts that Brian eventually earned a doctor's income, such earning was not foreseeable at the time of the divorce, and this court should reverse and remand for calculation of alimony.

CONCLUSION

At the time of the parties' divorce, the court denied alimony, finding that Brian could not afford it. Five years later, after Deborah learned of Brian's unlikely high earning as a doctor, she requested alimony. Because there was never an alimony order to modify, her request was for establishment of alimony, and the family court's ruling that it was a modification was in error.

Even if it was a modification, Brian forged a judge's signature on a purported court document, making his future high earning as a doctor unanticipated and unforeseeable. This court should reverse and remand.

Respectfully submitted,

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Dated: September 26, 2023

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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 September 26, 2023, copies of the foregoing will be forwarded to Doreen Connor, Esq. via this court's efiling system.

Dated: September 26, 2023

Joshua L. Gordon, Esq.

ADDENDUM