State of New Hampshire
Supreme Court

NO. 2022-0483

2023 TERM

JANUARY SESSION

In the Matter of Amy Froebel-Fisher
and Richard Fisher

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

BRIEF OF PETITIONER/APPELLANT
AMY FROEBEL-FISHER

January 21, 2023

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QUESTIONS PRESENTED

I. Did the court err in not enforcing the agreements contained in the parties' joint divorce petition, and by substituting its notions for the parties' agreement?

Preserved: MOTION TO GRANT JUDGMENT OF DIVORCE (Mar. 1, 2022); MOTION FOR RECONSIDERATION (June 8, 2022).

II. Once the agreements were not enforced, should the court have reverted to a standard divorce proceeding?

Preserved: MOTION FOR RECONSIDERATION (June 8, 2022).

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Amy, Richard, Richard's Girlfriend, and the Child

Amy Froebel-Fisher and Richard Fisher[1] were married in 2004 and made their home for most of that time in Nashua, New Hampshire. *Trn_2* at 6. They have one child. JOINT PETITION FOR DIVORCE (Nov. 2, 2021), *Appx*. at 25.

Amy grew up in Massachusetts, is 47 years old, and holds a master's degree. She works for a human-resources consultancy firm based in Massachusetts, and makes about $200,000 annually. JOINT PETITION; PROPOSED CERTIFICATE OF DIVORCE (Oct. 29, 2021), *Sealed Appx*. at 3; AMY'S FINANCIAL AFFIDAVIT ¶6 (Apr. 11, 2022), *Sealed Appx*. at 14. She has been the family's main provider for all of the marriage, and has retirement savings. AMY'S FINANCIAL AFFIDAVIT ¶7 (Apr. 11, 2022). In late 2020, Amy's firm asked her to help expand its operations in the midwest. Consequently, although the family maintained its base in New Hampshire, Amy secured an apartment in Michigan, and stayed there about half time. She has since returned to the home in Nashua. *Jur.Hrg.* at 3-4, 10.[2]

Richard is 54 years old, and has a high school education. He holds a full-time job in a construction company, and makes about $55,000 annually. *Rev.Hrg.* at 23-24; PROPOSED CERTIFICATE OF DIVORCE; RICHARD'S FINANCIAL AFFIDAVIT (Apr. 11, 2022) at 1, *Sealed Appx*. at 17. During portions of the marriage, Richard abused cocaine, although he claims he is no longer addicted. He also had a gambling problem, was convicted of drug possession, and spent time in jail. *Rev.Hrg.* at 6-7, 10, 17-19, 26, 31. Richard worked sporadically and did not contribute to the mortgage. To support his habits, he

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

[2]There are two transcripts in this matter. The first, on January 31, 2022, was noticed as a hearing on jurisdiction, and is cited herein as "*Jur.Hrg*." The second, on April 11, 2022, was noticed as a "Review Hearing," and is cited herein as "*Rev.Hrg*."

took family money, hawked Amy's inherited jewelry, and sold their truck. *Rev.Hrg.* at 6-7. Financially he contributed little, and has no retirement savings. *Rev.Hrg.* at 10-11.

Richard claims that during the marriage and later in Michigan, he was an effective household manager and involved parent. *Rev.Hrg.* at 18-19, 30. Amy contends that Richard participated meagerly in keeping the house clean, stocking the pantry, paying the bills, or making the home a safe and consistent environment for the child. She suggests that when Richard was supposedly in charge, because his drug use and late nights made him incapable, it was actually Amy's mother or paid help who took care of the house and got the child to school. *Rev.Hrg.* at 7-8, 10, 26-27, 29

The couple separated in September 2021, shortly before Amy's sojourn to Michigan. PROPOSED CERTIFICATE OF DIVORCE ¶21. While Richard followed Amy to Michigan, they never lived together there, and he instead moved in with his girlfriend. *Rev.Hrg.* at 8, 11, 13, 29-30.

Their daughter, now 14, grew up in New Hampshire and attends a private high school near Nashua. She lives with Amy, who pays her tuition and all living costs. *Jur.Hrg.* at 3-4, 10-11. Amy and Richard both have great admiration for the other's parenting. Richard concedes Amy is "a great parent and a great mother." *Rev.Hrg.* at 31. Amy says Richard "was always a good dad. He was never a good husband. He was always a great dad." *Rev.Hrg.* at 26. The child has been having difficulty after her parents' separation. *Rev.Hrg.* at 27-28, 32-33. No guardian *ad litem* has been involved in this matter.

At the time of the hearings in this case, Richard and his girlfriend, a bartender, lived in Michigan in a very small apartment. Amy knows her, and commends his happiness with her. *Rev.Hrg.* at 8, 27-28. However, Amy believes Richard's girlfriend and her biker-gang crowd are involved in drugs and alcohol, and are otherwise "unsavory." *Rev.Hrg.* at 28. Amy does not think

Richard's residence, his girlfriend, or their friend-group, are safe and appropriate surroundings for the child, and has observed the child's unhappiness there. *Rev.Hrg.* at 8-9, 27-28, 32-33. Richard concedes his crowd is rough and understands Amy's concerns, but disputes that his girlfriend, their living situation, or their community are unsafe. *Rev.Hrg.* at 8, 17-18, 20, 30.[3]

[3]It is understood that Richard has since moved back to Nashua, New Hampshire.

II. Parties' Intents, and Their Resulting Proposed Divorce Stipulations

A. Agreement on Parenting

The parties agreed that Amy would have residential responsibility, and Richard would have visitation on a non-set schedule.

1. Intent of the Parties On Parenting

Both parents mutually expressed that their primary goal in their divorce was safety and stability for the child. Amy testified that "I'm trying to give her stability" because "the stability of home … is important for her right now." *Rev.Hrg.* at 28, 33. Richard agreed that "my daughter is my number one priority. I might not be able to give her the financial stability that [Amy] can give her." *Rev.Hrg.* at 30.

Their second goal was flexibility. Amy explained:

> [T]he reason why we agreed to what we agreed to, to be clear, was so that we did have flexibility, right. We weren't tied to scheduling that couldn't be worked around. He knows I would never, ever keep him from her.

Rev.Hrg. at 28. Richard agreed that Amy "does very well taking care of our daughter and I have no problems with that." Richard talks to the child daily, and visits every few weeks when it fits his schedule. *Rev.Hrg.* at 9, 21-23, 27-28. Richard has family in Saugus, Massachusetts, less then an hour from Nashua, and the child stays there when Richard comes to see her. *Rev.Hrg.* at 21-22. Amy happily "rearranges her schedule" to accommodate that, *Rev.Hrg.* at 9, and also pledged that she would pay for hotels when the child visits Richard in Michigan. *Rev.Hrg.* at 27.

Amy wanted to avoid "protractive litigation that costs money and time." *Rev.Hrg.* at 9. Richard agreed "this can turn into a nasty, bitter divorce. I don't want that." *Rev.Hrg.* at 30. They did not "want DCYF involved," and Amy had no desire for "a formal process of hair follicle and urine screens and sober length tests and drug treatments and therapies." *Rev.Hrg.* at 9. They had

privacy concerns as well, "hoping they didn't have to … invite the world into their sphere." *Rev.Hrg.* at 4.

2. Resultant Stipulated Parenting Plan

Guided by these goals, together Amy and Richard developed a joint proposed parenting plan. (PROPOSED) PARENTING PLAN (Nov. 2, 2021), *Appx*. at 10. It provided that it was agreed-upon by the parties, that they would have joint decision-making, and that the child's legal and school residence would be with Amy in Nashua. *Id.* at 1 and ¶¶A.1., C.3.

Their stipulation said that while Amy "has full time residential responsibility," Richard "has non-residential parenting time based upon mutual agreement of the parents with no specific schedule required." *Id.* at ¶B.1. There was a single condition:

> Richard … shall have open visitation upon request; however, he shall not be allowed to visit with [the child] with/or in the presence of [the girlfriend]. And, [the child] shall not reside with or have overnight stays with [Richard] at his current residence nor future residence(s) wherein [the girlfriend] is present or resides. Should Richard … find a more suitable residence wherein [the girlfriend] is not residing and demonstrate that he is able to maintain a stable home and adequate income, Amy … is open to reconsideration of overnight visitation as long as [the girlfriend] is not present.

Id. at ¶B.1. (spelling corrected). The stipulation accordingly declined to specify holiday, long-weekend, or vacation schedules. *Id.* at ¶¶B.2., B.3., B.4.

The agreement allowed Richard to pick up the child at Amy's residence, and that both parents could phone the child at the other's home. *Id.* at ¶¶D, E. Because stability for the child was paramount, and Amy was at that time planning her move back home to New Hampshire from Michigan, the relocation provision dealt only with that intended move. *Id.* at ¶F. If either

party required non-parental care for more than five days, the other had the right of first refusal, and they both pledged to work out disagreements between them. *Id.* at ¶¶B.6, G, H.

Neither party was represented by counsel. The agreement was signed by both Amy and Richard, and witnessed before a Michigan notarial officer. *Id.* at 9.

B. Agreement on Property

1. Intent of the Parties On Property

As noted, the parties' main concern was consistency for the child, and that it was important for the child to continue living and attending private school near Nashua. *Rev.Hrg.* at 10-11. They also wanted to preserve the home as an asset for the child's future benefit, but given the value of the home and the amount of the mortgage, doubted that it would make sense for Amy to buy Richard out. *Rev.Hrg.* at 10-11, 15-16; MOTION TO GRANT JUDGMENT OF DIVORCE ¶17 (Mar. 1, 2022), *Appx*. at 43; AMY'S FINANCIAL AFFIDAVIT (Apr. 11, 2022) at 1 (home worth $711,000, but associated debt is $391,980); RICHARD'S FINANCIAL AFFIDAVIT (Nov. 2, 2021) at 1, *Sealed Appx*. at 9 (home worth $650,000, but associated debt is $391,980).

They thus agreed that the marital home should be preserved for the child, and not sold. *Jur.Hrg.* at 4, 10-12; *Rev.Hrg.* at 15. Richard testified:

> [W]e both wanted to keep it. Just you know, maybe keep it for, like, a forever house. Give it to our daughter. We never had any intent on selling the house.

Jur.Hrg. at 15. He later repeated:

> I don't want [Amy] to sell the house because we came to an agreement that we should – she should keep the house and give it to our daughter, so that when she's older, she doesn't have the burden of a mortgage or a house or any of that stuff.

Rev.Hrg. at 20.

2. Resultant Stipulated Property Split

For similar reasons, the parties had clear ideas on how to divide the rest of their assets, *Rev.Hrg.* at 16, 25, 30, and thus jointly developed a proposed property split. (PROPOSED) FINAL DECREE (Nov. 2, 2021), *Appx*. at 3.

Under the proposed decree, even though he squandered marital assets, Richard would leave the marriage free of marital debt. Amy would keep the home for the benefit of the child, but retain all marital debt stemming from the house, cars, and credit cards – debt totaling $536,772. *Id.* ¶¶14, 15; AMY'S FINANCIAL AFFIDAVIT ¶11 (Apr. 11, 2022); *Rev.Hrg.* at 10-11, 16. Each would retain a vehicle, and Richard's only remaining indebtedness would be his own medical debt of about $4,400. (PROPOSED) FINAL DECREE ¶¶9, 14; RICHARD'S FINANCIAL AFFIDAVIT ¶11 (Nov. 2, 2021).

Amy would keep her retirement account worth about $271,000, and she also has a $2 million life insurance policy which names the child as beneficiary. (PROPOSED) FINAL DECREE ¶¶ 11, 12; AMY'S FINANCIAL AFFIDAVIT (Nov. 2, 2021) at 1, 3, *Sealed Appx*. at 4. Amy would retain her business interests. (PROPOSED) FINAL DECREE ¶13.

While the parties agreed to no alimony, (PROPOSED) FINAL DECREE ¶6, it was understood that Amy would pay for all the child's current and anticipated educational costs, with Richard contributing only as his "means allow," with "[e]xact amounts TBD based on future mutual agreement." *Id.* ¶4. For this, Richard expressed gratitude: "I know she's going to pay for our daughter's … education and college and high school, and that's amazing." *Rev.Hrg.* at 20.

As above, neither party was represented by counsel, and the agreement was signed by both and witnessed before a Michigan notarial officer. (PROPOSED) FINAL DECREE at 7.

C. Agreement on Child Support

The parties followed a similar pattern regarding child support. They agreed that "neither party shall be required to pay support to the other," that Amy "will provide primary child care support of their child," and that Richard "may contribute as his means may allow but is not required to provide child support." MUTUAL NON-SUPPORT AGREEMENT (Nov. 2, 2021), *Appx*. at 29; (PROPOSED) UNIFORM SUPPORT ORDER (Nov. 2, 2021), *Appx*. at 19.

As above, the parties' mutual non-support agreement and joint proposed support order was negotiated when neither was represented by counsel; the documents were signed by both parties and witnessed before a Michigan notarial officer. *Id.* at 3.

D. Stipulations on All Issues Filed Jointly

On November 2, 2021, while in Michigan, Amy and Richard mutually signed their stipulated divorce decree, a stipulated parenting plan, a stipulated support order, a mutual non-support agreement, and their joint petition for divorce. JOINT PETITION FOR DIVORCE (Nov. 2, 2021); (PROPOSED) FINAL DECREE (Nov. 2, 2021); (PROPOSED) PARENTING PLAN (Nov. 2, 2021); MUTUAL NON-SUPPORT AGREEMENT (Nov. 2, 2021); (PROPOSED) UNIFORM SUPPORT ORDER. Both were *pro se*. *Jur.Hrg.* at 3; *Rev.Hrg.* at 6. The joint petition listed as cause for the divorce both irreconcilable differences and "[i]nfidelity on the part of … Richard." JOINT PETITION FOR DIVORCE ¶13.

Amy and Richard filled out New Hampshire financial affidavit forms. They also completed a data sheet, signed by Richard as joint petitioner. AMY'S FINANCIAL AFFIDAVIT (Nov. 2, 2021); RICHARD'S FINANCIAL AFFIDAVIT (Nov. 2, 2021); PERSONAL DATA SHEET (Nov. 2, 2021) (omitted from appendix). All were witnessed before the Michigan notarial officer.

On November 4, 2021, still *pro se*, Amy filed all the documents in the Nashua Family Court.

III. Court Issued Final Orders on Parenting, Property, and Child Support After "Review Hearing"

A. Court Rejected Parties' Stipulations and Scheduled a "Review Hearing"

A few days after Amy filed the documents, apparently noting the connection to Michigan, the court *sua sponte* scheduled a hearing "regarding jurisdiction." NOTICE FROM COURT (Nov. 8, 2021), *Appx*. at 30; NOTICE OF HEARING (Dec. 7, 2021), *Appx*. at 31. This prompted Amy to hire a lawyer. In December, she filed a motion, to which Richard assented, which recited the facts of their domicile in New Hampshire. It requested the court cancel the jurisdiction hearing as unnecessary, and grant the parties a judgment of divorce on the terms they negotiated. ASSENTED MOTION TO GRANT JUDGMENT OF DIVORCE (Dec. 28, 2021), *Appx*. at 32.

In January 2022, Richard, *pro se*, filed a "Motion for Extension" requesting time to find a lawyer, asserting he was now domiciled in Michigan, and that therefore he "does not assent to the relief of the motion." MOTION FOR EXTENSION (Jan. 14, 2022), *Appx*. at 37. Amy objected, and suggested the upcoming hearing should be converted to a scheduling conference to identify any outstanding issues between them. OBJECTION TO MOTION FOR EXTENSION (Jan. 25, 2022), *Appx*. at 38.

The court ordered the jurisdiction hearing go forward, and indicated the motion would be heard then. NOTICE OF DECISION (Jan. 5, 2022) ("Assented to motion to grant judgment of divorce – to be addressed on 1/31/2022."). At the hearing in January 2022, the parties explained their domiciliary situations. *Jur.Hrg., passim*.

While there was no discussion of the parties' joint motion to grant a judgment of divorce, at the end of the hearing, the court indicated it would "review the documents to see if they comply with the law, as far as child

support and division of assets and whatnot." *Jur.Hrg.* at 18. In February, the court determined New Hampshire had jurisdiction, and that matter is not before this court. ORDER ON HEARING TO DETERMINE JURISDICTION (Feb. 1, 2022), *Addendum* at 40.

But also in its order, the court indicated it was dubious of the parties' stipulations. Regarding parenting, the court wrote:

> [T]he parenting plan is defective as it provides [Richard] with no definite parenting time and leaves him at the mercy of [Amy's] agreement. The parenting plan also restricts [Richard's] freedom associate with [the girlfriend] during his parenting time. On its face, the agreement is constitutionally defective. The Court will not approve an agreement that restricts either parties' right to associate with third parties during his/her parenting time, absent a compelling basis.

Id. at 1-2. Regarding property division, the court (erroneously) asserted:

> [D]espite being a long-term marriage, the proposed final decree awards [Amy] 100% of the marital assets, which the court does not approve. It is generally understood that, absent special circumstances, the property division must be as equal as possible. … If the parties wish to file a final decree that provides for an equal division of the marital assets, the court will approve same.

Id. at 1. Regarding child support, the court said the parties' agreement "does not comply with child support guidelines," and therefore the court "will not approve."

> If the parties wish to file a [uniform support order] that provides for [Amy] paying [Richard] child support consistent with the guidelines, the Court will approve same.

Id. at 1.

Finally, the February order also promised that "[a] one-hour Review Hearing will be scheduled," and ordered the parties to file updated financial affidavits seven days before it. *Id.* at 2. The court subsequently issued a notice of hearing, scheduling the "Review Hearing" in April. NOTICE OF HEARING (Feb. 18, 2022), *Addendum* at 42.

Amy filed a motion suggesting the review hearing was unneeded and that the court should grant a judgment of divorce based on the parties' stipulations. MOTION TO GRANT JUDGMENT OF DIVORCE (Mar. 1, 2022). The court denied the motion, saying "[t]he hearing is necessary for the parties to explain the basis of the requests." NOTICE OF DECISION (Apr. 1, 2022), *Appx*. at 49.

B. Parties Discussed Their Stipulations at the "Review Hearing"

At the beginning of the April "Review Hearing," there was discussion regarding what the hearing was for, and what would be decided at its conclusion. The court introduced the hearing, saying, "we have a hearing on the – a review hearing based upon – I issued an order regarding jurisdiction." *Rev.Hrg.* at 2. The court explained:

> I had issued an order regarding why I could not approve the agreement as is currently written. And so this is what this hearing is on. Depending on what's said here today, we'll decide next steps. If somehow I'm convinced that I should approve the agreements, I'll do that. Otherwise, we'll have to have a hearing as to what I should approve.

Rev.Hrg. at 2-3. There then followed a colloquy between the court and Amy's lawyer:

> **Lawyer**: Thank you, Your Honor. Your Honor, we're before you today and we're sort of at a fork in the road.
>
> **Court**: Yep.
>
> **Lawyer**: You know, on the one hand, we can go down – and we plan to provide this Court with facts that justify and warrant the agreement that was reached between the parties.
>
> **Court**: If you want to do that today, we have an hour set aside. Otherwise, we can do that at another, later time if you're requesting more time to present the facts that you need in order for me to do it.
>
> **Lawyer**: Is that not the intent of today's hearing, though?
>
> **Court**: Well, it's possibly. It's a review hearing, it's not an uncontested hearing. An uncontested hearing would be that type of opportunity where you would do that if you both feel like you can do this today and turn into uncontested, I'm fine with that.

Lawyer: Your Honor, I haven't had a chance to speak with Mr. Fisher about his feelings on the agreement, but we are guided by *Bossi* knowing that they came to an agreement, they signed it, and it's enforceable if this Court finds that it's an appropriate agreement under the circumstances. We can provide to you today the reasons why we believe the agreement is fair and reasonable under the circumstances, why it should be enforced.

…

[W]e are here because of this court order, and that's what we're going to be doing this morning.

Court: That's fine.

Lawyer: The other alternative, Your Honor, when we read this order, the court has already decided in this order what is fair and reasonable. The court dictated the outcome that it would only accept guideline support, 50-50 division, and specific allocations of parenting time. That makes us concerned that this Court has prejudged the facts in this case having not heard any and decided the outcome.

Court: Well, Counsel, you understand that you had presented me with the financial affidavits of the parties. And I haven't precluded; that's why we're having this hearing, so you can give me information to further weigh in on this.

But the law is very clear. The parties don't have the authority to enter agreements by themselves. The Penal Code of New Hampshire is called – the agreements that they submitted as really recommendations. I have statutory obligations that I need to comply with.

Lawyer: Yes, Your Honor absolutely has the authority to determine whether the agreement is fair. The order oversteps and dictates the outcome.

Court: Well, I think you misread the order.

Lawyer: I hope I do.

Court: Yeah, you misread the order. We have a situation here where 100 percent of the assets, based upon the information that you gave me in a financial affidavit, go to your client. 100 percent.

Lawyer: Well, as well as 100 percent of the debt.

Court: Well, you need to give me the bottom line on that and what that is. Because the way I look at the agreements as written, it gives a significant amount of assets to your client and nothing to Mr. Fisher, who is self-represented. And so this is your opportunity to explain to me the world behind the financials.

Lawyer: And that's what we plan to do right now.

Rev.Hrg. at 2-5 (minor transcription anomalies corrected).

With that understanding, Amy's attorney began an offer-of-proof in which he explained the parties' intents regarding parenting, property, and child support, and how the stipulations on each encapsulated those intents. *Rev.Hrg.* at 6-17.

About half-way through the hearing, Richard was sworn and began presenting his thoughts. He did not talk open-endedly, however; his testimony was guided by the court's constant queries. Richard discussed his girlfriend and their friend-group and where they lived, his involvement with the child and her activities, his admiration for Amy's earning and mothering, his visitation arrangements and preferences, and his job and how much he gets paid. *Rev.Hrg.* at 17-26.

The court then began questioning Amy. She answered regarding Richard's drug use, her feelings toward Richard's girlfriend and their friend-group in Michigan, Richard's relative lack of parental involvement in the child's activities, and why they agreed to flexible parenting. *Rev.Hrg.* at 26-30.

The court returned to Richard, who added details about his parenting and his Michigan situation, *Rev.Hrg.* at 30-31, and then to Amy who reflected on the child's travails. *Rev.Hrg.* at 30-33. The court asked the parties questions directly: how often did Richard want visitation in Michigan, *Rev.Hrg.* at 23, 25; did Amy want drug testing as part of parenting time, *Rev.Hrg.* at 26; "To whom should I order support paid?" *Rev.Hrg.* at 13.

Richard (in apparent contravention of the court's precondition) had not filed his updated financial affidavit a week before the hearing. Thus, toward the end of the hearing, the court insisted that Richard file it before he left the courthouse, and also mail a copy to Amy's lawyer. *Rev.Hrg.* at 33-34. The court asked Amy's attorney whether he had "any objection to [Richard] filing it after the hearing concludes or do you want a further hearing once he files it?" Counsel responded: "No objection to him filing it this afternoon." *Rev.Hrg.* at 25.

The court closed the 44-minute[4] hearing, saying:

> I'm going to wait for [the financial affidavit] and then I'll issue an order as to my decision, based upon the offers or proof and the testimony. And you give me a lot to think about. Both of you. You gave me a real lot to think about as to what's fair and equitable. And how I'm going to address it, I don't know at this point. But I will get a decision out as soon as I can.
>
> …
>
> Like I said, this is not an easy decision for me, as to how I'm going to rule here. I will give it due consideration, both your positions. I heard both of you loud and clear and I will make a decision as soon as I can.

Rev.Hrg. at 34-35.

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[4]"Proceedings commence at 11:00 a.m." *Rev.Hrg.* at 2. Proceedings concluded at 11:44 a.m. *Rev.Hrg.* at 36.

C. After "Review Hearing," Court Issued Final Orders on Parenting, Property, and Child Support

On May 25, 2022, about six weeks after the "review hearing," the court issued an order. The order was not confined to whether the parties' mutual stipulations would be effectuated, as the court had articulated at the "review hearing."

Rather, without the benefit of the standard components of a contested divorce, *see* FAM. DIV. R. 2.1 to 2.31 – discovery, mediation, appointment of a guardian *ad litem*, cross-examination by opposing parties – the court issued a full final divorce order, comprising a final decree, a narrative order, a parenting plan, and a child support order. NOTICE OF DECISION (May 27, 2022), *Appx*. at 58 ("Enclosed please find a copy of the court's order dated May 25, 2022 relative to: Narrative Final Decree, Final Decree on Petition for Divorce, Final Parenting Plan, Final Uniform Support Order.").

Amy filed a motion for reconsideration, to which Richard did not object. MOTION FOR RECONSIDERATION (June 8, 2022), *Appx*. at 59. In July, the court issued an order on reconsideration. The court held that it had authority to "waive" the usual contested divorce procedure because family courts have authority to control their own proceedings, and that "the parties were given ample opportunity to present the facts and legal argument they wanted the court to consider in making a decision." ORDER ON RECONSIDERATION at 1, 2 (July 23, 2022), *Addendum* at 66.

In its order denying reconsideration, the court explained its rejection of the parties' stipulations, and also held that Amy waived her right to a standard divorce proceeding:

> The court instructed [Richard] to file his financial affidavit prior to leaving the courthouse. The court asked if [Amy] objected to [Richard] filing his financial after the hearing or if she would like another hearing. She responded that she had no objection to [Richard] filing his financial affidavit after the hearing and she did not request another hearing.
>
> …
>
> On at least two occasions during the hearing, the court discussed the possibility of another hearing, and [Amy] never indicated she wanted another hearing after April 11, 2022. Accordingly, [Amy] had notice of the issues to be discussed at the hearing.
>
> …
>
> When the Court raised the issue of another hearing after April 11, 2022, [Amy] did not request a hearing. Accordingly, the court allocated judicial time and effort to issue final orders.

ORDER ON RECONSIDERATION at 2-4. This appeal followed.

SUMMARY OF ARGUMENT

The parties reached mutual stipulations on all issues – parenting, property, and child support. They agreed to shared parenting, each trusting from their experience that the other was an effective and loving parent who would fairly act in the interest of their daughter. On finances, based on their history, they wanted as little future entanglement as possible. Richard was free of the considerable marital debt, and while Amy got the property, she also would fund the child's present and future costs – a home, daily and incidental expenses, health care, education, visitation, and $2 million of life insurance.

Scheduling them for a "review hearing," and without the usual procedures that attend contested divorce cases, the family court pegged the parties into an arrangement that subverts their objectives and overrides their goals.

This court should reverse, and allow the parties' agreements to go into effect.

Even if the family court's rejection of the parties' stipulation is upheld, however, this court should order that the family court commence a standard divorce proceeding, and make clear that justice is not served by courts shortcutting to an end without lawful procedure.

ARGUMENT

I. Court Erred By Imposing a Decree Radically Divergent From the Parties' Priorities

The parties' proposed decree demonstrated their intent to make stability for the child their first priority. It also encompassed their goal of flexibility, and their belief each would act in good faith, making a flexible arrangement desirable. That flexibility would allow them to accommodate both the child's wishes and their own locations and jobs, and also further their objectives of privacy and economy. The court undermined those goals, and turned an amicable dissolution, designed to protect the interests of the child, into a contested divorce. *See* RSA 5-C:58 (contested and uncontested divorce proceedings); *compare* FAM. DIV. R. 2.22 *with* 2.24 (contested and uncontested divorce hearings).

Stipulations reached by divorcing parties are recommendations to the family court, which the court can accept or reject in whole or part. *Estate of Mortner v. Thompson*, 170 N.H. 625 (2018); *Bossi v. Bossi*, 131 N.H. 262 (1988). "[F]raud, undue influence, deceit, or misrepresentation" in the negotiation will vitiate a marital stipulation. *Durkin v. Durkin*, 119 N.H. 41, 42 (1979). The family court must review marital settlement agreements, "to ensure that the stipulation is fair and reasonable to all," and "to determine whether a stipulation is, on the facts of the case in question, appropriate." *Matter of Mortner*, 168 N.H. 424, 429 (2015).

A. Court's Parenting Plan Overrides Parties' Intentions

The policy priority of New Hampshire law in divorce is to support and encourage parents to share parenting. RSA 461-A:2. Thus, the law "[e]ncourage[s] parents to develop their own parenting plan," RSA 461-A:2, I(c), and directs courts to "[g]rant parents … the widest discretion in developing a parenting plan." RSA 461-A:2, I(d).

Based on their experience, both parties have commendatory views of the others' parenting abilities, and confidence in their mutual commitments to fostering the other's healthy relationship with the child. They thus provided in their stipulated parenting plan that, while Amy has primary residential responsibility, Richard "has non-residential parenting time based upon mutual agreement of the parents with no specific schedule required." They agreed that Richard "will have full visitation as agreed to by the two parties upon request. All holidays and school vacation schedules will be mutually agreed upon request." (PROPOSED) PARENTING PLAN ¶B.1 (Nov. 2, 2021), *Appx*. at 10.

Based on no evidence from the child or through a GAL, the court held that it is in the child's "best interest for there to be set schedules to the best extent possible." NARRATIVE FINAL DECREE (May 25, 2022) at 3, *Addendum* at 51.

Rejecting the parties' mutual approach, the court's parenting plan instead established a "routine schedule," enumerating a list of certain days and holidays, fixing when the child will be with one parent or the other, and specifying where visitations will occur. COURT'S PARENTING PLAN ¶B (May 25, 2022), *Addendum* at 57. Despite there being no mention in the record of any discussion of any particular day or holiday, the court's parenting plan provides, for instance, "Thanksgiving with Father in even years from Wednesday until Sunday," *id.* at ¶B.2., and "Labor Day with Mother every year." *Id.* at ¶B.3.

Moreover, the flexibility the parties agreed to would allow for discussion between them of the child's ongoing needs and preferences. The court's plan gives no voice to the child, who is already 14 years old.

It is apparent that Amy does not like or trust Richard's girlfriend. While Richard defended her, he accepts Amy's judgment as it concerns the child. Amy is indifferent about Richard's comfort or well-being amongst his friends or where he resides, but has "grave concerns" about her daughter living in

conditions below Amy's standards if the child were to visit her father in Michigan or elsewhere. *Rev.Hrg*. at 27. Thus the parties negotiated that when the child is at Richard's home, the girlfriend will not be present. The parties' stipulation specifies this condition in detail.

The court, however, expressing constitutional rights which were not asserted and probably do not exist, *see, e.g., Eldridge v. Eldridge*, 42 S.W.3d 82, 89 (Tenn. 2001) ("[I]n an appropriate case a trial court may impose restrictions on a child's overnight visitation in the presence of non-spouses."), eliminated the condition. NARRATIVE FINAL DECREE at 3.

Finally, Richard testified that when he visits the child in New Hampshire, he stays at, and brings the child to, his family's house in Saugus. Nobody gave evidence about that location, how long it might be available, or the situation there, but the parties presumably have knowledge of those conditions and accept them. Moreover, because the child is a teen approaching driving age, dictating how and where Richard sees the child when he is in New Hampshire was not critical for them. Nonetheless, the court opined about the Saugus family home, "long term that may not be feasible," and urged Richard to "explore other lodging options when exercising parenting time in New Hampshire." *Id.* at 3.

Overall, while the court-imposed parenting plan is not unreasonable in the abstract, it subverts the parties' intentions, ignores the circumstances of this case, and contravenes New Hampshire's policy of encouraging divorcing couples to resolve their own affairs. This court should thus reverse, and order the family court to enforce the parties' stipulations.

B. Court's Property Decree Overrides Parties' Intentions

In numerous ways, the court abandoned the parties' mutual interests and child-focused financial plan. The court instead imposed a fair-sounding, but non-individualized, property division, which does not take into account the customized approach the parties intended and agreed upon.

The parties understood Amy has a $2 million life insurance policy with the child as beneficiary. (PROPOSED) FINAL DECREE ¶8 (Nov. 2, 2021), *Appx*. at 3; AMY'S FINANCIAL AFFIDAVIT (Apr. 11, 2022) ¶10, *Sealed Appx*. at 14; AMY'S FINANCIAL AFFIDAVIT (Nov. 2, 2021) ¶10, *Sealed Appx*. at 4. The court's order only provides that Amy insure her life in the amount of $125,000, with Richard as trustee for the child. COURT'S FINAL DECREE ¶8 (May 25, 2022), *Addendum* at 43. The parties' approach provided both a greater benefit to the child, and, in the event of Amy's death, would not put Richard, who has demonstrated his tendency to squander, in charge of a sum of money. The parties' stipulation was tailored to their situation and their mutual desire to protect their child, while the court's order dangerously overrides that objective.

The parties' stipulation allowed Amy the marital home, but also gave her responsibility for both mortgages on it, for the purpose of maintaining equity for the benefit of the child. (PROPOSED) FINAL DECREE ¶15. The court's order, however, forces Amy to pay out half the equity to Richard within three months; if she cannot, then the "home shall be sold" and the proceeds split. COURT'S FINAL DECREE ¶15. The court's order thus undermines the parties' intentions regarding maintaining the home for the benefit and future financial stability of the child, and puts the child at risk of the disruption which Amy and Richard tried to prevent.

Same with the child's education. Amy is paying for the child's current private high school, and the parties' proposal commits Amy to financing college. Under their plan, the college obligation would be enforceable.

(PROPOSED) FINAL DECREE ¶4. The court's order, however, checks "N/A" about these costs, COURT'S FINAL DECREE ¶4, thus potentially leaving Richard open to paying for at least some of them, and preventing him from invoking the decree if Amy were to renege. *See In the Matter of Oligny*, 169 N.H. 533, 537 (2016).

While the court's order and the parties' agreement provide that Amy gets her car, regarding the parties' truck, they decided that Amy would get both it and its debt. (PROPOSED) FINAL DECREE ¶¶9, 14. The court, however, gave Richard both the truck and the debt associated with it, which is substantial – $32,568. COURT'S FINAL DECREE ¶¶9, 14; AMY'S FINANCIAL AFFIDAVIT (Nov. 2, 2021) ¶7. The record contains no evidence regarding the truck, Richard's alternative transportation, or whether he desires the obligation on the expensive vehicle.

For other areas of marital debt, the parties negotiated that Amy would assume *all* of it – mortgage, credit cards, vehicles – such that Richard would be free of marital debt. (PROPOSED) FINAL DECREE ¶14. The court's order split the debt, however, so that Richard is responsible for not only the truck loan, but also half the marital credit card – over $34,000 – based on no evidence regarding the items accounting for the debt nor Richard's wish to pay it. COURT'S FINAL DECREE ¶14; AMY'S FINANCIAL AFFIDAVIT ¶11 (Apr. 11, 2022).

Likewise, contrary to the parties' intent, which would have Amy pay for travel if the child visited Richard in Michigan, *Rev.Hrg.* at 10, the court's plan makes Richard pay for his and the child's transportation to exercise his parenting. COURT'S PARENTING PLAN ¶D.3.

The parties allowed Amy her own retirement account, worth about $271,000. (PROPOSED) FINAL DECREE ¶11; AMY'S FINANCIAL AFFIDAVIT ¶7 (Apr. 11, 2022). The court's order split the account. COURT'S FINAL DECREE

¶11. While that may sound fair, it does not take into account the parties' recognition of Richard's long record of non-contribution to family wealth, and his thiefsome and squanderous history.

The court's order is inexplicably silent on Amy's business interests. Whereas the parties specified that Amy retains her interest in her business, "Greenpeak Industries dba Skymint Brands, Inc," the court's order checks "N/A," thereby possibly leaving some ambiguity in the disposition of the corporation (although there was no evidence about its current status). (PROPOSED) FINAL DECREE ¶13; COURT'S FINAL DECREE ¶13.

Overall, the parties' agreement severed financial ties. While Amy got the property, she also got all the debt. Their arrangement kept things simple by rejecting enforceability of the decree after death, and having mutual releases. (PROPOSED) FINAL DECREE ¶¶17, 21. It is thus "appropriate" and "fair and reasonable to all." *Mortner*, 168 N.H. at 429. The court's order, however, provides for posthumous enforceability and spurns mutual releases. COURT'S FINAL DECREE ¶¶17, 21.

Accordingly, while the court-imposed allocation of property is not patently unreasonable, it is dissociated from the parties' stated intentions, and ignores their history and circumstances. Even if the court could have reasonably determined that some adjustment to the parties' stipulation were necessary, its complete undoing of their intent was error beyond its discretion.

Moreover, the court misunderstood the law guiding its decision-making on property division, which may account for the court's wholesale rejection of the parties' stipulation. The court said that "absent special circumstances, the property division must be as equal as possible." ORDER ON HEARING TO DETERMINE JURISDICTION at 1 (Feb. 1, 2022), *Addendum* at 40. But equity may sometimes require an unequal distribution of marital property. *In the Matter of Jones*, 146 N.H. 119, 124 (2001). "Our dissolution statutes do not

require the court to divide property equally." *Fabich v. Fabich*, 144 N.H. 577, 580 (1999) (overruled on other grounds by *In the Matter of Preston*, 147 N.H. 48 (2001)). While "an equal division of property is presumed equitable … marital property is not to be divided by some mechanical formula but in a manner deemed just based upon the evidence presented and the equities of the case." *In the Matter of Geraghty*, 169 N.H. 404, 417 (2016). Highly unequal distributions have been held equitable. *See, e.g., In the Matter of Crowe*, 148 N.H. 218, 220 (2002). As the family court may have been misguided by its misunderstanding of the law, this court should reverse and order the family court to enforce the parties' stipulations.

Finally, the court undid the parties' intentions in the absence of Richard claiming the property division was not to his satisfaction. While the court was bothered about the fact that the stipulation gave Amy the property, Richard was not. He never said that he wanted more, that the agreement was unfair, or that he was lied to or unduly influenced. Both parties were *pro se* when the agreement was negotiated. Richard said, at most, "I just don't think I should be walking away with zero." *Rev.Hrg*. at 21. But he never claimed he got zero – and he didn't. Amy embraced all his considerable debt, promised to pay costs of visitation, is paying for the child's private high school and accepted an obligation to finance college, and assumed the expense of maintaining the house for the child's interest.

C. Court's Support Order Overrides Parties' Intentions

The parties had an understanding that Amy would pay the child's general expenses, her private secondary and post-secondary educational costs, and amounts incurred when visitation occurs. They also recognized Richard's ignominious financial history, and preferred to immediately end their fiscal relationship. Thus they submitted a mutual non-support agreement, which provides that they "have mutually agreed that neither party shall be required to pay support to the other as a result of the dissolution of their marriage," and that Richard "may contribute as his means may allow but is not required to provide child support." MUTUAL NON-SUPPORT AGREEMENT (Nov. 2, 2021), *Appx*. at 29; (PROPOSED) UNIFORM SUPPORT ORDER (Nov. 2, 2021), *Appx*. at 19.

The court rejected the arrangement and required Amy pay child support. While it adjusted Amy's support obligation to account for her payment of the child's private high school expenses, it otherwise ordered guidelines support. COURT'S UNIFORM SUPPORT ORDER ¶¶4, 6 (May 25, 2022), *Appx*. at 50; CHILD SUPPORT GUIDELINES WORKSHEET (May 17, 2022), *Appx*. at 57.

Nowhere in the record did Richard complain about the lack of support in the parties' agreement. This is unsurprising because Amy was going to pay for the child's travel and accommodations for any visitation, and Richard's only childcare-related expense would be his transit to New Hampshire.

Moreover, the court appears to have misapprehended that the child support guidelines are the only legitimate measure. Rather, while there is a "rebuttable presumption … that the amount of the award which would result from the application of guidelines … is the correct amount of child support," RSA 458-C:4, II; *In the Matter of Ndyaija*, 173 N.H. 127, 141 (2020), and the court is required to perform a guidelines calculation, *In the Matter of Laura and Scott*, 161 N.H. 333 (2010), the court "does not have to follow the guidelines strictly if such an application would be unjust or inappropriate in a given

situation." *Wheaton-Dunberger v. Dunberger*, 137 N.H. 504, 508 (1993).

Parties can negotiate non-guidelines support, or no support. "When arrangements for child support are delineated in an agreement between the parties, and not made according to guidelines, [the court] shall determine whether the application of the guidelines would be inappropriate or unjust in such particular case." RSA 458-C:4, IV. Thus, while the court was required to investigate the parties' mutual stipulations, here the court indicated that it categorically "will not approve the [parties'] agreement absent a child support order that complies with the child support guidelines." ORDER ON HEARING TO DETERMINE JURISDICTION at 1 (Feb. 1, 2022).

Accordingly, this court should reverse and order the family court to enforce the stipulations as negotiated.

II. Court Erred by Imposing Final Orders on Parenting, Property, and Child Support, All Without Holding a Standard Contested Divorce Proceeding

Amy contends that the family court should have accepted the parties' stipulations. However, if they were lawfully rejected, the family court was then required to treat the matter as a contested divorce, complete with a standard final hearing of which the parties were entitled to notice, which did not occur here.

New Hampshire law entitles litigants to notice of the issues that a court will address at a hearing. "The purpose of a notice requirement is to inform the recipient of the character of a proposed action so that he can prepare adequately for the hearing." *Appeal of Clement*, 124 N.H. 503, 506 (1984). For this reason, this court has admonished that "[n]otices furnished by our courts to counsel and parties should make clear what is to be heard or considered." *V.S.H. Realty, Inc. v. City of Rochester*, 118 N.H. 778, 781 (1978).

A general notice of hearing is not sufficient; it must be specific as to the exact issues the court will hear. "[A]dequate notice is notice that is reasonably calculated to give the defendant actual notice of the issue to be decided at the hearing." *Town of Swanzey v. Liebeler*, 140 N.H. 760, 763 (1996).

> Under both Part I, Article 15 of the New Hampshire Constitution and the Fourteenth Amendment of the Federal Constitution, an elementary and fundamental requirement of due process is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. In the divorce context, notice to the parties must give the defendant actual notice of the hearing and the issues to be addressed.

Douglas v. Douglas, 143 N.H. 419, 423 (1999) (quotations and citations omitted). Notice must "give the [party] actual notice *of the issue* and the

hearing." *Duclos v. Duclos*, 134 N.H. 42, 45 (1991) (emphasis in original); U.S. CONST., amd. 14; N.H. CONST., pt. 1, art. 15.

In *Morphy v. Morphy*, 112 N.H. 507 (1972), a marital defendant received notice of a "contempt hearing" based on non-payment of support. The court then ruled on the contempt, but also extended the period during which he owed support. This court reversed, finding that "[d]efendant was thus justifiably unprepared to meet the issue when raised at the hearing," and ordered the trial court to allow a subsequent hearing on extension. *Morphy*, 112 N.H. at 510.

An opportunity to present evidence on a non-noticed issue does not cure lack of notice. *Reardon v. Lemoyne*, 122 N.H. 1042, 1051 (1982) (Although court heard evidence which "occasionally strayed from the subject matter of the motion into the merits of the dispute, we do not find this fact a sufficient reason to have deprived the [party] … of a full opportunity to present their case."). The requirement of notice is well-established. *See*, *e.g.*, *Kimball v. Fisk*, 39 N.H. 110 (1859).

When a court reaches an issue without adequate notice, its order on the non-noticed issue must be vacated. *V.S.H. Realty*, 118 N.H. at 782; *Morphy*, 112 N.H. at 511.

Here, the court noticed the parties that there would be a "review hearing." There are no New Hampshire cases construing that phrase, but an examination of other sources suggests that a "review hearing" occurs when the court plans to inquire further into outstanding issues. The Child Protection Act, for instance, provides for "periodic review hearings," RSA 169-C:24, which is defined as following an "initial review hearing," and is for the purpose of determining "whether the [State] has made reasonable efforts" on behalf of an abused or neglected child. *See, e.g., In re C.M.*, 163 N.H. 768, 784 (2012) (court "may conduct additional review hearings upon its own motion or upon the request of any party at any time").

The dictionary defines "review" as "to view or see again," "to examine again," "make a second or additional inspection of," "study anew." *Webster's Third New International Dictionary* 1944 (unabridged ed. 2002). *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 873 (1990) (Term "land withdrawal review program" "does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations, but is simply the name by which petitioners have occasionally referred to certain continuing (and thus constantly changing) BLM operations regarding public lands.").

It is thus apparent that when the court invited the parties to a "review hearing," it was not for the purpose of litigating the final merits of a contested divorce. Presumably it was to "examine again" the enforcement of the parties' stipulations, and either approve or reject the stipulations. The court made that purpose clear from the clerk's notice, from its consistent reference to the hearing as a "review hearing," and from its extensive colloquy from the bench. At the beginning of the "review hearing," the court even promised further hearings before reaching the merits of a contested divorce:

> I had issued an order regarding why I could not approve the agreement as is currently written. And so this is what this hearing is on. Depending on what's said here today, we'll decide next steps. If somehow I'm convinced that I should approve the agreements, I'll do that. *Otherwise, we'll have to have a hearing as to what I should approve.*

Rev.Hrg. at 2-3 (emphasis added).

As in *Morphy*, Amy was thus made ignorant of the court's apparent intention to reach the merits, in violation of her State and Federal rights to due process. Had Amy known that the "review hearing" was actually her divorce trial, she would have shown up with witnesses and evidence regarding her own contributions to the maintenance and growth of marital assets, as well as expenses for the child's private high school and expected college, extracurricular

activities, health insurance, day-to-day living, and travel and visitation. She would have related her understanding of the child's preferences, either through her testimony or a GAL. Amy also would have insisted on cross-examining Richard, on such matters as the role his infidelity played in causing the breakdown of the marriage, his criminal record and how much that cost the family, his gambling and how much money he squandered, his income and underemployment, and his living situation and his plans for visitation with the child both in New Hampshire and elsewhere.

In its order on reconsideration, the court suggested that Amy waived such rights by acquiescing to Richard filing his financial affidavit at the end of the hearing. ORDER ON RECONSIDERATION at 2, 4 (July 23, 2022), *Addendum* at 66. It is apparent from the record that Amy's attorney expressed no more than: "No objection to him filing it this afternoon." *Rev.Hrg.* at 25. Amy never waived her right to a full divorce hearing following the rejection of the parties' stipulations, and the court erred in denying the parties a final hearing on the merits.

Accordingly, even if the court lawfully dissolved the parties' stipulations, the court's final divorce decree – on parenting, property, and child support – must be vacated. As the matter would then no longer be an uncontested divorce, this court should order the family court schedule a standard contested divorce proceeding in accord with Family Division Rules 2.1 through 2.31.

Even though family law is often somewhat collaborative, it is part of the American "adversarial system of justice." *See In re Nathan L.*, 146 N.H. 614, 619 (2001) (juvenile deliquency); *Crawford v. Washington,* 541 U.S. 36, 43 (2004) ("The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers."). Affirming the judgment below could result in a fundamental change in the way justice is administered in New Hampshire. Any judge in any

court who would like to efficiently shortcut to the endgame could, during any preliminary or motion hearing, decide the merits of the case, simply by posing some questions to the parties, and then drafting what the judge considers a solution, without having to go through the tediousness of trial evidence, exhibits, and cross-examination. Affirmance would also create a disincentive for parties to reach negotiated stipulations: by merely presenting an agreement to the court, parties might instead receive a radically different result, while never having a chance to back out nor offer proofs in a standard contested proceeding.

CONCLUSION

The parties' mutual stipulations – on parenting, property, and child support – reflected their priorities and objectives. The family court, however, pegged them into a poorly-founded arrangement that subverts their intentions and overrides their goals, all without a contested divorce proceeding.

This court should vacate the court's decree, and allow the parties' stipulations to go into effect.

If the family court's rejection of the stipulations is upheld, this court should order that the family court proceed with a standard contested divorce proceeding, making it clear that justice is not served by courts shortcutting to a result without the indulgence of actually trying the case.

Respectfully submitted,

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Dated: January 21, 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 January 21, 2023, copies of the foregoing will be forwarded to the parties registered on this court's e-filing system.

Dated: January 21, 2023

Joshua L. Gordon, Esq.

ADDENDUM