State of New Hampshire
Supreme Court

NO. 2008-0106

2008 TERM

JUNE SESSION

In the Matter of

Gabriello Gabrielli

&

Concetta Gabrielli

RULE 7 APPEAL OF FINAL DECISION OF
PORTSMOUTH FAMILY DIVISION COURT

BRIEF OF PETITIONER, GABRIELLO GABRIELLI

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QUESTIONS PRESENTED

I. Did the court err by failing to enforce the parties' separation order, which was a judgment of the Massachusetts court?

Preserved: Motion to Enforce Stipulation (July 17, 2007)

II. Did the court err in awarding alimony given the language of the parties' 1984 court-approved Separation Agreement?

Preserved: Preserved: Motion to Enforce Stipulation (July 17, 2007)

III. Was an award of alimony barred by laches given that the parties' Separation Agreement was court-approved in 1984?

Preserved: Preserved: Motion to Enforce Stipulation (July 17, 2007); Requests for Findings of Fact and Rulings of Law (Oct. 31, 2007); *Trn.* at 93, 102.

IV. Did the court err in awarding alimony in an amount beyond which would account for Ms. Gabrielli's need, customary lifestyle, or any other alimony consideration?

Preserved: *Trn.* at 101-02.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. 1984 Separation Agreement Halved the Assets

Mr. Gabriello Gabrielli and Ms. Concetta Gabrielli,[1] both 79 years old, were married in 1954 in Rome, Italy. *Trn*. at 8. They lived in their marital home for 30 years in Waltham, Massachusetts until they separated in 1984. Their youngest child reached the age of majority in 1980, several years before the separation.

Because the doctrine of their religion frowns on divorce, *Trn*. at 44-45, 80, they entered a Separation Agreement. STIPULATION (Sept. 19, 1984), *Appx*. at 23. The Agreement is signed by the two Massachusetts attorneys who represented each party.

Upon filing with the Massachusetts court, the Agreement became a court order. JUDGMENT OF SEPARATE SUPPORT (Sept. 20, 1984), *Appx*. at 22. The judgment specifies:

> The parties are ordered to comply with the terms of a Stipulation and Addendum thereto dated September 19, 1984 filed and incorporated in this Judgment, notwithstanding the foregoing, said Stipulation and Addendum shall survive and have independent legal significance.

JUDGMENT OF SEPARATE SUPPORT ¶ 9.

The Separation Agreement and its "Exhibit A" list the properties the couple owned, including the residence and several income-producing properties, and assigns values to each. It accomplished a 50/50 split of assets by giving Connie the residence, the proceeds from the sale of a property, interest in a mortgage owned by the couple, and a note provided by Gabe to Connie secured one of the assets Gabe retained. Gabe got that asset, and also an apartment building at 15 Church Street, Hampton, New Hampshire. STIPULATION ¶¶ 1a & 1b.

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[1]To ease confusion, but meaning no disrespect, the parties will be referred to herein by the names they call themselves, Gabe and Connie.

The Agreement provided that a variety of liquid assets were to be evenly split, STIPULATION ¶ 2 & 3, and a potential recovery from a lawsuit was to be apportioned. STIPULATION ¶ 6. The Agreement set forth the terms of the note which Gabe gave Connie, STIPULATION ¶¶ 1* & 4, and contained a variety of hold-harmless clauses. STIPULATION ¶ 5. The Agreement specifies how payments were to be made from Gabe to Connie on the note, and how taxes were to be filed. STIPULATION ¶¶ 7-9.

The Agreement's addendum was hand-written by Connie's attorney.[2] It provides for a receiver for various assets and specifies payment to various creditors. STIPULATION ¶ 11. The last paragraph of the Agreement's addendum provides in full:

> Henceforth, the parties agree that they shall not pledge the credit of the other, and shall act in all respects, to the extent allowed by the law, as if they were sole and unmarried. Neither shall interfere with the other's personal liberty, security, or property. Each party waives any and all statutory rights as husband or wife in the estate of the other.

STIPULATION ¶ 12.

II. Differing Uses of Halved Assets in Intervening Years

Around the time of the 1984 Agreement, the couple separated. Connie continued living in the residence in Waltham, Massachusetts. Because the house had been purchased in the 1950s, the mortgage was paid off shortly after the separation. *Trn*. at 71. The house has a 2006 tax assessed value of $394,800. FINANCIAL AFFIDAVIT OF CONCETTA GABRIELLI (Oct. 2007), *Appx.* at 54. Connie continues to live there with one of her adult sons who pays monthly rent. *Trn*. at 72-73, 87, 91-92.

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[2]From the signatory page it is apparent that Connie's lawyer was Anne L. Josephson. Someone with the initials "ALJ" – presumably Anne L. Josephson – initialed the Agreement. STIPULATION ¶ 10. The handwriting of both the signature and the initials match the handwriting on the rest of the document.

Connie enjoyed the proceeds of the several notes specified in the Separation Agreement until they expired, and then worked at a nursing home until 2004 when health issues caused her to retire. *Trn.* at 41-42. Connie has not put money into the house for many years and it needs some work. *Trn.* at 75. Despite her age and the value of the house, she refuses to consider a reverse mortgage because she believes it will force her to not live there. *Trn.* at 71-72, 74.

Gabe used his half of the separation proceeds much differently. The assets he received in the Separation Agreement required full-time care and maintenance, and he made substantial improvements to them. When he left the house in Waltham, Gabe moved into a unit in the Hampton, New Hampshire apartment building at 15 Church Street which he was awarded in the Separation Agreement, and where he continues to reside today. *Trn.* at 7, 11-12. The eight-unit tenement had a 2007 value of $500,000, FINANCIAL AFFIDAVIT OF GABRIELLO GABRIELLI (Oct. 30, 2007), *Appx.* at 58, presumably making his residence worth $62,500.

While Connie was enjoying Waltham, Gabe leveraged his half the assets, worked hard, bought and sold various properties, *Trn.* at 8, 12, and turned his half of the separation proceeds into a portfolio of properties, receivables, and investment accounts. These have a present net worth of $2.3 million, and produce a monthly income of about $19,000.[3]

[3]The alimony award contained in the court's original order was based on gross income. The court reduced the award based on a recalculation of *net* income in accord with figures contained in a post-trial motion. *See* DECREE OF DIVORCE, *Appx.* at 40, 44; MOTION TO RECONSIDER (Dec. 19, 2007), *Appx.* at 48; ORDER (Jan. 10, 2008), *Appx.* at 49(hand-written order on final page of Motion to Reconsider).

III. Alimony Requested in Recent Divorce

Several years ago Gabe and Connie attempted a reconciliation, *Trn*. at 43-44, and both filed and withdrew several petitions for divorce in Massachusetts and New Hampshire. *Trn*. at 45-47.

When reconciliation did not work, recently they finally pursued a divorce. During the short hearing at which alimony was the sole issue, only Gabe and Connie testified. The reasons for the couple's original separation, attempts at reconciliation, and the four adult children are not relevant to the issues on appeal.

Connie testified that at the time of the Separation Agreement, her plan for income was the payments from the notes specified in the Agreement, *Trn*. at 33-34, 36, which collectively were paying her over $1,000 per month. *Trn*. at 34, 36. Even though the notes had a stated value in the Separation Agreement, Connie said she did not know the income from them would end, and so did not plan for that eventuality. *Trn*. at 36-37. She also expressed surprise at developing health issues. *Trn*. at 41. Connie testified that the reason she was requesting alimony now was because the payments from the notes ceased. *Trn*. at 40.

Connie testified that when she entered the 1984 Separation Agreement she did not intend to make any future claims against Gabe for money. *Trn*. at 40, 79. Gabe testified he understood the exact same thing. *Trn*. at 10. Both testified that in the intervening years, Connie never asked for money, and Gabe never gave her any. *Trn*. at 8-9, 10, 78.

The Portsmouth Family Division (*Philip D. Cross*, MM; *Sharon F. DeVries*, J.) granted a divorce based on irreconcilable differences, and awarded Connie alimony in the amount of $4,000 per month. This appeal followed.

SUMMARY OF ARGUMENT

Mr. Gabrielli (Gabe) first sets forth the language of a 1984 Separation Agreement which waives each parties' rights in the estates of the other. He argues that this waiver includes any claim Ms. Gabrielli (Connie) now makes for alimony. Gabe also notes that the parties' behavior since they entered the Separation Agreement is in conformity with the Agreement, and therefore the Agreement should be enforced.

Gabe then details the points on which New Hampshire and Massachusetts law concerning the enforcement of separation agreements are similar and different. He notes that in both states, court make orders in conformity with separation agreements, and that when a court makes an award departing from a separation agreement, the aggrieved party has a cause of action on the contract. He argues that the parties intended the Separation Agreement to be enforced in a divorce proceeding, and that it is in the interest of both the parties and judicial economy to not create a new cause of action.

Gabe also argues that although he and Connie were nominally married for a long time, they were separated for 23 years, and that Connie should be barred by laches from requesting alimony because her request is far too late.

Finally, Gabe points out that the award of alimony made by the family court substantially increases Connie's standard of living, rather than merely maintains it. He argues that the court took into consideration factors not authorized by the alimony statute, and that the award is thus a windfall to which Connie has no claim.

ARGUMENT

I. Separation Agreement Waived Alimony

As noted, the last paragraph of the parties' Separation Agreement provides:

> Henceforth, the parties agree that they shall not pledge the credit of the other, and shall act in all respects, to the extent allowed by the law, as if they were sole and unmarried. Neither shall interfere with the other's personal liberty, security, or property. *Each party waives any and all statutory rights as husband or wife in the estate of the other.*

STIPULATION ¶ 12 (emphasis added).

A. Waiver of Alimony Shown by Language of Agreement

The question here is whether the Separation Agreement constituted a waiver of alimony. The court below ruled that "the stipulation's failure to refer to alimony does not constitute a waiver of [Connie's] right to later request it." DECREE OF DIVORCE (Dec. 10, 2007), *Appx.* at at 40, 42; *see also* Petitioner's REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW (Oct. 31, 2007) ¶ 6, *Appx. 30* (denial of requested ruling: "That this request for alimony i[s] contrary to parties' agreement that has been in effect for 23 years.").

To construe the Separation Agreement, a court:

> review[s] the record to determine what the parties, under an objective standard, mutually understood the ambiguous phrase … to mean. In applying this objective standard, [the court] consider[s] the parties' intent by examining the contract as a whole, the circumstances surrounding its execution and the object intended by the agreement, keeping in mind [the] goal of giving effect to the intention of the parties. [This Court] defer[s] to the trial court's findings of fact, if supported by the evidence.

Greenhalgh v. Presstek, Inc., 152 N.H. 695, 699 (2005) (citations omitted).

The Separation Agreement is very broad. It waives "any and all statutory rights," and has no limiting language. The clause does not confine itself to spousal shares after death or to any

other type of statutory right. Alimony is purely statutory in both New Hampshire, *Salta v. Salta*, 80 N.H. 218 (1921), and Massachusetts. *Heins v. Ledis*, 664 N.E.2d 10 (Mass.1996). Thus alimony is among the "any and all statutory rights" the Agreement waived.

Similarly, the language waives rights "as husband or wife in the *estate* of the other." Although this language no doubt includes waiver of the estate after death, alimony is paid from the marital estate. *See e.g.*, RSA 458:19, IV (court may consider "value of their respective estates" in making award of alimony).

This Court has construed the word "estate" very broadly. In the taxation context, "[t]he word 'estates' was held to include every species of property." *Opinion of the Justices*, 99 N.H. 512, 513 (1955). Referring to "possession or enjoyment of property," this Court held, "the term 'estates' covers all these matters. It includes in terms franchises and inheritances; but it also includes something more." *Conner v. State*, 82 N.H. 126, 128 (1925) (citations omitted); *see also, Morrison v. Manchester*, 58 N.H. 538 (1879) ("estate" referring to property mortgaged and rented); *Franklin St. Soc. v. Manchester*, 60 N.H. 342 (1880) ("estate" referring to all property). The word is construed equally broadly in Massachusetts. In the divorce context, the Supreme Judicial Court has declared: "Under our law, a party's 'estate' includes all property to which a party holds title, however acquired." *Williams v. Massa*, 728 N.E.2d 932, 939 (Mass.2000); *Heins v. Ledis*, 664 N.E.2d 10 (Mass.1996).

In the stipulation, there are no words modifying or limiting "estate" that suggest it would mean only a death or some other estate, and not a marital estate. And it is unlikely that the provision refers to a death estate because a one cannot lawfully deprive a spouse of their statutory spousal share. *Hanke v. Hanke*, 123 N.H. 175 (1983). Thus, any argument that the waiver does

not apply to alimony is not supported by the language of the waiver itself.

Moreover, it is apparent from the face of the Separation Agreement that it was fully bargained. The Agreement comprises three type-written pages with numerous hand-made changes. Those pages are followed by two more densely hand-written pages which are specifically referenced on the type-written pages. All the handwriting appears to have been done by Connie's Boston lawyer. Both the type-written and hand-written portions of the Agreement discuss technical matters, suggesting a well-informed attorney. The breadth of the waiver in the last paragraph cannot be regarded as a drafting error, surplusage, mere aspiration, or accident. Rather the Agreement as a whole suggests open-eyed parties bargaining hard.

The terms of the Separation Agreement cannot be called unfair. The Massachusetts statute allows separation agreements to include alimony, MASS.GEN.LAWS ch. 209 § 32 (setting forth factors and considerations for award of alimony in separate support orders), and payment of alimony could have been part of the deal had that been the intent of the parties. But Connie wanted the Waltham home and the stream of income she got, in exchange for an apartment in New Hampshire, a motel, and no further financial entanglements with Gabe.

B. Waiver of Alimony Shown by Words and Deeds

Even if there were ambiguity in the Separation Agreement, the intent of the parties became clear during their testimony. Connie testified:

Q: Did you intend to make further claim against your husband back - -

A: No.

Q: - - in 1984?

A: No.

Trn. at 40. Later Connie testified that one of her grandchildren asked her about alimony. Connie said, "I think she was saying about - - the other morning saying why didn't you get the alimony? I said, I don't know."

Gabe likewise understood that alimony was waived:

> Q: Now when you and Concetta went your separate ways, was it your understanding that you, at no time in the future, would have to pay her any money?
>
> A: That's correct.

Trn. at 10.

The parties behavior in the 23 years between the 1984 Stipulation and Connie's 2007 request for alimony below ratified their mutual understanding. Connie testified:

> Q: And anytime after 1984, did you ever go back to court in the commonwealth?
>
> A: No. No.
>
> Q: Did you ever go talk to a lawyer?
>
> A: No. I never - -
>
> Q: Did you ever - -
>
> A: - - asked for anything. And he can tell you that. If he doesn't say it, then he's lying.
>
> …
>
> Q: You went your separate ways. You never asked him for anything, did you?
>
> A: No.

Trn. at 78.

Likewise Gabe testified:

Q: And during that period of time have you acquired property and made - - earned money, made money?

A: Yes, I have.

Q: Okay. During this period of time have you provided any support to Concetta?

A: No.

Q: Okay. At any time during this period did she take you back to court in Massachusetts?

A: No.

…

Q: And did she ever ask for any money?

A: No, she hasn't.

Trn. at 8-9 & 9-10. "In determining the parties' intention, the court may properly consider their actions after the contract was executed." *Auclair v. Bancroft*, 121 N.H. 393, 395 (1981). For 23 years, Connie made no effort to alert Gabe that he was liable for alimony, and no effort to claim alimony. If Connie intended to collaterally attack the Separation Agreement, she had plenty of time. But her behavior, in accord with her testimony and the language of the Agreement, confirms Connie knew she had waived alimony back in 1984.

Finally, Connie testified that she asked for alimony only after she got old, developed health problems, could not work, and payments from the notes specified in the Separation Agreement ran their course. Age, infirmity, retirement, the need to invest in a house, and pay-off periods are all clearly foreseeable. Thus any argument that these took her by surprise – to the extent surprise

would be relevant – should be rejected.

Accordingly, this Court should find that the Separation Agreement waived any claim to alimony, and that the court below erred in awarding it.

II. Alimony Can Be Waived

A. New Hampshire and Massachusetts Law

The common perception is that alimony is not waivable in New Hampshire. *See e.g.*, C. Douglas, NEW HAMPSHIRE PRACTICE, Family Law § 11.03 (un-cited assertion). But the law is more complicated than that.[4]

In both New Hampshire and Massachusetts, a stipulation regarding alimony is binding on the parties unless it is both ***incorporated*** into and ***merged*** with a subsequent divorce or other family law decree.[5] In both states, if a stipulation is merged, it becomes modifiable by a court, and therefore cannot be independently enforced. *Norberg v. Norberg*, 135 N.H. 620 (1992); *Knox v. Retick*, 358 N.E.2d 432, 434 (Mass.1976). When stipulations are merged into a decree, they are "entitled to consideration in the formulation of the decree, even though they are not binding on the court." *Narins v. Narins*, 116 N.H. 200, 201 (1976).

A non-merged stipulation, however, is subject to enforcement like any contract. In *Knox v. Remick*, 358 N.E.2d 432, 435 (Mass.1976), the Massachusetts Supreme Judicial Court wrote, "where a husband has obtained a reduction in his support obligation under a court order, the wife is entitled to recover in a contract action any difference between the amount he contracted to pay and the amount the judge has ordered him to pay." In *Culhane v. Culhane*, 119 N.H. 389, 393 (1979), this Court approvingly quoted that same passage in *Knox v. Remick*.

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[4]The law of prenuptial agreements, in which parties can clearly waive alimony, *MacFarlane v. Rich*, 132 N.H. 608, 613 (1989), is not illuminating here because they are entered before the wedding.

[5]This is not the case for stipulations regarding child support because that would involves the rights of third persons to whom the state has independent duties. *See e.g., Ames v. Perry*, 547 N.E.2d 309 (Mass.1989); *Ryan v. Ryan*, 358 N.E.2d 431 (Mass.1976); *Culhane v. Culhane*, 119 N.H. 389 (1979).

An example is *Hastings v. Hastings*, 114 N.H. 778 (1974). Before their divorce in Germany, an American couple entered into a separation agreement regarding reduction of child support upon reaching adulthood. The former husband moved to New Hampshire, and sought to reduce support. This Court held, "[o]n the record of this case none of the evidence suggests that either the original separation agreement or the subsequent agreement were ever incorporated into the German divorce decree." Thus, the "agreement stands independent of the divorce decree as a contract for support."

New Hampshire and Massachusetts law do differ, however.

The first difference lies in how stipulations get merged. In New Hampshire, merger is automatic or nearly automatic. *Norberg v. Norberg*, 135 N.H. 620, 624 (1992) ("regardless of the language in the stipulation, the court retains the power to modify orders concerning alimony upon a proper showing of changed circumstances"); *Desaulnier v. Desaulnier*, 97 N.H. 171, 172 (1951) ("Although the legal separation granted the wife was entered pursuant to the stipulation of the parties …, the resulting decree was nevertheless the conclusion of the court and not merely a private agreement between the parties.").

In Massachusetts, however, merger takes place only if the parties are explicit in their intention to have their stipulation merged into a decree. In *Moore v. Moore*, 448 N.E.2d 1255 (Mass.1983), for example, the former wife brought a contract action against her former husband to recover payments owed her under their separation agreement. The Supreme Judicial Court held:

> [I]t is the intent of the parties, rather than the inclination of the Probate Court, which controls whether a separation agreement survives a decree. The Commonwealth's strong policy has favored survival of separation agreements, even when such an intent of the parties is merely implied.

Moore, 448 N.E.2d at 1257.

The second difference between New Hampshire and Massachusetts is that in New Hampshire an independently enforceable alimony agreement is a rarity. Massachusetts law, however, as noted in the quote from *Moore v. Moore, supra*, strongly favors the survival of separation agreements. Thus, in Massachusetts:

> as a general rule, unless the parties expressly provide otherwise, their separation agreement will be held to survive a subsequent divorce decree incorporating by reference the terms of the agreement.

Surabian v. Surabian, 285 N.E.2d 909 n. 4 (Mass.1972). Massachusetts courts routinely enforce separation agreements when they are intended to survive a related divorce decree. *See e.g.*, *Stansel v. Stansel*, 432 N.E.2d 691 (Mass.1982).

Finally, the Massachusetts Supreme Judicial Court has expressed a preference for how non-merged separation agreements should be handled procedurally:

> We believe that all aspects of the dispute between the former spouses should be resolved in one proceeding. If one spouse seeks modification of a support order so as to depart from the terms of the separation agreement, the other spouse should raise the availability of the separation agreement as a potential bar in the same proceeding.

Knox v. Remick, 358 N.E.2d 432, 436 (Mass.1976).

B. Waiver of Alimony Should be Enforced by the Family Court

In Gabe's and Connie's case, they entered their Separation Agreement in Massachusetts with their respective attorneys, presumably understanding the background Massachusetts law. Their judgment thus spells out their intentions regarding merger:

> The parties are ordered to comply with the terms of a Stipulation and Addendum thereto dated September 19, 1984 filed and incorporated in this Judgment, notwithstanding the foregoing, said Stipulation and Addendum shall survive and have independent legal significance.

JUDGMENT OF SEPARATE SUPPORT ¶ 9, *Appx.* at 22.

The court below made several errors.

First, Gabe and Connie made clear that the Separation Agreement "shall survive," that it has "independent legal significance," and that it can therefore be enforced outside of a divorce proceeding. Thus the court erred in essentially considering it surplusage.

Second, the Separation Agreement itself waives alimony and must be given consideration. Thus the court erred in not following its terms.

Third, the parties' judgment recites that the Separation Agreement "shall survive and have independent legal significance," indicating a technical level of Massachusetts procedural knowledge such that the parties understood the Agreement would likely be resolved in a single proceeding as the Supreme Judicial Court prefers.

Thus, the court below erred by effectively creating a new cause of action that will consume both private and judicial resources, and force the parties to litigate anew rather than efficiently resolving their dispute. For these reasons, this Court should remand with instructions for the court to abide by the parties' deal expressed in their Separation Agreement.

III. Requesting Alimony Now is Estopped by Laches

Connie waited 23 years before requesting alimony. Even if she were not precluded from making the request by the language of the Separation Agreement, she waited too long, and should therefore be estopped from making the request now.

> Laches is an equitable doctrine that bars litigation when a potential plaintiff has slept on his rights. Laches … is not a mere matter of time, but is principally a question of the inequity of permitting the claim to be enforced – an inequity founded on some change in the conditions or relations of the property or the parties involved.… In determining whether the doctrine should apply to bar a suit, the court should consider the knowledge of the plaintiffs, the conduct of the defendants, the interests to be vindicated, and the resulting prejudice.

Premier Capital, LLC v. Skaltsis, 155 N.H. 110, 118 (2007). Connie's did not proffer an excuse for her delay, and Gabe was prejudiced by not being able to arrange his affairs to take into account a payment of alimony.

In any event, courts are suspicious of requests for alimony after long separations. *See e.g., Pendleton v.. Pendleton*, 496 N.W.2d 499 (Neb. 1993) (alimony denied where 30 year marriage and 15 year separation); *Calandra v. Calandra*, 757 N.Y.S.2d 574 (N.Y.A.D. 2003) (alimony denied where long marriage and 17 year separation).

IV. Alimony Award is a Windfall

Pursuant to New Hampshire's alimony statute, alimony may be awarded provided that the court finds all three of the following:

- a party "lacks sufficient income, property, or both … to provide for such party's reasonable needs, taking into account the style of living to which the parties have become accustomed during the marriage"; and
- "The party from whom alimony is sought is able to meet reasonable needs while meeting those of the party seeking alimony, taking into account the style of living to which the parties have become accustomed during the marriage"; and
- "The party in need is unable to be self-supporting through appropriate employment at a standard of living that meets reasonable needs or is allocated parental rights and responsibilities … for a child of the parties whose condition or circumstances make it appropriate that the parent not seek employment outside the home."

RSA 458:19, I. "Need" is not synonymous with bare necessity, but takes into account the standard of living during marriage and the financial status of both parties. *Murphy v. Murphy*, 116 N.H. 672 (1976).

Connie did well in the 1984 bargain. She got the Waltham house she wanted to live in, which is now worth almost $400,000, and she got income-producing investments.

Currently she retains significant assets. Connie is now 79 years old. The Waltham house is capable of being transformed into money for living expenses through a reverse mortgage which will allow her to continue living there. Her son lives there and pays rent, and Connie gets social security benefits. Her financial affidavit shows she has investments of over $200,000, and a retirement account worth $55,000. She is in no danger of losing her lifestyle or becoming a public charge.

The court noted that unlike Gabe, on her income Connie cannot travel, fix up her house,

and buy "treats for the parties' children and grandchildren." DECREE, *Appx.* at 40,44. It thus found that "equity cries out" for the award. DECREE, *Appx.* at 40, 45. These considerations, however, are not statutorily allowable factors. The $4,000 monthly award of alimony does not merely allow Connie to *maintain* a "style of living to which the [she] ha[s] become accustomed during the marriage," RSA 458:19, I(a), but vastly *increases* it.

In their 23 years apart, Gabe frugally lived in a small apartment. He started with the exact same amount of assets that Connie began with, but turned it into something greater. His wealth is unrelated to any effort on Connie's part. She did not support him, entertain his clients, help him buy and sell real estate, or take part in the management of property. The youngest of their children reached the age of majority three years before the Separation Agreement. Connie did not bear any burdens of Gabe's efforts. Awarding Connie alimony – especially the amount of $4,000 per month – is a windfall to which she has no claim. *See Calderwood v. Calderwood*, 114 N.H. 651 (1974) ("The purpose of an order for support is not to provide … a life-time profit-sharing plan for the wife.").

The court below committed legal error by basing alimony on factors not contemplated by the statute, and inappropriately exercised its discretion in making such a large award.

CONCLUSION

Based on the foregoing Gabriello Gabrielli respectfully requests this honorable Court to reverse the alimony award in its entirety.

Respectfully submitted,

Gabriello Gabrielli
By his Attorney,

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Dated: June 16, 2008

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Gabriello Gabrielli requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case are novel in this jurisdiction.

I hereby certify that on June 16, 2008, copies of the foregoing will be forwarded to David W. Sayward, Esq.

Dated: June 16, 2008

Joshua L. Gordon, Esq.

APPENDIX