State of New Hampshire
Supreme Court

NO. 2008-0106

2008 TERM

AUGUST SESSION

In the Matter of

Gabriello Gabrielli

&

Concetta Gabrielli

RULE 7 APPEAL OF FINAL DECISION OF
PORTSMOUTH FAMILY DIVISION COURT

REPLY BRIEF OF PETITIONER, GABRIELLO GABRIELLI

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ARGUMENT

I. Waiver of Alimony Thoroughly Litigated and Proved in Trial Court

In her brief Connie claims that Gabe cannot assert that the stipulation waived alimony, because it had to be specifically plead. *Connie's Brf.* at 8. For support she cites treatises, but no controlling law. New Hampshire has a long tradition of liberal pleading requirements. *See e.g., Porter v. City of Manchester*, 151 N.H. 30, 43 (2004) ("[W]e take a liberal approach to the technical requirements of pleadings."); *In re Proposed New Hampshire Rules of Civil Procedure,* 139 N.H. 512, 516 (1995). As Connie has advanced no rationale for a new pleading requirement, and none can be easily discerned, declining to reach the merits on technical pleading grounds would not advance the cause of justice in this case nor in the future.

Nonetheless, Gabe plead waiver. Long before trial he filed a pleading in which he raised the issue. MOTION TO ENFORCE STIPULATION (July 17, 2007), *Appx. to Reply* at 12. The Motion quoted in full paragraph 12 of the Stipulation which provided that he and Connie "waive[] any and all statutory rights as husband or wife in the estate of the other," *id.* at ¶ 4, noted that Connie had requested alimony in the current divorce case, *id.* at ¶ 5, and concluded that "this request i[s] contrary to parties' agreement that has been in effect for 23 years." *Id.* at ¶6.

Even if Gabe's pleading is deficient, it is clear by Connie's own pleading that she was aware Gabe asserted waiver of alimony. *Williams v. Delta Grocery & Cotton Co.*, 132 So. 732 (Miss. 1931) (no pleading requirement when waiver appears in adverse party's pleadings); *Digen v. Schultz*, 210 P. 1057 (Mont. 1922) (same). In her objection to Gabe's Motion, Connie wrote:

> In Petitioner's Motion to Enforce Stipulation, he argues that the parties' September 1984 Stipulation … resolved finally the issue of alimony. However, that Stipulation nowhere mentions the word alimony or spousal support or any other similar concept. Consequently, the issue of alimony was not determined in the 1984 agreement. If Petitioner had wished to resolve the issue of alimony by

> agreement, he could have done so. Having failed to do so in the proffered Stipulation, he cannot rely upon it now to foreclose Respondent's rights to seek alimony. The language of paragraph 12 of the agreement cannot be interpreted to be a waiver or a resolution of the issue of alimony. The paragraph is intended to make clear that the parties have separate property and are to deal with their property as if unmarried. The waiver of statutory rights as husband and wife in the estate of the other clearly applies to waiver of a spouse's statutory share of an estate upon the death of the other spouse. … Since that Stipulation does not in any way deal with the issue of alimony, it does not foreclose a request for same.

OBJECTION TO MOTION TO ENFORCE STIPULATION ¶¶ 2-3 (July 26, 2007), *Appx. to Reply* at 13. The Objection cited Gabe's motion, set forth his position that the Stipulation waived alimony, and rebutted his position with the same arguments Connie made both below and here. She cannot now credibly maintain that Gabe did not plead waiver or she was unaware of the issue.

On the same day as trial, Connie filed a trial memorandum. Although too voluminous to quote in full, in it she cited paragraph 12 of the Stipulation, restated Gabe's position that it contains an alimony waiver, and set forth her argument against that position. TRIAL MEMORANDUM (Oct. 31, 2007), *Appx. to Reply* at 15, 17-18.

The issue repeatedly arose during trial. At the beginning of trial Connie's attorney made reference to his trial memorandum, *Trn.* at 5, and set forth her position that because "alimony is not mentioned in there [it] was not foreclosed by that judgment, [and] therefore remains an issue." *Trn.* at 6. Gabe's attorney agreed that was the only remaining issue for trial. *Trn.* at 6.

During his testimony, counsel read to Gabe paragraph 12 of the Stipulation, and Gabe provided his understanding of it, which was that in 1984 he and Connie went their "separate ways," and that "at no time in the future would [he] have to pay her any money." *Trn.* at 10.

At the end of trial the court heard counsels' arguments regarding the construction of paragraph 12. Connie's lawyer argued "for whatever reason, these attorneys never provided for alimony in 1984. They could have. … One would think that they would." *Trn.* at 95-96. "They

could have provided for alimony and they didn't." *Trn*. at 99. Gabe's lawyer rejoined, "our position still is that they made their deal twenty-three years ago, and that brought down the curtain." *Trn*. at 93. Gabe argued that his no-alimony construction of the Stipulation was reasonable in light of Connie's subsequent behavior: "The paragraph in that stipulation talks about as if we live singly, and her testimony was that during that period of time from 1984, she never went back to Court. She never asked him. She never came with her hand out. She dealt with it in probably a very good way." *Trn*. at 94. Gabe's attorney told the court, "You've got to decide, is she entitled to alimony, and if so, what is a reasonable amount if she's entitled to any." *Trn*. at 94, *see also Trn*. at 102.

The issue was further litigated by both parties post-trial. In a request for finding of fact (which was denied), Gabe stated: "That this request for alimony i[s] contrary to parties' agreement that has been in effect for 23 years." REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW ¶ 6 (Oct. 31, 2007), *Appx. to Opening Brf*. at 30. Relatedly, in a request for finding of fact (which was granted), Connie stated: "In the parties' Separate Support stipulation, there is no mention of alimony." RESPONDENT'S REQUESTS FOR FINDINGS OF FACT ¶ 4 (Oct. 31, 2007), *Appx. to Opening Brf*. at 31.

Finally, the lower court itself ruled on the issue of whether alimony had been waived by the parties' Stipulation, belying any claim now that it wasn't presented below. The court's decree provides that "[t]he parties agree that the stipulation is a binding property settlement.… They disagree, however, about whether the stipulation prevents the court from awarding alimony to the Respondent." DECREE OF DIVORCE (Dec. 10, 2007), *Appx. to Opening Brf*. at 41. The court set forth each party's position on the matter in lettered paragraphs. Purporting to rely on *Norberg v. Norberg*, 135 N.H. 620 (1992), it found "that the stipulation's failure to refer to alimony does not

constitute a waiver of the Respondent to later request it." DECREE, *Appx. to Opening Brf.* at 42.

In her brief Connie asserts that "[n]owhere in the record is there any indication in written submissions or testimony that Gabe claimed there had been a waiver of alimony," *Connie's Brf.* at 8-9; alleges that "Gabe did not argue before the trial court that the Stipulation's waiver clause effectuated an alimony waiver," *Id.* at 10; and suggests that "[t]here was no need for Concetta to object to waiver testimony or argument at trial on the basis of Gabe's failure to plead waiver, because Gabe did not argue waiver of alimony before the trial court." *Id.* at 8. These statements do not comport with the record.

Given that waiver of alimony was thoroughly litigated, Connie had plenty of opportunity to raise any issue regarding how it might have been plead differently than it was. She did not. Therefore the issue of whether waiver of alimony was properly plead was itself waived.

Likewise, the central issue – whether paragraph 12 of the Stipulation waived alimony – was squarely before the trial court, and is thus ripe for review. In Massachusetts, a separation agreement can waive alimony by conclusory language, and without being explicitly enumerated. *See e.g., Cappello v. Cappello*, 501 N.E.2d 535, 537 (Mass.App. 1986) (alimony waived by phrase: "parties are desirous of settling their affairs"); *see also, Gianola v. Continental Cas. Co.*, 149 N.H. 213, 214 (2003) (waiver by "language indicating … intent to forego a known right, or conduct from which it may be inferred"). Here, the explicit language of the Stipulation waived "any and all statutory rights as husband and wife in the estate of the other," which necessarily includes alimony, and Connie's subsequent conduct was in accord with that waiver. This Court should thus reverse the order for alimony erroneously awarded below.

II. Equitable Estoppel Argument Hinges on One Ambiguous (and Erroneous) Hearsay Description by One Attorney About What Another Attorney Said

In several respects Connie's brief puts great emphasis on the fact that the word "alimony" does not appear in the Stipulation. First, Connie claims, without citation to either law or logic, that because the word "alimony" is not specified in the Stipulation, the phrase "any and all statutory rights of husband or wife in the estate of the other" does not encompass alimony, and that despite the breadth of the waiver, Gabe is barred from seeking it. *Connie's Brf.* at 10.

Second, she elevates an evidentiary squabble during her direct testimony at trial into a suggestion that Gabe had contradicted himself and thus waived the legal core of his claim, despite him having raised it repeatedly before, during, and after trial. In the context of Connie testifying about having less money than she expected from a variety of assets settled by the Stipulation, *Trn.* at 33-37, she was asked about her expectations regarding alimony.

> Q: (by Atty Sayward): [I]in the course of this separate support and maintenance proceeding, did you ever discuss or hear about alimony?
>
> A: (by Connie): No.
>
> MR. MCCARTHY: Objection, Your Honor. The document speaks for itself. Whatever the document says is what they talked about and agreed upon.
>
> MR. SAYWARD: Well –
>
> MR. MCCARTHY: And she was represented by counsel, and, in fact, they're the ones that prepared a lot of the handwritten stuff.
>
> MR. SAYWARD: Well, Your Honor, as long as it's stipulated by the other side that alimony was never discussed or mentioned in the agreement, then I have no further questions.
>
> MR. MCCARTHY: Your Honor, we had – in a prior hearing, Master Fishman asked Attorney Langone …, who was my client's counsel, there's nothing in here about alimony? He says, that's right. There is nothing. That word is not used. And that representation that he made was that in the commonwealth, you can't waive something that might happen in the future, Okay?
> …

MR. SAYWARD: *I object to what might have been said at the prior hearing,* but –

MR. MCCARTHY: But that point being is there – if you read that, no. There's no use of that word in there about alimony.

THE COURT: Okay.

MR. MCCARTHY: We've acknowledged that.
…

MR. SAYWARD: As long as it's stipulated to that there's no – that my client did not make a knowing and intelligent waiver of alimony, then I have no problem. If that's objected to, I have to ask her questions.
…

THE COURT: I don't think Attorney McCarthy was, unless I'm hearing it wrong, is stipulating that there was a waiver of …. I think what you're asking me to accept is that the stipulation does not say the word, alimony.

MR. MCCARTHY: Doesn't use the word alimony.

THE COURT: Okay.

MR. MCCARTHY: And on direct examination, I read Paragraph 12 to my client, which was at least what they agreed to in 1984, whatever that means.

THE COURT: Okay.

MR. MCCARTHY: But you – the word was never used and that came up at the hearing back in June

THE COURT: Okay.

MR. MCCARTHY: It's – you know, it's nowhere in there. That word is nowhere in there, so.

MR. SAYWARD: Okay. That's fine.

Trn. 37-39 (emphasis added).

It is apparent from the interchange that there was a previous hearing, the transcript of which Connie did not provide to this Court, which included the testimony of the attorney who signed the Stipulation on Gabe's behalf. *See* STIPULATION, *Appx. to Opening Brf.* at 25. That

attorney made representations about Massachusetts law, the nature of which are not altogether clear from Attorney McCarthy's brief description.

That ambiguous hearsay description by one attorney about what another attorney said about the supposed content of another State's law, is the lone basis on which Connie now suggests equitable estoppel should rest. Beyond that, there is nothing in the record to suggest that below Gabe made anything other than the argument he presented in his opening brief to this Court. Rather, he consistently and repeatedly made the waiver argument throughout pre-trial motion litigation, at trial, after trial, and on appeal.

Moreover, even if whatever transacted at the earlier hearing were unambiguous and reliably related in the record here, during the interchange Attorney Sayward made clear he "object[s] to what might have been said at the prior hearing." *Trn.* at 38. Thus it is hardly equitable now for Connie to use the squabble as the lynchpin of her appellate argument.

Finally, even if what Gabe's New Hampshire Attorney said is that his Massachusetts Attorney said that alimony is not waive-able in Massachusetts, that would be wrong. Alimony is clearly waive-able in the Commonwealth. *See e.g., Krapf v. Krapf*, 786 N.E.2d 318 (Mass. 2003) (alimony waived in exchange for military pension); *Cappello*, 501 N.E.2d at 537.

III. Connie is Presumed to Know the Contents of Her Stipulation

Connie says in her brief she was unaware that payments on the various notes contained in the property division portion of the 1984 Stipulation would end on certain dates, did not know that she could have or did negotiate for alimony in 1984, was ignorant of the contents of the Stipulation, and was not told of other matters. *Connie's Brf.* passim. She then argues that it was Gabe's burden to present evidence that she knew of and understood the terms of the Stipulation.

As noted in Gabe's opening brief, the Stipulation was drafted by Connie's lawyer, and

given the scope and depth of the matters in it, that attorney appears to have been learned and capable. Litigants are presumed to know and understand the contents of legal documents that pertain to them. *Piper v. Boston & M.R.R.*, 75 N.H. 435 (1910) ("When a party enters into a written contract, in the absence of fraud or imposition he is conclusively presumed to understand the terms and legal effect of it, and to assent to them."); *Gifford v. Gifford*, 236 N.E.2d 892 (Mass. 1968) ("[I]n the absence of fraud, one who signs a written agreement is bound by its terms whether he reads and understands it or not or whether he can read or not."). Litigants are also bound by their attorney's signature. *Bock v. Lundstrom*, 133 N.H. 161 (1990). As such, Gabe had no burden to present evidence of knowledge or awareness of what was in the Stipulation.

IV. "During the Marriage" Does Not Mean "While Living Together"

New Hampshire's alimony statute provides

> for the payment of alimony to the *party* in need of alimony, ... [if] the court finds that [t]he *party* in need 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*.

RSA 458:19, I(a) (emphasis added). Despite the statutory use of the singular "party in need," Connie argues for some sort of income averaging when considering the lifestyle to which the alimony recipient has become accustomed, and urges that the statutory phrase "during the marriage" should actually mean while "living together." *Connie's Brf.* at 23.

Although the "primary purpose of alimony is rehabilitative," other considerations apply when "the supported spouse … is not capable of establishing her own source of income." *In re Nassar*, 156 N.H. 769, 777 (2008) (quotations omitted). In that case, the "needs" of a supported spouse are "shaped by the parties' lifestyle during the marriage." *Id.* at 778.

Here Gabe and Connie may have lead differing lifestyles during the 23 years of their separation. Connie made no effort to show her lifestyle changed after she separated from Gabe in

1984. And nothing in the statute suggests that *her* needs are to be measured by *his* lifestyle. *See e.g.*, *Kayle v. Kayle*, 132 N.H. 402, 404 (1989) (alimony award upheld where it did not "amount to a general sharing of [husband's] current prosperity"); *Murphy v. Murphy*, 116 N.H. 672, 675 (1976) (alimony should be "sufficient to cover the wife's needs" and "should … take into account the standard of living established during *her* marriage") (emphasis added); *Steneken v. Steneken*, 873 A.2d 501 (N.J. 2005) ("the goal of a proper alimony award is to assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage."). As noted in Gabe's opening brief, the alimony amount increases Connie's lifestyle beyond what she enjoyed during her marriage, awards her a share of Gabe's post-separation prosperity, and creates a windfall not sanctioned by the alimony statute.

V. Sundry Contentions

There are several matters alleged in Connie's brief that warrant a reply.

As noted in Gabe's opening brief, the handwritten portion of the Stipulation appears to be the writing of Connie's attorney. Connie does not dispute the assessment, but points out there is no evidence in the record regarding who wrote it. *Connie's Brf.* at 5. In any event, this Court may take judicial notice of handwriting. *Owen v. State*, 396 N.E.2d 376 (Ind. 1979); *People v. Harter*, 282 N.E.2d 10 (Ill. App. 1972); *Herndon v. State*, 543 S.W.2d 109 (Tex. 1976).

Connie appears to dispute whether Gabe lives in the apartment in Hampton, New Hampshire. *Connie's Brf.* at 5. It is understood from the documents before this Court that he lives at that address. Gabe's FIN. AFFIDAVIT, *Appx. to Opening Brf.* at 58; NOA at 1.

Connie takes issue with the calculated value of Gabe's apartment. *Connie's Brf.* at 5. Although there is no specific mention of value, this Court may judicially notice math operations, 29 AM.JUR. 2D *Evidence* § 109 (2008), and thus can divide $500,000 by 8 units, Gabe's FIN.

AFFIDAVIT, *Appx. to Opening Brf.* at 58, to calculate a presumable value of $62,500.

Connie does not agree with Gabe assessment that he lives "frugally." *Connie's Brf.* at 5. Although he owns a Ferrari, it is an investment – it is 21 years old and has just 12,000 miles. *See* REGISTRATION (Aug. 9, 2007), *Appx. to Reply* at 21; MOTORCARS RECEIPT (Aug. 6, 2007), *Appx. to Reply* at 22 (neither contained in record below). The tuition on Gabe's financial affidavit is for his own schooling. The affidavit shows total monthly expenses which are not lavish and which can be labeled frugal. Gabe's FIN. AFFIDAVIT, *Appx. to Opening Brf* at 59.

Connie takes issue with Gabe's notation that Connie is "in no danger of … becoming a public charge." *Connie's Brf.* at 26, citing *Gabe's Brf.* at 18. It should be noted that becoming a "public charge" is merely a policy exception to the general Massachusetts law that separation agreements are to be specifically enforced:

> Where, however, the Probate Court judge determines that one spouse is or will become a *public charge*, the judge may order support pursuant to his statutory authority, not specifically enforcing the separation agreement to the point where the separation agreement would be used to impose support obligations on the taxpayers of the Commonwealth.

Knox v. Remick, 358 N.E.2d 432, 436 (Mass. 1976) (emphasis added). The issue was touched on in Gabe's brief only to confirm that the policy exception should not apply.

Finally, Connie suggests that laches was not preserved for review. It should be noted that Connie's pre- and post-trial pleadings address laches, belying her claim that it was not litigated below. TRIAL MEMORANDUM (Oct. 31, 2007), *Appx. to Reply* at 18-19; RESPONDENT'S REQUESTS FOR RULINGS OF LAW ¶ 9 (Oct. 31, 2007), *Appx. to Opening Brf.* at 38.

CONCLUSION

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

Respectfully submitted,

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By his Attorney,

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Dated: August 28, 2008

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CERTIFICATION

I hereby certify that on August 28, 2008, copies of the foregoing will be forwarded to David W. Sayward, Esq.

Dated: August 28, 2008

Joshua L. Gordon, Esq.

APPENDIX