State of New Hampshire
Supreme Court

NO. 2013-0765

2014 TERM

MAY SESSION

In the Matter of Christopher Herring and Jennifer Bowen

RULE 7 APPEAL OF FINAL DECISION OF THE
LEBANON FAMILY DIVISION

OPENING BRIEF OF CHRISTOPHER HERRING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Hampshire Cases

Other States' Cases

New Hampshire Statutes

QUESTIONS PRESENTED

I. Did the court err in ignoring in its final decree the significant changes in the parties' circumstances that occurred in the long delay between trial and decree?

Preserved: PETITIONER'S VERIFIED EMERGENCY MOTION TO MODIFY TEMPORARY SUPPORT ORDER AND TEMPORARY DECREE AND REQUEST FOR THE COURT TO TAKE NEW EVIDENCE (Mar. 15, 2013), *Appx*. at 38; PETITIONER'S SUPPLEMENTAL VERIFIED EMERGENCY MOTION TO MODIFY TEMPORARY SUPPORT ORDER AND TEMPORARY DECREE AND REQUEST FOR THE COURT TO TAKE NEW EVIDENCE (May 9, 2013), *Appx*. at 62; PETITIONER'S VERIFIED MOTION TO RECONSIDER, MOTION FOR RELIEF AND JUDGEMENT, AND MOTION TO STAY (Sept. 27, 2013), *Appx*. at 96; ORDER ON RECONSIDERATION AND CLARIFICATION (Oct. 10, 2013), *Appx*. at 110.

II. Did the court err in ordering a property division of 80 percent to 20 percent in this non-fault divorce?

Preserved: PETITIONER'S VERIFIED MOTION TO RECONSIDER, MOTION FOR RELIEF AND JUDGEMENT, AND MOTION TO STAY (Sept. 27, 2013), *Appx*. at 96; ORDER ON RECONSIDERATION AND CLARIFICATION (Oct. 10, 2013), *Appx*. at 110.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Separation and Divorce

Christopher Herring and Jennifer Bowen met in the mid-1990s, lived together for several years, and got married in 1999. *Trial Trn. Day 1* at 15; *Trial Trn. Day 2* at 247, 320; RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ¶¶ 1, 2, 101(a) (Dec. 7, 2012), *Appx*. at 25 (hereinafter cited as RESP. FOF&COL); PETITIONER'S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW ¶ 6 (Dec. 7, 2012), *Appx*. at 8 (hereinafter cited as PETR. FOF&ROL). At the time of trial, Ms. Bowen was 42 years old and Mr. Herring was 41. PETITION FOR DIVORCE (July 15, 2011), *Appx*. at 1; RESP. FOF&COL (Dec. 7, 2012) ¶¶ 4-5.

Both are well-educated. Ms. Bowen holds a masters degree in occupational therapy from Duquesne University, and Mr. Herring has a Ph.D in microbiology from the University of Wisconsin. RESP. FOF&COL (Dec. 7, 2012) ¶¶ 6-7.

They have three girls, at the time of trial ages 4, 7, and 9, who are all happy and healthy. Both Mr. Herring and Ms. Bowen acknowledge the other is a good parent. FINAL REPORT OF GAL (July 7, 2012) (not included in appendix); DIVORCE DECREE (Sept. 15, 2013) at 7, 9-10, *Appx*. at 79; PETR. FOF&ROL ¶ 93; *Trial Trn. Day 2* at 157, 248.

The couple moved to Wisconsin and then California while Mr. Herring was completing his doctoral and post-doctoral work. RESP. FOF&COL ¶ 12. During the period of Mr. Herring's graduate school, he was making between $21,000 and $25,000 per year. PETR. FOF&ROL ¶ 8. Ms. Bowen worked full time as an occupational therapist, earning up to $41,000 per year. RESP. FOF&COL ¶ 99.

They came to New Hampshire in 2006 when Mr. Herring got a salaried position conducting research on cellulose biomass at Mascoma Corporation in Lebanon. PETR. FOF&ROL

¶ 10; RESP. FOF&COL ¶¶ 10, 14. As "Research Scientist 1," he was earning approximately $107,000 annually, DIVORCE DECREE (Sept. 15, 2013) at 3, *Appx*. at 79; *Contempt Hrg*. (Feb. 10, 2012) at 7, 34; *Trial Trn. Day 1* at 14, plus occasional bonuses and stock options, with an unpaid adjunct position at Dartmouth. PETR. FOF&ROL ¶¶ 14-15; RESP. FOF&COL ¶¶ 87, 89; *Contempt Hrg*. (Feb. 10, 2012) at 31, 44, 46. The couple agreed Ms. Bowen would be a stay-at-home mother, and she allowed her professional credentials to expire. RESP. FOF&COL ¶ 11, 36, 101.

Assets of the marriage include a house, retirement accounts, vehicles, modest debt, and savings to pay for the children's college.

In July 2011, despite several years of marital counseling, Mr. Herring moved into the basement room of their home, then to a house nearby, and also filed for divorce. *Trial Trn. Day 1* at 9, 17; *Trial Trn. Day 2* at 173, 204; FINAL REPORT OF GAL (July 7, 2012) (not included in appendix); PETITION FOR DIVORCE (July 15, 2011), *Appx*. at 79.

In November 2011, a temporary order established support obligations and parenting schedules, which contributed to continuing contention and more than 100 pleadings. *See, e.g.*, *Motions Hrg*. (Sept. 13, 2012) (parenting and financial disputes); *Contempt Hrg*. (Feb. 10, 2012); ORDER (on contempt) (Feb. 16, 2012), *Appx*. at 5 (declining contempt, but ordering payment of obligations); ORDER (on contempt) (Sept. 23, 2012), *Appx*. at 7 (finding but suspending contempt); FINAL REPORT OF GAL (July 7, 2012) (not included in appendix) (detailing problems in parenting cooperation).

After separation, Ms. Bowen got re-credentialed and re-licenced, was earning about $27,000 per year at the time of trial, and expects to make more as she ramps up to full time once the youngest child enters school. DIVORCE DECREE at 3-4, *Appx*. at 79; PETR. FOF&ROL ¶¶ 12, 17, 70; RESP. FOF&COL ¶ 91.

II. Trial and Delay

In November and December 2012, the court held a three-day final hearing. Both parties and the GAL testified, and several experts opined on financial and parenting matters. *See*, *Trn. Day 1* passim; *Trn. Day 2* passim; *Trn. Day 3* passim. At the end of trial the court promised a decree as soon as possible. *Trn. Day 3* at 401.

In January 2012, just a month after trial, Mr. Herring was one of 15 people laid off from Mascoma Corporation. Exploiting his Dartmouth connection, he performed a one-time consulting project, but was thereafter unable to find steady employment. In March 2012, upon expiration of his two-month severance, he notified the court of his plight and asked for suspension and re-computation of his obligations. PETITIONER'S VERIFIED EMERGENCY MOTION TO MODIFY TEMPORARY SUPPORT ORDER AND TEMPORARY DECREE AND REQUEST FOR THE COURT TO TAKE NEW EVIDENCE (Mar. 15, 2013), *Appx*. at 38. Ms. Bowen objected, claiming her husband's changed circumstances should have no impact on support or property division. RESPONDENT'S OBJECTION TO PETITIONER'S VERIFIED EMERGENCY MOTION TO MODIFY TEMPORARY SUPPORT ORDER AND TEMPORARY DECREE AND REQUEST TO TAKE NEW EVIDENCE (Mar. 21, 2013), *Appx*. at 43; *see also* PETITIONER'S RESPONSE TO RESPONDENT'S OBJECTION TO PETITIONER'S EMERGENCY MOTION AND REQUEST FOR ORDER ON DISCLOSURE OF CONFIDENTIAL INFORMATION (Apr. 2, 2013), *Appx*. at 47.

Mr. Herring apprised the court that from the loss of his job and subsequent unsuccessful searches for employment, he had learned that given his specialized skills, other jobs in New Hampshire did not match the salary and benefits that he and Ms. Bowen had expected when they moved here for the Mascoma position. He also notified the court that since trial, all three children had begun school, allowing Ms. Bowen to work greater hours. PETITIONER'S VERIFIED

EMERGENCY MOTION TO MODIFY TEMPORARY SUPPORT ORDER AND TEMPORARY DECREE AND REQUEST FOR THE COURT TO TAKE NEW EVIDENCE ¶ 8 (Mar. 15, 2013), *Appx*. at 38; PETITIONER'S SUPPLEMENTAL VERIFIED EMERGENCY MOTION TO MODIFY TEMPORARY SUPPORT ORDER AND TEMPORARY DECREE AND REQUEST FOR THE COURT TO TAKE NEW EVIDENCE (May 9, 2013), *Appx*. at 62; PETITIONER'S VERIFIED MOTION TO RECONSIDER, MOTION FOR RELIEF AND JUDGEMENT, AND MOTION TO STAY ¶ II.10 (Sept. 27, 2013), *Appx*. at 96; PETITIONER'S MOTION TO BRING FORWARD AND TO MODIFY ¶ 8 (Nov. 23, 2013), *Appx*. at 111.

During the divorce decree delay, disputes developed. In March 2012, for example, Mr. Herring and Ms. Bowen could not agree on whether their youngest child would start Kindergarten when she was five years old or six. PETITIONER'S MOTION TO PERMIT KINDERGARTEN REGISTRATION PENDING THE FINAL DIVORCE DECREE (Mar. 15, 2013), *Appx*. at 36. In April, they could not agree on how to keep their house out of foreclosure. EMERGENCY MOTION FOR RELIEF (Apr. 15, 2013), *Appx*. at 51; PETITIONER'S RESPONSE TO EMERGENCY MOTION FOR RELIEF (Apr. 19, 2013), *Appx*. at 53; AFFIDAVIT OF JENNIFER BOWEN (Apr. 25, 2013), *Appx*. at 57; RESPONDENT'S RESPONSE TO PETITIONER'S RESPONSE TO RESPONDENT'S EMERGENCY MOTION FOR RELIEF AND SECOND EMERGENCY MOTION FOR RELIEF (Apr. 25, 2013), *Appx*. at 60; NOTICE OF DECISION (regarding forestalling foreclosure) (May 2, 2013), *Appx*. at 61. In August 2013, nearly nine months after trial, Ms. Bowen re-told the court what had been extensively litigated at trial – that the now two-year-old temporary parenting plan was long past working for the parents or the children – and expressed frustration at the delay in issuing a final decree. REQUEST FOR THE COURT TO ISSUE A PARENTING PLAN (Aug. 22, 2013), *Appx*. at 70. In a rare instance of agreement, Mr. Herring largely joined Ms. Bowen's

sentiments. PETITIONER'S RESPONSE TO RESPONDENT'S REQUEST TO ISSUE A PARENTING PLAN ¶¶ 1, 6(b) (Sept. 6, 2013), *Appx*. at 73 ("All parties agree that the existing temporary order is not working as well for the parties or their children as a proper parenting plan should.").

Both parties requested an opportunity to present refreshed evidence due to the court's delay in issuing a decree, provided discovery and cross-examination were available. PETITIONER'S VERIFIED EMERGENCY MOTION TO MODIFY TEMPORARY SUPPORT ORDER AND TEMPORARY DECREE AND REQUEST FOR THE COURT TO TAKE NEW EVIDENCE (Mar. 15, 2013), *Appx*. at 38; PETITIONER'S SUPPLEMENTAL VERIFIED EMERGENCY MOTION TO MODIFY TEMPORARY SUPPORT ORDER AND TEMPORARY DECREE AND REQUEST FOR THE COURT TO TAKE NEW EVIDENCE (May 9, 2013), *Appx*. at 62; RESPONDENT'S RESPONSE TO PETITIONER'S SUPPLEMENTAL VERIFIED EMERGENCY MOTION TO MODIFY TEMPORARY ORDERS AND REQUEST FOR COURT TO TAKE NEW EVIDENCE (May 16, 2013), *Appx*. at 67.

III. "Somewhat Unequal Division"

In September 2013, nearly ten months after trial, the court announced its decision, "first apologiz[ing] to the parties and their lawyers for the delay in issuing this decree." It granted a divorce on irreconcilable differences, ordered child and spousal support, and established a parenting plan in which Mr. Herring cares for the children nearly half the time. DIVORCE DECREE ¶¶ 1-2.

The court awarded the house, with equity worth $35,000, to Ms. Bowen. DIVORCE DECREE ¶ 15; RESP. FOF&COL ¶ 62. It awarded it to her "for the benefit of the children," DIVORCE DECREE at 5, and because it found "[t]he children are comfortable and happy in their home with [Ms. Bowen] and in their respective school and preschool." RESP. FOF&COL ¶ 104(d). Mr. Herring did not receive any credit for his share of the equity in the home.

The court allowed each to retain their own cars – Ms. Bowen's with a net value of about $12,400 and Mr. Herring's with a net value of about $830. DIVORCE DECREE ¶ 9; PETR. FOF&ROL ¶¶ 44-45. The court awarded each their own retirement accounts – Ms. Bowen's collectively worth about $34,300, DIVORCE DECREE at 4 & ¶ 11B; PETR. FOF&ROL ¶¶ 37, 40, and Mr. Herring's worth about $23,500. DIVORCE DECREE at 4 & ¶ 11A; PETR. FOF&ROL ¶ 41. The court also apportioned the modest debt. DIVORCE DECREE ¶¶ 11, 14; PETR. FOF&ROL ¶ 41.

Overall the court issued a highly unequal split, with Ms. Bowen receiving about 79 percent of the total, and Mr. Herring receiving about 21 percent, as summarized in the chart:

Marital Asset	Jennifer Bowen	Christopher Herring
House	$35,000	
Honda CRV		$16,315
Honda debt		(15,483)
Toyota Sienna	12,370	
Fidelity 401k		23,577
TIAA/CREF retirement	24,615	
TIAA/CREF debt	(3,639)	
Wisconsin Annuity	9,684	
SDCCU debt		(3,500)
TOTAL	**$78,030**	**$20,909**
RESULTING PERCENTAGE SPLIT	**78.8%**	**21.1%**

The court rationalized its "somewhat unequal division" as follows:

> [T]he court finds and holds that a somewhat unequal division of assets in favor of [Ms. Bowen] is equitable in this case given the totality of the evidence. In reaching this conclusion, the court has given the greatest weight to RSA 458:16-a II (b) and (c), particularly the significant disparity in favor of [Mr. Herring] relative to amount and sources of income and opportunities for the future acquisition of capital assets and income over time and each party's reasonable needs and other liabilities. The court has also given appropriate weight to [sic] in its determination to [Ms. Bowen's] need to own or occupy the marital residence for the benefit of the children, the significant disparity between the parties relative to [Ms. Bowen's] contributions to the marriage, particularly with regard to her care and education of the children and management of the home prior to the parties' separation and her indirect contribution in doing so to [Mr. Herring's] education and career opportunities.

DIVORCE DECREE at 5, *Appx*. at 79.

In its decree the court mentioned that shortly after trial Mr. Herring had been laid off, was granted a severance package, was eligible for unemployment benefits, and had performed a temporary consulting job; and that Ms. Bowen had been freed up to work more. DIVORCE

DECREE at 3, 11. But it explicitly disregarded consideration of these facts. DIVORCE DECREE ¶ 21 ("This decree is issued based upon the state of the credible evidence *at the time of trial*.") (emphasis added). Instead, the court suggested the parties "remain free to seek post-decree relief." DIVORCE DECREE ¶ 21.

IV. Court Denied Request to Consider Post-Trial Change in Circumstances

Mr. Herring filed a motion to reconsider. He argued that the court ignored the post-trial changes in circumstances for purposes of support and property division. More particularly, he noted the court failed to recognize both Mr. Herring's diminution of income due to the loss of his job, and Ms. Bowen's increased earning potential now that the children were all attending school. PETITIONER'S VERIFIED MOTION TO RECONSIDER, MOTION FOR RELIEF AND JUDGEMENT, AND MOTION TO STAY (Sept. 27, 2013), *Appx*. at 96. Ms. Bowen objected on technical grounds. RESPONDENT'S OBJECTION TO PETITIONER'S MOTION TO RECONSIDER, MOTION FOR RELIEF AND JUDGEMENT AND MOTION TO STAY (Oct. 3, 2013), *Appx*. at 107.

The court denied Mr. Herring's suggestion to take into account changes that had occurred after the trial but before issuance of the decree:

> In issuing a final decree, the court may only consider information admitted into evidence at trial. While circumstances and matters which have transpired subsequent to the final hearing could be admissible evidence in an action to bring cause forward, such information cannot be presented or considered by the court at this juncture.

ORDER ON RECONSIDERATION AND CLARIFICATION (Oct. 10, 2013), *Appx*. at 110. This appeal was taken from that order.

Thereafter Mr. Herring filed a motion to bring forward and modify, noting again the change in both parties' circumstances, to which Ms. Bowen objected. PETITIONER'S MOTION TO BRING FORWARD AND TO MODIFY (Nov. 23, 2013), *Appx*. at 111; RESPONDENT'S RESPONSE TO PETITIONER'S MOTION TO BRING FORWARD AND MODIFY (Dec. 5, 2013), *Appx*. at 116. A hearing on the motion is scheduled for July 2014, ORDER (Mar. 31, 2014) (not included in appendix), at which financial information will likely show nearly equalized income between the parties.

SUMMARY OF ARGUMENT

Mr. Herring first argues it was reversible error for the family court to reject the parties' suggestion that it consider Mr. Herring's loss of job and Ms. Bowen's re-employment which occurred in the long interregnum between trial and decree. He then notes the disproportionate property division is so lopsided that it is tantamount to a fault-based divorce, and thus dissolves the important policy rationale for fault divorces, and was incorrect as a matter of law

ARGUMENT

I. By Ignoring Changes in Circumstances During the Long Period Between Trial and Decision, the Decree was Already Moot When Issued

After trial, but before the decree, the circumstances of the parties had already significantly changed. First, Mr. Herring no longer had a high-paying job and was unable to support himself and his family at the level the trial evidence suggested. Second, the restrictions on Ms. Bowen's working time due to young children had been eliminated once the youngest had entered school. By the time the decree was issued nearly ten months after trial, the parties' financial circumstances were far more equal than at the time of trial, and the decree was therefore already almost moot. The court's refusal to entertain evidence of current circumstances, and to disregard intervening events as mere modification, impoverished Mr. Herring because he was forced to continue paying support obligations for nearly a year at a rate that assumed an income he no longer had.

While trial courts have discretion to determine when a decree may be issued and entered, *Dennis v. Vasquez*, 72 P.3d 135, 137 (Utah 2003) ("judgment on the merits may be made at any stage of the litigation"), courts have a duty to act within a reasonable time. *See, e.g., Waterman v. United Caribbean, Inc.*, 577 A.2d 1047 (Conn. 1990) (consent to late judgment); *Friend v. Borrenpohl*, 161 N.E. 110, 112 (Ill. 1928) ("It is the duty of a … judge to decide cases promptly and within a reasonable time after submission under all the circumstances surrounding the work of the court."); *Moroney v. Tannehill*, 215 P. 938 (Okla. 1921). Moreover, discretion is limited by materially changed circumstances. *Tuttle v. Tuttle*, 89 N.H. 219 (1938) (death of a divorce party).

By insisting that changes in circumstances occurring pre-decree should wait until a modification proceeding, the court ignored the significant differences between procuring an

initial decree and litigating its modification.

First, a property division can almost never be modified. *McSherry v. McSherry*, 135 N.H. 451 (1992) (decree regarding property distribution may be reformed only for fraud, undue influence, deceit, misrepresentation, or mutual mistake; financial hardship alone insufficient); *see also*, *Spellman v. Spellman*, 136 N.H. 235 (1992) (late discovery); *Sommers v.Sommers*, 143 N.H. 686 (1999) (lack of mutuality); *Grabowski v. Grabowski*, 120 N.H. 745 (1980) (mutual mistake).

Second, although spousal and child support are inherently modifiable, RSA 458:14 (alimony); *Laflamme v. Laflamme*, 144 N.H. 524, 527 (1999) ("alimony award is always modifiable"); RSA 458-C:7 (child support modification); *In re Stall*, 153 N.H. 163 (2005) (modification of child support), modification imposes specific burdens and heightened proofs not present in an initial determination. While it is traditional that the divorce petitioner goes first in putting on evidence regarding support, the petitioner does not carry any burden of proof. Rather, for alimony, the court's determination is whether there is need and ability to pay, RSA 458:19, and for child support there is a presumption that both parents will pay. RSA 458-C:1.

To modify alimony, however, the "*party requesting an alimony modification* must show that a substantial change in circumstances has arisen since the initial award, making the current alimony amount either improper or unfair." *In re Canaway*, 161 N.H. 286, 289 (2010) (emphasis added, quotations omitted). Likewise, to modify child support,"the *moving party* must show a substantial change of circumstances of the parties that makes continuing the original order improper and unfair." *In re Duquette*, 159 N.H. 81, 86 (2009) (emphasis added). Thus unlike the initial decree, in order to obtain modification, the burden is on the moving party – not equally shared – and the movant must prove a "substantial change."

A third difference between initial determination and subsequent modification is the appellate rights of the parties; while initial determinations are mandatory appeals, modifications are discretionary. SUP.CT.R. 3(9); *see In re Miller*, 161 N.H. 630, 644-45 (2011).

The family court here ruled that any post-trial change in circumstances would be determined in a modification proceeding. But the court did more than merely move the time at which property and support issues would be addressed. Rather, the court purposely blinded itself to current reality, lessened the relevance of the current decree from the outset, and imposed on Mr. Herring substantively different burdens and standards.

Although family courts often adjudicate rights in dynamic situations, and consequently there is always some possibility of up-to-the-minute inexactitude, here the changes were directly material to the decree. *State v. Etienne*, 163 N.H. 57, 91 (2011) (evidence is material if it would have affected the verdict); *Macie v. Helms*, 156 N.H. 222, 224 (2007) ("An issue of fact is 'material' for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law."). Mr. Herring's changed circumstances directly impacted how much money he had to support himself and his family. Ms. Bowen's changed circumstances directly impacted how much money she needed for those same things. It was thus error to further delay recognition of these already-known changes for a someday modification.

Insofar as the court could not issue a timely decree, it was obligated to hold a new hearing and consider updated evidence. It should have determined the nature and extent to which the trial evidence was no longer pertinent, learned Mr. Herring was earning significantly less than his former salary, learned Ms. Bowen was earning or capable of earning significantly more, and generally ensured its order reflect current facts. *Cf. In re Aube*, 158 N.H. 459 (2009) (cure of awarding statutory interest not applicable where issues do not concern mere time-value

of money); *In re Nyhan*, 147 N.H. 768 (2002) (same). Although not specifically addressed here, the court might have also taken additional evidence regarding whether the parenting plan it imposed – designed by the GAL before the youngest child had entered school – still mirrored the children's development a year later.

Accordingly, this court should reverse and remand with instructions to take evidence to ensure that the initial decree maintains relevance and equity regarding property division, child support, and alimony.

II. 80% - 20% Property Division in No-Fault Divorce is Unlawfully Unequal

In New Hampshire, divorce courts must order an equitable division of property. An equal division is presumed equitable, and an unequal division may be awarded upon consideration of statutory factors. RSA 458:16-a, II.[1] Although this court has repeatedly noted that an equitable division does necessarily not mean equal, *In re Valence*, 147 N.H. 663, 666 (2002) ("the court may determine that an equal division would not be appropriate or equitable");

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[1]RSA 458:16-a:

II. When a dissolution of a marriage is decreed, the court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution of property, unless the court establishes a trust fund under RSA 458:20 or unless the court decides that an equal division would not be appropriate or equitable after considering one or more of the following factors:

(a) The duration of the marriage.
(b) The age, health, social or economic status, occupation, vocational skills, employability, separate property, amount and sources of income, needs and liabilities of each party.
(c) The opportunity of each party for future acquisition of capital assets and income.
(d) The ability of the custodial parent, if any, to engage in gainful employment without substantially interfering with the interests of any minor children in the custody of said party.
(e) The need of the custodial parent, if any, to occupy or own the marital residence and to use or own its household effects.
(f) The actions of either party during the marriage which contributed to the growth or diminution in value of property owned by either or both of the parties.
(g) Significant disparity between the parties in relation to contributions to the marriage, including contributions to the care and education of the children and the care and management of the home.
(h) Any direct or indirect contribution made by one party to help educate or develop the career or employability of the other party and any interruption of either party's educational or personal career opportunities for the benefit of the other's career or for the benefit of the parties' marriage or children.
(I) The expectation of pension or retirement rights acquired prior to or during the marriage.
(j) The tax consequences for each party.
(k) The value of property that is allocated by a valid prenuptial contract made in good faith by the parties.
(l) The fault of either party as specified in RSA 458:7 if said fault caused the breakdown of the marriage and:
    (1) Caused substantial physical or mental pain and suffering; or
    (2) Resulted in substantial economic loss to the marital estate or the injured party.
(m) The value of any property acquired prior to the marriage and property acquired in exchange for property acquired prior to the marriage.
(n) The value of any property acquired by gift, devise, or descent.
(o) Any other factor that the court deems relevant.

…

IV. The court shall specify written reasons for the division of property which it orders.

Holliday v. Holliday, 139 N.H. 213 (1994); *Hanson v. Hanson*, 121 N.H. 719, 720 (1981) ("A master is not obliged to divide property equally, but must apportion the estate according to the equities of the circumstances."), an unequal division must take into account respective circumstances. *In re Martel*, 157 N.H. 53, 59 (2008).

This court has approved an unequal division of assents in the context of no-fault divorce of as much as 60 percent to 40 percent. *See, e.g.*, *In re Chamberlin*, 155 N.H. 13, 14 (2007) (57% to 43%); *In re Maynard*, 155 N.H. 630, 633 (2007) (60% to 40%); *In re Harvey*, 153 N.H. 425, 428 (2006) (55% to 45%). Mr. Herring's and Ms. Bowen's case is not an outlier in any regard. Rather, it is like *Harvey*, where this Court approved a 55 percent to 45 percent division in a no-fault divorce based on "the length of the marriage, [wife's] role as the primary caretaker of the family throughout the marriage, her role post-divorce as primary custodial parent, and her relatively modest earning capacity and ability to acquire capital assets."

Indeed, the greatest known property division disparity in this Court's jurisprudence appears in *In re Letendre*, 149 N.H. 31 (2002), where this Court approved "a sixty-eight/thirty-two percent apportionment in [wife's] favor." But that was a *fault* divorce, where the court considered the husband's far greater wealth, the wife's lack of education and employable skills, and her health condition that made future employment even less likely. *See also In re Valence*, 147 N.H. 663, 665 (2002) (fault-based divorce upholding 65%-35% split).

Here the court created a larger disparity than even *Letendre*, essentially allocating the property 80 percent to Ms. Bowen and 20 percent to Mr. Herring. And this is a no-fault divorce where both parties are educated and employable. Even if the house were not considered – an unreasonable assumption given Mr. Herring's contribution to its equity and his equal need to provide living and sleeping space for the three children when they are with him nearly half the

time – the split would be almost the same as fault-based *Letendre*.

While some disproportionality may be justified on the trial evidence, its breadth is too wide here to be a sustainable exercise of discretion. If this Court were to approve such a lopsided disparity, it would render meaningless the financial distinction between fault and no-fault divorces, *Murphy v. Murphy*, 116 N.H. 672, 673-74 (1976), undermine the public policy favoring greater disproportionality when there is fault, *Kibbee v. Kibbee*, 99 N.H. 215, 216-17 (1954), and allow an inequitable and therefore unlawful result in this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the decree and remand for consideration of post-trial facts as an initial determination, and should reverse the disproportionate property division.

Respectfully submitted,

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Dated: May 26, 2014

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Christopher Herring requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues in this matter are novel, and are of interest to divorce practitioners because of occasional delays in issuance of divorce decrees by the family courts throughout the State.

I hereby certify that the decision being appealed is addended to this brief. I further certify that on May 26, 2014, copies of the foregoing will be forwarded to Jennifer Bowen in care of her family-court attorney, James L. Mulligan, Esq., Simpson & Mulligan, P.L.L.C., Wheelock Office Park, Suite S-1, 31 Old Etna Road, Lebanon, New Hampshire 03766; and to Sara Ecker, GAL, P.O. Box 1133, Norwich, VT 05055.

Dated: May 26, 2014

Joshua L. Gordon, Esq.

ADDENDUM