State of New Hampshire
Supreme Court

NO. 2004-0288

2004 TERM

OCTOBER SESSION

IN THE MATTER OF

TATJANA A. DONOVAN
and
ROBERT F. DONOVAN

REPLY BRIEF OF ROBERT DONOVAN

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I. Designation as "Obligee" Rather than "Obligor" Does Not Alter Court's Authority to Determine Underemployment

Tatjana appealed the lower court's order concluding that she was voluntarily underemployed. In his brief, Robert cited a number of cases finding a person was voluntarily underemployed in a variety of circumstances. In her Answering Brief, Tatjana seeks to distinguish those cases on the grounds that each of them involve a finding of underemployment by the *obligor*. Because, she argues, she is the *obligee*, those cases hold no sway here.

For the purposes of child support, this Court has made clear that the designation as either "obligor" or "obligee," other than identifying who writes the statutorily-mandated check, is not legally significant. *Wheaton-Dunberger v. Dunberger*, 137 N.H. 504, 509 (1993).

Thus, Tatjana's designation as "obligee" rather than "obligor" does not alter the court's authority to find that she is underemployed.

II. New Statute Specifically Barring Courts from Requiring Payment for College Trumps Older Statute Generally Requiring Decrees to Include Provisions in Relation to Education

In her answering brief, Tatjana argues that the provision stipulating that Robert should pay for college expenses should remain intact even in the face of recent legislation taking away courts' power to order such payments.

It is important to note that she has *not* argued that the new statutes does not apply to existing orders or stipulations. Given the language of RSA 458:17, XI-a – "[n]o child support order shall require" – such an argument would have little merit.

It is obviously this Court's long-held opinion that a college education is important and that every child should have post-secondary educational opportunities. *See* Carolyn Sargelis & Cheryl Steinberg, *Empty Nest – Will Post Majority Educational Support Ever End in New Hampshire?*, 33 N.H. B.J. 455 (1992). The Legislature, however, apparently either does not agree, or at least believes that divorced parents cannot be required to pay for it. RSA 458:17, XI-a.

Tatjana seeks to avoid the statute by claiming there is some ambiguity caused by it and other older statutes which she cites. The claim, however, is based on a misstatement of the law of statutory construction. It is settled in New Hampshire that when statutes appear to conflict, newer more specific legislation trumps older more general law. *See e.g., Petition of Dunlap*, 134 N.H. 533, 548 (1991) ("'When a conflict exists between two statutes, the later statute will control, especially when the later statute deals with a subject in a specific way and the earlier enactment treats that subject in a general fashion.'") (quoting *Board of Selectmen v. Planning Board*, 118 N.H. 150, 152 (1978)). *See also, Appeal of Public Service Company of New Hampshire*, 130 N.H. 265 (1988) (later statute controls); *In re Laurie B.*, 125 N.H. 784 (1984)

(more specific statute controls); *State v. Bell*, 125 N.H. 425 (1984) (more specific statute controls); *In re Robert C.*, 120 N.H. 221 (1980) (more specific statute controls).

Tatjana is correct that the an older statute generally directs courts upon divorce to "make such further decree in relation to the support, education, and custody of the children." RSA 458:17. But RSA 458:17, XI-a, which provides that "[n]o child support order shall require a parent to contribute to an adult child's college expenses," is brand-new and speaks directly to the issue here. Accordingly, the court lacked authority to require Robert to pay for college.

III. CPI Escalator Violates New Hampshire Law

Robert has argued that the escalation clause violates RSA458-C:7 because the statute provides that in order for a child support order to be modified, either of two conditions must be met – the passage of three years, or a substantial change in circumstances. Because the automatic escalator operates annually, it modifies the order without satisfying either conditions. He also argued that because the escalator is based on the CPI, it tracks inflation rather than his income, as New Hampshire's "income shares" statute requires. RSA 458-C:3, II(a); *In the Matter of Plaisted & Plaisted,* 149 N.H. 522, 524 (2003).

In her brief, Tatjana's response is a citation to *Heinze v. Heinze,* 122 N.H. 358 (1982), and to several out-of-state cases approving CPI escalators. None of the other-jurisdiction cases are based on support statutes that are comparable to New Hampshire's. *Heinze* was decided in 1982, before the enactment of both the "income shares" model (circa 1988) and the two-pronged modification statute (circa 1991). Despite the convenience and attractive simplicity of CPI escalators, using them to automatically adjust child support orders violates New Hampshire law.

CONCLUSION

Based on the foregoing, Robert Donovan respectfully requests this honorable Court to leave in place the court's conclusion that Tatjana Donovan is underemployed; but remand for a reformation of the parties' stipulation concerning college costs, extracurricular expenses, and the automatic annual CPI escalator.

Respectfully submitted,

Robert Donovan,
By his Attorney,

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Dated: October 8, 2004

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CERTIFICATION

I hereby certify that on October 8, 2004 copies of the foregoing will be forwarded to Bronwyn Asplund-Walsh, Esq.

Dated: October 8, 2004

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