State of New Hampshire Supreme Court

NO. 2014-0615

2015 TERM

JUNE SESSION

In the Matter of

Robert P. Stack, Jr. and Kerry Stack

RULE 7 APPEAL OF FINAL DECISION OF THE
DERRY FAMILY DIVISION

REPLY BRIEF OF ROBERT P. STACK, Jr.

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REPLY ARGUMENT

I. Cafeteria Employee Benefit Plan is "Income" for Purposes of Calculating Child Support

In her Memorandum, Kerry ignores the feature of her employer's cafeteria benefit plan which allows it to be taken as cash. STAFF BENEFITS at 1 (employee can take choice pay "as taxable pay or use [it] to purchase a wide variety of other benefits"). It is understood that it is Kerry's decision how to allocate "Choice Pay dollars," *Trial Trn*. at 155. It is further understood that in 2014 Kerry applied her "Choice Pay dollars" to benefits rather than cash, although unlike an in-kind payment, it is payable as cash.

While employment benefits enjoy a tax deduction, this Court has made clear that tax treatment of income is not related to child support calculations "because the objectives of the child support guidelines differ from the objectives of the federal income taxation statutes." *In re Albert*, 155 N.H. 259, 263 (2007) (quotations omitted).

For child support purposes, the relevant considerations in New Hampshire law are whether the income belongs to the employee as a matter right, and whether it is "payable as money." *In re Clark*, 154 N.H. 420, 423 (2006), *citing In re Fulton*, 154 N.H. 264, 267 (2006). The income need not be *paid* as money, but rather "*payable*" as money. As noted in Robert's opening brief, numerous jurisdictions recognize that cafeteria-style benefit packages are income for child support purposes, and there is no reason to distinguish here.

It is understood that Kerry's employer requires that she have health insurance, STAFF BENEFITS, *Appx*. at 166, and that in 2014 she applied a portion of her "Choice Pay dollars" for that purpose. There are five levels of health insurance coverage available however, STAFF BENEFITS, *Appx*. at 160, 167, presumably with commensurately differing levels of premiums. In 2014 Kerry also applied a portion of her "Choice Pay dollars" to dental benefits, but that is

optional.

According to her company's benefits literature, there are numerous types of other optional benefits to which "Choice Pay dollars" can be applied, including prescription drug coverage, dental and vision care, disability insurance, paid time off, life insurance, health care flexible spending accounts, dependent care flexible spending accounts, retiree medical savings accounts, cash balance retirement plans, tax-sheltered annuity contributions, tuition assistance, STAFF BENEFITS, *Appx*. at 173-196, and "personal priorities" which appears to be a savings account for certain types of contingencies. STAFF BENEFITS, *Appx*. at 194-95.

Taking "Choice Pay dollars" as benefits rather than cash does not change the fact that the "Choice Pay dollars" are *payable* as cash, and thus included in the child support calculation. Kerry appears to argue that as long as "Choice Pay dollars" are not *paid* in cash, they should not count toward child support. Under that interpretation, however, Kerry could, for example, take her "Choice Pay dollars" as retiree medical savings, annuity contributions, or "personal priorities." Such benefits might improve her personal welfare, but would come at the expense of Robert's ability to afford basic accommodations for the children – which is the purpose of child support.

And that happened here. In 2014, Kerry applied a portion of the "Choice Pay dollars" to 10 days of paid time off. 2014 PERSONAL BENEFITS SUMMARY at 3 (attached as Exhibit B to RESPONDENT'S SUPPLEMENTAL MEMORANDUM (June 11, 2014)), *Appx. to Reply Brf.* at xx.

This Court should maintain its bright-line rule, based on *Clark* and *Fulton*, that unless an employment benefit can be suspended at the whim of the employer or is incapable of being reduced to cash, the benefit is included in the child support calculation. On that criteria, the value of Kerry's Choice Pay benefit should be included in her child support calculation.

One possible outcome here is that the monetary value of a cafeteria plan which is deductible from the child support calculation is that amount beyond necessary to pay for "benefits such as health insurance or employer contributions to a retirement plan." *Fulton*, 154 N.H. at 267. Such a ruling seems to be what Kerry suggests in her Memorandum by quibbling about the exact number of "Choice Pay dollars" she spends on each benefit. However, one employee might chose the Bronze plan, and another the Platinum. This Court would then be the arbiter of what is a sufficient or extravagant health insurance plan, and how much is a sufficient or extravagant employer contribution to retirement. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. __, 134 S.Ct. 2751 (2014) (determining whether employer can object to contraception benefits in Obamacare). These are legislative determinations on which there is no known statutory guidance.

Finally, as noted in Kerry's Memorandum, "the only states/jurisdictions that mention this particular issue in their statutes, list these employer contributions toward health insurance premiums as an *exclusion* from income for the purposes of child support." APPELLEE'S MEMORANDUM at 10 (emphasis in original). The New Hampshire legislature has provided its citizens no such exclusion, and this Court should not enact one.

II. Differing Income is Not a Special Circumstance

As noted by the family court, Kerry makes $6,000 more per month than Robert, calculating to a $1,223 per month guidelines child support obligation. Despite nearly equal parenting time, however, the family court imposed no child support obligation. Meanwhile, on Robert's salary it is difficult to maintain housing with sufficient accommodations for four children.

In her Memorandum, Kerry defends this as "special circumstances" on the grounds that Kerry has assumed a number of expenses on behalf of the children.

It should be recalled that "special circumstances" are an exception to the general rule. Normally the child support guidelines govern. RSA 458-C:4 ("Subject to the provisions of RSA 458-C:5, guidelines provided under this chapter *shall* be applied in all child support cases.") (emphasis added).

In determining this case is an exception to the general rule, the family court appears to have given little consideration to the legislature's direction that it consider "[w]hether the income of the lower earning parent enables that parent to meet the costs of child rearing in a similar or approximately equal style to that of the other parent." RSA 458-C:5, I(h)(2)(C). It appears to have given similarly insufficient consideration to "[w]hether the obligor parent has established that the equal or approximately equal residential responsibility will result in a reduction of any of the fixed costs of child rearing incurred by the obligee parent." RSA 458-C:5, I(h)(2)(B).

Kerry can afford to have more expensive tastes than Robert. Her preferences, however, are at the expense of Robert being able to provide basic sustenance when the children are in his care. There is nothing special or remarkable about differing incomes and tastes. *Laughlin v. Laughlin*, 229 P.3d 1002, 1006 (Alaska 2010) (reversing deviation from child support guidelines; "It is not unusual for one spouse to have a greater income than the other.").

If this Court allows differing income to be a "special circumstance," the exception eclipses the rule.

III. Error for Family Court to Separate Cars From Their Values

Counsel acknowledges that his overly-pithy phrase about the values of the cars, when taken out of context, could be misconstrued to mean the opposite of Robert's position. Nonetheless, from the parties' record of bargaining and ultimate agreement – "free and clear of any interest" of the other – they understood that whomever got the property rights to whichever car also got the monetary value subsumed within them. If the parties had intended to compensate for the unequal values of the cars, they would have built a charge-back into their bargain.

The divorce process encourages parties at several junctures to reach agreement on as many issues as possible, *see e.g.,* RSA 458:15-c (providing for mediation in family cases); FAM.CT.R. 2.12 (case manager to aid agreements); FAM.CT.R. 2.13 ("parties shall be ordered to participate in mediation"); FAM.CT.R. 2.14 ("court may order parties to engage in … alternative dispute resolution"); SUP.CT.R. 12-A (appellate mediation), and claims to respect parties' stipulations when they do. *See* citations collected in Robert's opening brief at 16.

By allowing family courts to reach into agreements made, and unsettle matters already settled, this Court would loosen those incentives. Careful lawyers will be forced to add language to stipulations indicating the parties intend no further equalization. Moreover, the lawyers here did just that – specifying the cars would be allocated "free and clear of any interest" of the other. It is notable Kerry has offered no construction of "free and clear" which suggests the parties intended an equalization.

Accordingly, it was error for the family court to separate the cars from their values, and this Court should reverse that provision of the decree.

IV. Disregard Post-Record Allegations

In her Memorandum Kerry several times references allegations that are not in the record because, to the extent they occurred, they would have occurred after the record was closed. *See e.g.*, APPELLEE'S MEMORANDUM at 3 n. 1; APPELLEE'S MEMORANDUM at 5 (first two sentences of second paragraph); APPELLEE'S MEMORANDUM at 14 (middle paragraph, beginning with the words, "since the parties' divorce …").

These and any other post-record allegations should be disregarded.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand for reallocation of property and recalculation of child support.

Respectfully submitted,

Robert Stack
By his Attorney,

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Dated: June 1, 2015

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CERTIFICATION

I hereby certify that on June 1, 2015, copies of the foregoing will be forwarded to Robyn A. Guarino, Esq., and to Anna L. Elbroch, Esq., GAL.

Dated: June 1, 2015

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Joshua L. Gordon, Esq.

ADDENDUM

1. PERSONAL BENEFITS SUMMARY (attached as Exhibit B to RESPONDENT'S SUPPLEMENTAL MEMORANDUM (June 11, 2014)) 8