State of New Hampshire
Supreme Court

NO. 2010-0250

2010 TERM

DECEMBER SESSION

In the Matter of Yvonne Taylor and Michael Taylor

RULE 7 APPEAL OF FINAL DECISION OF
DERRY FAMILY DIVISION

BRIEF OF PETITIONER/APPELLEE YVONNE TAYLOR

By: Joshua L. Gordon, Esq.
NH Bar ID No. 9046
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEW HAMPSHIRE CASES

NEW HAMPSHIRE STATUTES

SECONDARY SOURCES

STATEMENT OF FACTS AND STATEMENT OF THE CASE

The essential facts of this alimony case are not in dispute. Yvonne Taylor and Michael Taylor were married for 30 years.[1] Of their three children, their oldest son is emancipated, their second son is in college, and their daughter is a senior in high school. ORDER ON FINAL HEARING AND DECREE OF DIVORCE (Oct. 20, 2009), *Appx*.[2] at 2 (hereinafter referred to as "DECREE" with citation to appendix page only). Yvonne petitioned for divorce, and then Mr. Taylor cross-petitioned, on irreconcilable differences. DECREE, *Appx*. at 5.

I. Parties' Education and Work Histories

Although he does not have a college degree, Mr. Taylor served in the navy. *Trn*. at 6-7, 121. He has worked at the same software company for 30 years, where he has been steadily promoted. Mr. Taylor currently earns $109,000 per year, DECREE, *Appx*. at 2, and enjoys an extensive company benefit plan, including "medical, dental, life insurance, vision insurance, disability, [and] legal aid." *Trn.* at 126.

Yvonne has a high school education. When the children were young, she held a number of part-time jobs such babysitting, night-cleaning offices, and in the library at the local elementary school which her children attended. *Trn*. at 13, 17, 20. She was a teller at a Nashua bank, but gave it up to be a homemaker when the eldest child was born. *Trn*. at 10, 16. Given her family

[1]To ease confusion, Michael Taylor will be referred to herein by his formal name, and Yvonne Taylor will be referred to by her first name.

[2]The appendix filed with Mr. Taylor's brief will be cited herein as "*Appx.*" Documents omitted from Mr. Taylor's appendix are included in a supplemental appendix accompanying this brief. It will be cited herein as "*SuppAppx.*"

responsibilities, she never had a chance to go back to school. *Trn*. at 16. Because of the flexibility, Yvonne started working in retail in 1998 at Filene's (which later became Macy's). *Trn*. at 18. When the children were younger, she worked weekends and evenings, increasing her hours as they got older. *Trn*. at 19; SOCIAL SECURITY STATEMENT (June 2, 2009) (Exhibit 1), *SuppAppx.* at 3.

In the interest of her family and to facilitate Mr. Taylor's more lucrative job, Yvonne pursued neither an education nor a career. *Trn*. at 11, 21, 64, Yv.FoF&RoL ¶¶ 18, 25, *Appx.* at 33.[3] The arrangement was by mutual agreement of the parties. DECREE, *Appx.* at 3; *Trn*. at 11-12, 36, 82, 183-185, 193-94.

At Macy's she was considered a part-time employee without full-time potential. *Trn*. at 84. About the same time this case commenced, in 2008 Yvonne was fired from Macy's for accepting a gift-card from a customer, a mistake she regrets. *Trn*. at 55; LETTER TO WHOM IT MAY CONCERN, (May 14, 2009), *Appx.* at 89. At the time her Macy's job ended, she was making $11.65 per hour, and her pay topped in 2008 at $16,000. *Trn*. at 110-111; MIKE'SFOF&ROL ¶33, *Appx.* at 41; MACY'S EARNING STATEMENT (Nov. 14, 2008), *Appx*. at 88. *Trn*. at 20; Yv.FoF&RoL ¶ 29, *Appx.* at 34; SOCIAL SECURITY STATEMENT (June 2, 2009) (Exhibit 1), *SuppAppx.* at 3. What money Yvonne made during the marriage went mostly to household bills. *Trn*. at 15, 20-21.

Yvonne began working at Lowe's Home Centers in Hooksett in March 2009 during the pendency of this case, and is still working there. *Trn*. at 6, 23. She generally works four days per week for a total of about 25-30 hours, and has enjoyed some promotions. *Trn*. at 23-25, 62, 67. Yvonne testified she badly wants a full-time job, has applied for several, would take one if offered,

[3]Both parties filed requests for findings of facts and rulings of law, which are included in the appendix. Yvonne's requests are cited as YV.FOF&ROL, and Mr. Taylor's are cited as MIKE'SFOF&ROL, both with pin-cites to the appendix.

but so far none have been available. *Trn*. at 24-25, 62, 66, 84, 111.

At Lowe's Yvonne makes $11.69 per hour, essentially identical to her former position at Macy's, which nets her about $15,000 to $16,000 per year. MIKE'SFOF&ROL ¶27; *Trn*. at 24-25, 110-111. If she could get a full-time position at Lowes, her rate of pay would not be affected, but she could increase her earning to $20,000 to $22,000 per year. *Trn*. at 25, 26. Unless she can secure a full-time position, Lowe's does not offer retirement, medical, or other benefits. *Trn*. at 26; 60, 63. The court found Yvonne's annual income is about one-fifth of Mr. Taylor's. DECREE, *Appx.* at 4.

Mr. Taylor conceded that even though Yvonne has had some bookkeeping experience, it was 13 years ago and she has no degree an any related field. *Trn*. at 198. Thus Yvonne understands that, being 50 years old with just a high-school education, she probably won't be able to increase her earning much beyond $20,00 to $25,000 in the coming years. *Trn*. at 35.

Given these facts, the court rejected Mr. Taylor's allegation that Yvonne is intentionally underemployed. DECREE, *Appx.* at 6; MIKE'SFOF&ROL ¶40, *Appx*. at 41.

II. Background: Property Division and Parenting Plan

Although the property division and the parenting plan are not issues in this alimony appeal, they form part of the background for the alimony decree.

The parties by agreement sold the marital home. The proceeds from it were used to pay off family credit card debt, and the remainder was evenly split. DECREE, *Appx.* at 2; YV.FOF&ROL ¶11, *Appx.* at 32.

All the parties' other debts and modest assets were split on a roughly equal basis. The retirement plan and stock purchase plan were equally split. DECREE, *Appx.* at 8. Several debts were

roughly evenly split, with Yvonne responsible for one of the children's co-signed college loans and Mr. Taylor the other. DECREE, *Appx.* at 8-9. The court allowed Yvonne to retain an inheritance from her mother that accrued shortly before the commencement of this case, most of which Mr. Taylor conceded was used to pay off joint obligations. DECREE, *Appx.* at 5; *Trn.* at 191. The court awarded Mr. Taylor the dependent tax deduction. DECREE, *Appx.* at 7. Personal property was roughly split, with Mr. Taylor getting the piano – the only significant item – and each keeping their respective automobiles. DECREE, *Appx.* at 10. Mr. Taylor was ordered to maintain life insurance for an amount and term equaling his alimony obligation. ORDER ON MOTION TO RECONSIDER (Mar. 8, 2010), *Appx.* at 56-57. Yvonne will have medical insurance at her expense under COBRA, although the court found that its $500-600 monthly cost is probably beyond Yvonne's means. DECREE, *Appx.* at 7; YV.FOF&ROL ¶ 63; *Trn*. at 126.

Only the youngest of the children is un-emancipated. Through a GAL the child expressed her interest in living with Mr. Taylor, which the court implemented. PARENTING PLAN, *Appx.* at 16.

III. Rehabilitative Alimony Declining Over Seven Years

Whatever the lifestyles to which the parties had become accustomed in their new 10-room, 3,300 square-foot, home, with a 2-car garage, an in-ground pool on 7 acres of land in Londonderry, *Trn.* at 137, it was agreed that they probably lived beyond their means during the marriage, *Trn*. at 156 (Mr. Taylor); *Trn*. at 77-79 (Yvonne), and that their divorce would necessarily entail a reduction in standards. DECREE, *Appx.* at 6; *Trn*. at 80-81.

Since their separation, Yvonne lives in a small apartment. It comprises two bedrooms as provision for her daughter's visits. *Trn*. at 30, 41, 114. Yvonne drives a modest car. She does not

go on any expensive vacations, have memberships at any country clubs, nor enjoy any lavish habits. *Trn*. at 75. Mr. Taylor conceded that she is unlikely to become a major earner, *Trn*. at 183-84, and that even if she doubles her income there will still be a "huge difference" between Yvonne's earnings and his. *Trn*. at 198.

In determining that Yvonne was in need of alimony under the statute, the court took into consideration the long marriage, Yvonne's low income and lack of marketable skills due to the mutual arrangement made within the marriage, her inability to be immediately self-supporting, the disparity in income between the parties, her expenses, and her inability to afford child support payments. DECREE, *Appx.* at 6; YV.FOF&ROL ¶ 35, *Appx.* at 34. The court rejected Mr. Taylor's allegation that Yvonne is voluntarily underemployed, and found that she is "doing her best to become employed full-time." DECREE, *Appx.* at 6; MIKE'SFOF&ROL ¶ 40, *Appx*. at 41. The court found that even if she secured full-time employment, her income would increase by only $75 per week, and in such event alimony would still be justified. DECREE, *Appx.* at 6.

Mr. Taylor conceded that his finances can support up to $2,000 per month in alimony. *Trn*. at 180-81. He recently bought a house in Londonderry, and purchased numerous amenities for it including $3,000 for a TV and $6,000 for new appliances. DECREE, *Appx.* at 6; *Trn*. at 186; HOME SALE PROCEEDS (undated) (Exhibit B), *SuppAppx.* at 5. Mr. Taylor conceded that post-separation, his standard of living has not changed much, *Trn*. at 156, and that it is much better than Yvonne's. *Trn*. at 173.

In determining that Mr. Taylor has the ability to pay alimony, the court found he makes $109,000 per year. DECREE, *Appx.* at 2. The court took into consideration "the fact that [Mr. Taylor] is shouldering a greater portion of the marital responsibilities relative to the parties' minor child."

DECREE, *Appx.* at 7. It found that Mr. Taylor is able to meet his own reasonable needs after payment of alimony. DECREE, *Appx.* at 6; YV.FOF&ROL ¶ 36, *Appx.* at 34.

Mr. Taylor requested zero alimony, *Trn*. at 184, PROPOSED FINAL DECREE (June 29, 2009) (not included in appendices), on his theory that poverty is the price of "break[ing] up the family." DECREE, *Appx.* at 5; *Trn.* at 199. Yvonne requested $3,000 monthly alimony for 12 years, which is when she will be 62 and Mr. Taylor will begin drawing retirement at age 65. *Trn.* at 37.

The court chose a middle route, explicit that it was awarding rehabilitative alimony declining over 7 years:

> $2,500 per month from November 2009 to December 2010;
> $2,000 per month from January 2011 to December 2013;
> $1,000 per month from January 2014 to December 2016.

UNIFORM SUPPORT ORDER ¶ 21 (Oct. 15, 2009), *Appx*. at 28; ORDER ON MOTION TO RECONSIDER (Mar. 8, 2010), *Appx.* at 56. Not satisfied, Mr. Taylor appealed the alimony order.

SUMMARY OF ARGUMENT

After setting forth the facts, Yvonne Taylor points out that Michael Taylor's arguments are merely attacks on the discretion of the family court, whose findings are amply supported by the record. Yvonne then argues that the family court was fully justified in establishing a reasonable level of rehabilitative alimony which declines over seven years. Yvonne then addresses a batch of Mr. Taylor's tangential arguments, none of which affect the alimony on appeal.

ARGUMENT

I. Family Court Appropriately Exercised its Discretion in Ordering Rehabilitative Alimony Declining Over Seven Years

New Hampshire's alimony statute entails a two-step procedure, governed by two separate sections of the alimony statute. In Step 1, the court must first determine *whether* to award alimony, using criteria specified for that purpose. RSA 458:19, I ("[T]he court shall make orders for the payment of alimony [if] … the court finds" criteria listed). If the answer is yes, the court goes on to Step 2, and determines *how much* alimony, using a separate set of criteria specified for that purpose. RSA 458:19, IV ("In determining the amount of alimony, the court shall consider" criteria listed).

The factors in Step-1, *whether* to award alimony, are:

> (a) The 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; and
>
> (b) 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
>
> (c) 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.

The factors in Step-2, *how much* alimony to award, are:

> (b) [T]he court shall consider the length of the marriage; the age, health, social or economic status, occupation, amount and sources of income, the property awarded …, vocational skills, employability, estate, liabilities, and needs of each of the parties; the opportunity of each for future acquisition of capital assets and income; the fault of either party …; and the federal tax consequences of the order.

> (d) The court may also consider the contribution of each of the parties in the acquisition, preservation, or appreciation in value of their respective estates and the noneconomic contribution of each of the parties to the family unit.

RSA 458:19, IV (emphasis added) (section (c), regarding factors the court cannot consider, is not relevant here).

It is important to note that only Step 1 includes "the style of living to which the parties have become accustomed during the marriage." Step 2 does not have a "style of living" consideration.

"The trial court has broad discretion in determining and ordering the payment of alimony. Accordingly, absent an unsustainable exercise of discretion, [this Court] will not overturn its factual findings." *In re Nassar*, 156 N.H. 769, 772 (2008) (quotations and citations omitted).

The Derry Family Division made both sets of findings. In lettered paragraphs the court discussed the length of the marriage and the parties' ages. It reviewed Yvonne's health issues, economic status, occupation, sources of income, skills, and employability. It noted the liabilities of the parties, their relative opportunities for future acquisition of wealth, and their respective contributions to the family unit. It noted the parties' "traditional marriage," and the lack of fault in the divorce. DECREE, *Appx*. at 3-4, ¶¶ A-K.

> This [c]ourt enters a finding that Yvonne is entitled to alimony based upon the parties' 29 years of marriage, the parties' ages, 50/53, Yvonne's lack of marketable skills, the disparity in income between the parties, her inability to become self supporting immediately after the parties['] decree of divorce is issued, all of which this Court finds require an infusion of capital on behalf of [Mr. Taylor] to help Yvonne maintain a reasonable standard of living.

DECREE, *Appx*. at 6. It continued:

> This [c]ourt in review of the aforementioned is entering a specific finding that Yvonne cannot be self-supporting through her employment without the assistance of alimony as her reasonable monthly obligations surpass her monthly income. [Mr. Taylor] has the ability to pay alimony to Yvonne and to continue to meet his own

> reasonable needs to include care and maintenance of the parties' minor child, without child support being paid by Yvonne.

DECREE, *Appx*. at 6.

It is notable here that the court specifically took into account the fact that the un-emancipated child will be living with Mr. Taylor and that Yvonne is not paying child support. Contrary to Mr. Taylor's assertions that the court failed in this regard, MICHAEL'SBRF. at 21, 22-23, the decree provides, "[t]he Court has taken into consideration the fact that Yvonne is not paying child support or contributing to the daily care and maintenance of the parties' minor child." DECREE, *Appx.* at 6.

The court then ordered rehabilitative alimony, declining over seven years. DECREE, *Appx*. at 6. The award is neither excessive nor out-of-step with current family court alimony awards for parties in comparable situations. *See*, *e.g.*, *In the Matter of Canaway and Canaway*, __ N.H. __, Slip.Op. 2009-918 (decided Dec. 7, 2010) (approving 1994 alimony obligation starting at $2,500 per month declining annually and extending indefinitely).

Both procedurally and substantively the family court appropriately exercised its discretion. This Court should affirm.

II. Tangential Issues Argued by Mr. Taylor are Unrelated to Review of Alimony

In his brief Mr. Taylor posits a number of arguments that have no basis either in law or in the facts of this case. Although they are unrelated to this Court's review for unsustainable exercise of discretion, they cannot be left unaddressed by Yvonne.

A. Mr. Taylor's Tangential Arguments Regarding Yvonne's Need for Alimony

1. Focus on Assets, Rather Than Statutory Factors

In Mr. Taylor's brief, he argues that Yvonne does not have need for alimony because she earns $18,000 per year at Lowes, got $55,000 from the sale of the parties house, inherited $41,000 from her recently-deceased mother, has an IRA worth $1,500, has a car worth $9,000, was awarded one-half of the parties' $4,100 stock plan, and was awarded one-half of the parties' pension. These assets, Mr. Taylor claims, add up to over $100,000 and therefore she does not exhibit sufficient need to warrant alimony. MICHAEL'SBRF. at 12-13.

From the decree it is apparent the family court already considered these matters. It also considered that a sizable chunk of the assets Mr. Taylor named were used to pay debts incurred during the marriage; that an item such as the car cannot be counted as merely an asset because it provides Yvonne transportation to her job, that an asset such as the IRA is illiquid and may carry tax penalties if used prior to maturity, and that an asset such as the pension does not provide any income until Mr. Taylor retires 12 years from now. Mr. Taylor also calls Yvonne's inheritance "income," MICHAEL'SBRF. at 16, which it clearly is not. *See e.g.*, *Opinion of the Justices*, 82 N.H. 561 (1927) ("[i]ncomes are strictly incidences of property rather than the property itself"); RSA 458-C:2, IV (defining income for child support purposes).

Moreover, Mr. Taylor focuses solely on assets, while "the property awarded" is just one of

a myriad of factors in the alimony statute. His argument ignores all of the statute's other provisions. It ignores Yvonne's contribution to Mr. Taylor's career, by being a homemaker and caretaker of the couple's children, and by limiting her own education and career opportunities during the marriage. It ignores a 30-year marriage, and Yvonne's current health issues. It ignores Yvonne's very limited opportunities for "future acquisition of capital assets and income." RSA 458:19, IV(b).

The family court correctly considered all factors noted by Mr. Taylor, but also considered all the other statutory factors. Accordingly the award should be affirmed.

2. Not an Unequal Property Division

Again focusing only on the property division, Mr. Taylor argues in his brief that because there was an unequal property division, Yvonne has no need and alimony is therefore unjustified. MICHAEL'SBRF. at 13. For the reasons just canvassed – *i.e.*, there are many more provisions of the statute than just property division – the argument should be rejected.

In addition, there is no basis to the claim that the property division was unequal. First, Mr. Taylor did not preserve the property division for appellate review. Second, Mr. Taylor points to nothing in the record showing the division was inequitable. Third, the record suggests it was roughly equal. Fourth, even if it weren't, there is nothing unlawful about an unequal property division. For these reasons also, the argument should be rejected. MICHAEL'SBRF. at 13.

3. Marital Debts Were Shared

In Mr. Taylor's brief, he argues that Yvonne does not have need for alimony because some portion of her debts were eliminated in the agreed-upon sale of the marital home. MICHAEL'SBRF. at 14. It appears that the debts to which Mr. Taylor refers were split equally as part of the sale transaction. In fact, the portion of the appendix to which he cites contains a finding by the family

court flatly contradicting his assertion. The finding grants: "From the net proceeds [of the home sale], the parties agreed to pay off the Discover Card in the amount of $12,872.27 and the Digital Credit Union debt in the amount of $22,646.50. MIKE'SFOF&ROL ¶ 50, *Appx*. at 42-43. The argument should thus be rejected.

4. Property Was Not Wasted

In Mr. Taylor's brief, he argues that Yvonne does not have need for alimony because she "wasted her property award before the final decree became final." MICHAEL'SBRF. at 14. There are several problems with the argument. First, there is nothing in the record to suggest she wasted her money. Rather she accounted for most of it, including large amounts necessary to pay off marital debt and to pay her divorce lawyer. BREAKDOWN (undated) (Exhibit Q), *SuppAppx.* at 7. Second, the family court rejected Mr. Taylor's proposed finding that the money was wasted. MIKE'SFOF&ROL ¶ 43, *Appx*. at 42. Third, the family court considered Yvonne's accounting, and considered it as part of its decision. DECREE ¶ I, *Appx.* at 3. Fourth, how property is used not a statutory factor governing alimony. For these reasons, the argument should be rejected.

B. Mr. Taylor's Tangential Arguments Regarding His Ability to Pay Alimony

In Mr. Taylor's brief, he maintains he does not have the ability to pay alimony because he must pay for creation of the QDRO, for the Discover and DCU Visa debt, for one child's school loan, for a Dell Financial bill, for an Amex bill, and for other debts. MICHAEL'SBRF. at 14.

As above, this argument should be rejected. First, the property division is not on appeal. Second, to the extent Mr. Taylor is responsible for these obligations, the decree as a whole makes clear that debts were equitably split – Yvonne has to pay the college loan for the other child, and was

responsible for portions of the marital debt. Third, the family court took these factors into consideration, and nonetheless found that Mr. Taylor has the ability to pay alimony.

Relatedly, Mr. Taylor argues that because the court found he "lives pay check to pay check" and his salary is not likely to increase above the current $109,000 in the near future, he therefore does not have the ability to pay. MICHAEL'SBRF. at 15. But a finding that living "pay check to pay check" is not a finding of inability to pay alimony. At most the finding means that Mr. Taylor's spending roughly equals his earning. It does not imply he cannot afford alimony, especially when the court noted spending on luxurious amenities for his new house.

Finally, Mr. Taylor complains that he is unable to support the parties' un-emancipated child to the extent he wishes. He claims he cannot buy her a car, take her on vacations, or save for her college tuition. MICHAEL'SBRF. at 22. But these are all things that both parties conceded were not afforded *during* the marriage. *Trn*. at 75, 155-56 (no vacations during marriage); *Trn*. at 96, 143 (children's educations financed by loans, not savings); *Trn*. at 154-55 (aspiration to give car to older child). Blaming Yvonne for day-to-day financial concerns is not a basis for overturning the family court's alimony order. To the extent that Mr. Taylor has less money than during the marriage is, as noted *infra*, a common result of divorce.

Accordingly, the argument should be rejected.

C. Mr. Taylor's Tangential Arguments Regarding Purpose of Alimony

In his brief Mr. Taylor alleges that "the trial court improperly presumed that the parties' incomes should be equalized (and utilized an alimony award to do so), rather than awarding alimony based on a determination of need, as required by the alimony statute." MICHAEL'SBRF. at 15. Mr.

Taylor twice makes a second argument that "[a]limony is not intended to place the receiving spouse into the same exact standard of living that she was in before she filed for divorce." MICHAEL'SBRF. at 16-17, 17.

There are a number of problems with these arguments.

First, they were not preserved. Nothing in the trial court record or in Mr. Taylor's notice of appeal suggests he raised any legal argument that the family court was driven by motives, considerations, or factors outside the statute.

Second, there is nothing in the record even coming close to suggesting that the family court "presumed that the parties' incomes should be equalized," that the court "intended to place [Yvonne] into the same exact standard of living that she was in before she filed for divorce," or that it "utilized an alimony award to do so." MICHAEL'SBRF. at 15, 16, 17. The decree makes clear that the court focused on Yvonne's need and Mr. Taylor's ability to pay.

Third, "the primary purpose of alimony is to encourage the recipient spouse to establish an independent source of income," *Henry v. Henry*, 129 N.H. 159 (1987), called "rehabilitative" alimony. *In re Harvey*, 153 N.H. 425, 431 (2006) ("We have recognized that the primary purpose of alimony is rehabilitative."). The law on this point is clear, well-established, based in the language of the statute, and not in flux. *In re Nassar*, 156 N.H. 769 (2008); *In re Fowler*, 145 N.H. 516 (2000); *Tishkevich v. Tishkevich*, 131 N.H. 404, 407 (1989) ("the law is clear that the purpose of alimony is rehabilitative"); *Calderwood v. Calderwood*, 114 N.H. 651, 653 (1974).

The court below ruled, at Mr. Taylor's invitation, that the purpose of alimony is primarily rehabilitative. MIKE'SFOF&ROL ¶ II.C, II.d, II.E, *Appx*. at 46. In its decree the court repeatedly stressed Yvonne's inability to immediately earn enough for her needs, and the declining seven-year

term of alimony clearly indicates that rehabilitation was its intent.

Yvonne demonstrated to the family court a consistent effort to support herself and better her job position since the separation. The court also recognized her limited vocational skills and the unlikelihood of her being able to significantly improve her earning situation. It found she was not intentionally underemployed. Mr. Taylor's allegation that she neglected opportunities for "greater upward mobility" and a "lack of effort in improving her own situation," MICHAEL'SBRF. at 16, is simply at odds with the record and with the family court's findings.

Thus Mr. Taylor's allegations, even if preserved, are not supported by anything in the record, and they should be disregarded.

D. Mr. Taylor's Tangential Argument Regarding Child's Standard of Living

Mr. Taylor alleges that the statutory "goal is to ensure that the standard of living for … children does not diminish merely because of the divorce." MICHAEL'SBRF. at 21. There is no known law, however, that "ensures" children enjoy the same resources after divorce. The statute Mr. Taylor cites, RSA 458-C:1, does set as one of its purposes "to *minimize* the economic consequences to children" of divorce (emphasis added). But the interpretation of RSA 458-C is New Hampshire's child support statute, an issue not on appeal. Moreover, minimizing divorce's economic consequences on children is just one among several purposes listed in the statute.

Even if the issue were relevant to this case *and* even if the statute enacted what Mr. Taylor claims, such an interpretation would be contrary to common sense. Numerous observers have measured the impact of divorce on families, and have concluded that all parties, including the

children, tend to be poorer after divorce.[4] *See*, *e.g.*, Stephen J. Bahr, *Social Science Research on Family Dissolution*, 4 J. L. & FAM. STUD. 5, 8 (2002); Dora Sybella Vivaz, *Balancing Children's Rights into the Divorce Decision*, 13 VT. L. REV. 531, 535 (1989).

E. Mr. Taylor's Tangential Arguments Regarding Child Support and Alimony Calculations

In his brief Mr. Taylor alleges the court failed to take into account the fact that Yvonne's receives alimony under the decree when it excused her from paying child support. MICHAEL'SBRF. at 24. The allegation suggests that procedurally the court should first award alimony, and then order the obligor to give back some of it as child support.

The law cited by Mr. Taylor, however, presumes a pre-existing alimony decree. RSA 458-C:2, IV (defining gross income to include alimony). Such pre-existing alimony is considered income in the child support calculation.

But in cases where courts have awarded *both* child support and alimony *in the same decree*, this Court has suggested that the child support computation should occur first, and then alimony is calculated with regard to remaining income and assets. *In re Crowe*, 148 N.H. 218, 224(2002) ("As a practical matter, once child support has been calculated, a trial court can consider it in determining the obligor's resources for purposes of establishing alimony"); *In re Harvey*, 153 N.H. 425, 433 (2006) ("While it is unclear whether the trial court considered the respondent's child support obligations in deciding the amount of alimony, we have previously held that a trial court has the discretion to consider child support in determining the obligor's resources for purposes of

[4]Over the long term, the results tend to be disparate by gender; women tend to fair worse and men better.

establishing alimony."). This results in child support being necessarily taken into account when determining the amount of alimony.

The family court thus committed no error, and no remedy is necessary.

F. Mr. Taylor's Tangential Arguments Regarding Style of Living

1. "Style of Living" in the Statute

As noted *supra*, the phrase, "style of living to which the parties have become accustomed," is part of RSA 458:19, I (a) and (b), and is a factor in determining whether alimony will be awarded, but not a factor in determining how much. The family court used it in precisely that way, writing:

> In reviewing the … issues this [c]ourt pursuant to RSA 458:19, I, is required prior to awarding [a]limony to enter a finding that: (1) [t]he party in need lacks sufficient income, property or both, to provide for his or her own reasonable needs, *considering the style of living to which the parties have become accustomed during the marriage*; [and] (2) [t]hat the payor is able to continue to meet his or her own reasonable needs considering *the style of living to which the parties have become accustomed during the marriage*."

DECREE, *Appx.* at 5 (emphasis added). The court made those findings, and concluded that:

> [Mr. Taylor] is able to meet his own reasonable needs after the payment of alimony considering the style of living to which he has been accustomed to during the marriage [and] …Yvonne is entitled to alimony.

DECREE, *Appx.* at 6.

The court then went on to determine the *amount* of alimony. During its discussion of amount, the "style of living" phrase was not mentioned. Thus the court used the "style of living" factor lawfully in accord with the statute.

2. "Style of Living" in Mr. Taylor's Brief

In his brief Mr. Taylor offers four separate explanations for what the "style of living" phrase

means, none of them supported by the statute.

First Mr. Taylor alleges that "[t]he court erroneously placed significant emphasis on the … phrase 'style of living to which the parties have been accustomed during the marriage.'" MICHAEL'SBRF. at 16. Mr. Taylor provides no citation to the record or to the decree where the court alleged placed undue emphasis. In any event, it is clear from the decree that the court considered the matter in the way intended by the statute.

Second, Mr. Taylor argues that "[s]tyle of living is not a factor or element of RSA 458:19 that determines an award of alimony." If by this Mr. Taylor means that "style of living" is not a factor in determining *whether* to award alimony, the claim is an incorrect statement of the law. If, on the other hand, Mr. Taylor means that "style of living" is not a factor in determining the *amount* of alimony, it is a correct statement of the law, but irrelevant to this case as the court did not use "style of living" to determine amount.

Third, Mr. Taylor alleges that "[t]he style of living is only a consideration *if* these other three factors can be met." The three factors alleged are "1) the receiving spouse has a need for alimony, *and* 2) the paying spouse is able to meet his reasonable needs while paying alimony[,] *and* 3) the receiving spouse is unable to be self-supporting through appropriate employment." MICHAEL'SBRF. at 17 (emphasis in original).

Mr. Taylor is simply misreading the statute. The "style of living" phrase is undeniably in the statute, is one of the factors regarding determination of whether to award alimony, and its application is not conditional on anything.

Fourth, Mr. Taylor offers that:

the RSA 458:19 phrase 'style of living to which the parties have been accustomed

> during the marriage,' [is] … not a factor or element of RSA 458:19 that determines an award of alimony – it is merely a descriptive phrase of each one of the three required factors that must be met before alimony may be awarded.

MICHAEL'SBRF. at 16. This appears to be yet another misreading. "Style of living" is plainly a factor the court must use in determining whether to award alimony. Relegating it to "merely a descriptive phrase" is contrary to basic rules of statutory interpretation, which require that courts "will not add words that the legislature did not see fit to include, nor delete those that it did." *State v. Duran*, 158 N.H. 146, 155 (2008).

Thus Mr. Taylor has offered four separate explanations for what the "style of living" phrase means, all of them at odds with the statute. His arguments are not only unjustified by the statute, but also irrelevant to this appeal. This Court should ignore them.

III. Change in Alimony from Temporary to Final Decree is not a "Modification"

In his brief Mr. Taylor alleges that the court "increased the alimony award at the final hearing when there had been no change in circumstances since the temporary hearing." Citing law regarding modification of alimony, he alleges that any change in alimony from temporary to final hearing is a "modification," and that in order to make the change Yvonne should have had to show a "substantial change in [her] circumstances … occurred" during that time between the temporary and final orders. He alleges her circumstances did not change and therefore the "modification" was either unlawful or beyond the discretion of the court. MICHAEL'SBRF. at 20.

The argument is patently ridiculous. It is straightforward that modification is a concept reserved to post-divorce proceedings. One of the cases Mr. Taylor cites, *Laflamme v. Laflamme*, 144 N.H. 524, 525 (1999), makes this clear as it involved a 1989 final decree and a 1993 modification. *See also In the Matter of Canaway and Canaway*, __ N.H. __, Slip.Op. 2009-918 (decided Dec. 7, 2010) (1994 decree; 2009 modification). The other two cases he cites are beside the point: *Nassar v. Nasser*, 156 N.H. 769 (2008), involves alimony, but not modification, and *Cole v. Ford*, 156 N.H. 609 (2007), is a child support case.

Temporary orders are, by definition, issued *before* the final hearing, RSA 458:16(f), and thus before the complete facts are known to the court. Requiring that changes from temporary to final orders be regarded as "modification," with the higher burdens of proof that implies, would render the final hearing nearly nugatory.

Moreover, circumstances *did* change. The court noted that after divorce Yvonne would have to begin paying for her own medical insurance, which the court found will be $500 to $600 per month through COBRA. DECREE, *Appx.* at 7; YV.FOF&ROL ¶ 63; *Trn*. at 126. The increase was

intended to cover that new expense.

Mr. Taylor's argument is frivolous, and should be ignored by this Court.

IV. Yvonne is Not Underemployed

In his brief Mr. Taylor alleges that Yvonne is deliberately underemployed. In a pithy, but not necessarily useful comment, he asserts "[a]limony is not intended to act as underemployment compensation, nor does it envision a former spouse as being an underemployment agency." MICHAEL'SBRF. at 16, 20-23. There are several problems with this assertion.

First, the court found Yvonne is not underemployed. It is apparent from the record that she works hard, is willing to work more, is earning at the level of her qualifications, and is not at fault for her inability thus far to increase her pay. *See Wheaton-Dunberger v. Dunberger*, 137 N.H. 504 (1993).

Second, even if Yvonne were underemployed, imputing income involves looking to a person's former earnings before becoming voluntarily underemployed. RSA 458-C:2, IV(a) ("The court … may consider as gross income the difference between the amount a parent is earning and the amount a parent has earned in cases where the parent voluntarily becomes unemployed or underemployed."); *In re Bazemore*, 153 N.H. 351 (2006). Here, however, Yvonne's earning record before the divorce shows even less income than she is making now. Mr. Taylor offered no other facts against which to impute income.

Accordingly this Court should affirm the family court's judgment that Yvonne is appropriately employed.

V. Family Court Had Child Support Guidelines Worksheet on Which to Rely

In his brief Mr. Taylor takes issue with the fact that the family court ordered Yvonne to file a post-decree child support guidelines worksheet. For several reasons Mr. Taylor's argument is specious. Nonetheless, a procedural background, omitted from Mr. Taylor's brief, is necessary to put the matter into perspective.

A. Procedural Background

The final decree was issued on January 5, 2010. DECREE, *Appx*. at 1. A few days later Mr. Taylor asked for reconsideration. RESPONDENT'S MOTION TO RECONSIDER (Jan. 12, 2010), *Appx*. at 48. He contested alimony on grounds similar to those asserted on appeal, and also addressed other issues. In passing Mr. Taylor noted that "[t]he [c]ourt failed to include a Child Support Guideline[s] Worksheet with [its] order." *Id.* at ¶ 30.

Yvonne objected to the motion. PETITIONER'S OBJECTION TO RESPONDENT'S MOTION TO RECONSIDER (Jan. 20, 2010), *SuppAppx.* at 8. Regarding the worksheet, Yvonne acknowledged that one was not attached to the decree, but noted that "upon information and belief, it is not common or routine for Child Support Guidelines Worksheets to be included with court orders (especially when there is no child support order) nor was one warranted in this case." *Id.* ¶ 34.

The family court issued an order addressing the variety of issues Mr. Taylor pressed in his request for reconsideration. It added: "The [c]ourt … is instructing [Yvonne] to resubmit a Child Support Guidelines Worksheet reflecting the Court's January 5, 2010 order." ORDER ON MOTION TO RECONSIDER (Mar. 10, 2010), *Appx.* at 56. Yvonne complied and filed the worksheet. CHILD SUPPORT GUIDELINES WORKSHEET (Mar. 15, 2010), *Appx.* at 59.

Mr. Taylor filed a second request for reconsideration. RESPONDENT'S MOTION TO

RECONSIDER MARCH 10, 2010 ORDER ON MOTION TO RECONSIDER (Mar. 19, 2010), *Appx*. at 60. In it he noted the court's instruction that Yvonne submit a post-decree worksheet, made similar complaints about it as he presses here, and attached his own post-decree worksheet. CHILD SUPPORT GUILDELINES WORKSHEET (Mar. 18, 2010), *Appx.* at 68.

Yvonne objected to the second request for reconsideration. PETITIONER'S OBJECTION TO RESPONDENT'S MOTION TO RECONSIDER MARCH 10, 2010 ORDER ON MOTION TO RECONSIDER (Mar. 25, 2010), *SuppAppx.* at 13. She pointed out that after a day of testimony the court was fully aware of the parties' financial situations, that due to the court's use of the word "*re*submit" in its order Yvonne's post-decree worksheet was supposed to be "identical to that earlier submitted … at the final hearing," and that the post-decree worksheet she submitted *was* identical. Yvonne also explained her understanding that the reason the court requested the post-decree worksheet was that the status of alimony was necessarily not known before trial and now that it was known, the post-decree worksheet could accurately take that into account.

In a handwritten denial of Mr. Taylor's second request for reconsideration, the court noted that its "request that the USO [sic] be re-submit [sic] does not give rise to the right to a re-hearing. The USO [sic] submitted was identical." ORDER (handwritten on Respondent's Motion to Reconsider March 10, 2010 Order on Motion to Reconsider (April 5, 2010), *SuppAppx.* at 17.

B. Court Had Child Support Guidelines Worksheet

Mr. Taylor's argument concerning the post-decree worksheet is it allegedly "reveals that the trial court did not rely upon *any* child support guidelines worksheet when rendering its decision with regard to both the alimony and child support awards." MICHAEL'SBRF. at 23 (emphasis in original). There are several problems with the argument.

First, Mr. Taylor has not pursued child support on appeal. This makes moot any issue involving the Child Support Guidelines Worksheet, which is mandated in child support cases. RSA 458-C:3-a ("At every hearing in which child support is involved, the party seeking the order shall file a child support guideline worksheet.").

Second, during the pendency of this case, Yvonne filed a total of eight Child Support Guidelines Worksheets. The post-decree worksheet was her ninth. CHILD SUPPORT GUIDELINES WORKSHEET (record documents #16 (Nov. 24, 2008) (2 scenarios); #44 (Feb. 27, 2009); #49 (Feb. 27, 2009); #64 (June 29, 2009); #65 (June 29, 2009); #86 (Oct. 14 2009) (2 scenarios); #94 (Mar. 15, 2010)). Mr. Taylor thus cannot maintain that the court "did not rely upon any child support guidelines worksheet when rendering its decision."

Third, Yvonne's post-decree worksheet is *identical* to the last one she filed before trial. *Compare* CHILD SUPPORT GUILDELINES WORKSHEET (Mar. 15, 2010), *Appx.* at 59 *with* CHILD SUPPORT GUIDELINES WORKSHEET (record document #86) (Oct. 14 2009), *SuppAppx.* at 18. In its handwritten order the court commented that the documents were identical. Thus any argument that the court did not have a worksheet on which to rely is simply inaccurate.

Fourth, the court's handwritten denial makes apparent that, as a matter of fact, and contrary to Mr. Taylor's assertion here, it had sufficient information on which to base its child support and alimony decisions.

Finally, there is no prejudice. As noted *supra*, alimony is calculated after child support. Because child support here was zero, the calculation does not change the result. Moreover, Mr. Taylor submitted his own post-decree worksheet, thus suggesting estoppel.

For these reasons this court should reject Mr. Taylor's allegations.

CONCLUSION

For the foregoing reasons this Court should affirm the judgment of the court below. Moreover, because the arguments Mr. Taylor makes regarding the availability and amount of alimony are frivolous, this Court should award Yvonne attorneys fees and costs for this appeal.

Respectfully submitted,

Yvonne Taylor
By her Attorney,

Law Office of Joshua L. Gordon

Dated: December 12, 2010

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Yvonne Taylor requests that Attorney Joshua L. Gordon be allowed to present oral argument, but suggests that because the issues raised in this case are neither novel nor important to the administration of justice, no oral argument is necessary.

I hereby certify that on December 12, 2010, copies of the foregoing will be forwarded to Robert M. Shepard, Esq., and to Robert Daniels, Esq., GAL.

Dated: December 12, 2010

Joshua L. Gordon, Esq.