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QUESTIONS PRESENTED

1. **THE TRIAL COURT ERRED IN NOT CREATING A DIVISION OF ASSETS OUTSIDE OF THE TRUSTS THAT MORE STRONGLY FAVORED MR. GOODLANDER.**

   (NOA issues 1,2,3 & 8 raised below in Requests for Findings, Proposed Decree and Motion to Reconsider, all in Appendix and see T. 432, 449-453).

2. **MR. GOODLANDER IS ENTITLED TO A SHARE OF FUTURE DISTRIBUTIONS OF THE SAT AND EMT SUB-TRUST FROM BENEFICIARY TAMPOSI BECAUSE MS. TAMPOSI HAS A VESTED INTEREST IN THE SUB-TRUST.**

   (NOA issues 1,2, 3 & 8 raised below in Requests for Findings, Proposed Decree and Motion to Reconsider, all in Appendix and see T. 432, 449-453)

3. **ALIMONY WAS INCORRECTLY CALCULATED BASED UPON AN ERRONEOUS LEGAL STANDARD.**

   (NOA issue 5 raised in Requests for Findings and Proposed Decree ¶5 in the Appendix)

4. **THE COURT ERRED IN GIVING $1,600,000 IN RED SOX SALE FUNDS TO MS. TAMPOSI.**

   (NOA issue 4 raised in Requests for Findings and Proposed Decree ¶20, also see T. 127-42, 71, 558-59)

5. **PERMITTING THE CHILDREN OF THE PARTIES TO INTERVENE WAS AN ERROR.**

   (NOA issue 6 raised in Order on Motion to Reconsider (10/20/09) in Appendix at pp. 43-4 and see T. 4-16)

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS INVOLVED IN THE CASE

See page ii.

STATEMENT OF THE CASE

The parties were married on January 25, 1982. They separated in the late fall of 2006 and, on May 16, 2007, Mr. Goodlander filed for divorce based on irreconcilable differences. The divorce was decreed to Mr. Goodlander on that basis following a six day trial on October 27-31 and November 5, 2008. The parties had been married almost 25 years at the point of separation. The parties have three children together, John, age 18; Margaret, age 22; and Christina, age 25. All of the children are either in college or working independently. The children were initially intervenors in this case, but they were not inclined to attend the final hearing for various reasons. The court would not allow them to go forward without being at trial so they withdrew their petition on the first day of trial.

Following the Superior Court decree of January 21, 2009, Mr. Goodlander moved for reconsideration primarily because of the court's rulings on alimony and property division utilizing the Uniform Trust Act standards. The motion was denied by order dated March 24, 2009. A timely appeal followed and a cross-appeal by Ms. Tamposi was also filed. The decree and order on the reconsideration motion are in the Notice of Appeal at pages 7-45 (hereinafter NOA).

STATEMENT OF THE FACTS

Ms. Tamposi is 53 years old and is one of six children born to the late Samuel A. Tamposi. When the parties met, Ms. Tamposi was a managing partner of The Tamposi Company, the real estate development company founded by her father. She was employed in the family business for ten years. The court heard no evidence suggesting that Ms. Tamposi is not employable. Decree, NOA at pp. 7-9.

Before Mr. Tamposi, Sr.'s death in 1995, as a comprehensive estate plan, he established two trusts, the Samuel A. Tamposi, Sr. 1992 Trust (with various amendments) and the Samuel A. Tamposi, Sr. 1994 Irrevocable Trust, which contain similar terms. Id. at 9. The operative document is now the 1992 trust, and, therefore, the trial court referred to them collectively as the "SAT Trust." Id. See Trusts in Sealed Appendix at pp. 16 to 46.

Upon Mr. Tamposi's death, each of his six children were afforded equal interests in the SAT Trust corpus. Id. The assets of the SAT Trust have an approximate non-discounted value of $72,000,000 and consist primarily of real estate or entities that own and manage real estate. Id. and see exhibit 81 in the Sealed Appendix at p. 2. According to the SAT Trust documents, all assets of the SAT Trust are to be controlled and managed by two "investment directors," Samuel A. Tamposi, Jr. and Stephen A. Tamposi. Ms. Tamposi is currently in litigation in probate court again with those two brothers over management issues. Id. at 10.

Samuel Tamposi, Sr. also created twelve "sub-trusts," one generation skipping tax-exempt sub-trust and one non-exempt sub-trust for each child, all now governed by the terms of the Samuel A. Tamposi, Sr. 1992 Trust. Id. and see Exhibit 78, Appendix p. 1. She may have income from both. Transcript at 153 (**hereinafter T. and the page#**). Ms. Tamposi's sub-trusts will be referred to collectively as the "EMT Trusts." Each sub-trust has a trustee, who is governed by the standard to pay to or for the benefit of Samuel Tamposi, Sr.'s children (and their children) "such amounts from the net income and principal of the [sub-]trust necessary for their education, maintenance in health and reasonable comfort." Mr. Tamposi's current trustee is Attorney Julie Shelton of Chicago. Each sub-trust is funded by distributions made by the two investment directors from the SAT Trust. See Sealed T. at 19.

In addition to Ms. Tamposi's interest in the SAT Trust and EMT Trusts, she acquired in her name certain minority interests in other real estate partnerships and entities termed the "non-trust assets." Decree, NOA at 13. These assets are also managed and controlled by Samuel A. Tamposi, Jr. and Stephen Tamposi. Any income generated by or from the non-trust assets is paid to the owners according to their varying ownership interests. Id. Some owners are outside of the family. The non-trust assets are collectively valued at $6,883,300, minus marketability and minority discounts of up to 30%, or $4,818,310. Id. Samuel Tamposi, Jr. testified that he would not anticipate any difficulties if Mr. Goodlander were awarded part or all of Ms. Tamposi's interests in the non-trust assets. Id.

In 2007, Ms. Tamposi received distributions in the amount of approximately $101,184 from the non-trust assets. Id. at 14. From January through August 2008, she received distributions of $72,197. Id. In 2007, Ms. Tamposi also received income from the EMT Trusts and the non-trust assets that was available to her of $286,729. Id.

Mr. Goodlander is 66 years old. He is a self-made man. "There is no dispute that throughout the marriage he was extremely hard-working and, until 2004, enjoyed great success in his professional endeavors." Id. at 15. When the parties met in 1979, Mr. Goodlander was already a financial success with approximately $3,000,000 of assets in his name. Id. at 16. In June 1981, Mr. Goodlander purchased CabTech, Inc., which manufactured audio accessories. He turned the focus of the company to manufacturing computer accessories. Id. Eventually, a "disk array" and "parity disk," which essentially allowed the quick transfer of data from one disk drive to another, was developed by the talented engineers Mr. Goodlander hired. Id. Patents were obtained in the name of Storage Computer Corporation. Id. at 17.

In July, 1991, Mr. Goodlander formed a corporation named Storage Computer Corporation ("SCC"), to manufacture and market the storage disk array and future generation computer products. Ownership of the assets of CabTech, Inc., including the patents, was transferred to SCC. Decree, NOA at 17, T. 300. Mr. Goodlander gifted each of his children a 10% share in SCC. At its heyday in 2000 before the dot.com collapse each child's share was worth $20,000,000. Decree, NOA at 17 (emphasis added).

In 1986, Kristiania Corp., a real estate holding company, was formed by Mr. Goodlander to purchase an office and light industrial building at 11 Riverside Drive in Nashua, from which CabTech, Inc. and eventually SCC operated. Id. The real estate was sold by CabTech, Inc. to Kristiania Corp. for $400,000, the net proceeds of which Mr. Goodlander reinvested in Kristiania Corp. Id. Monthly rent was paid by SCC to Kristiania Corp. Mr. Goodlander gifted each of the Goodlander-Tamposi children a 25% ownership in Kristiania Corp. Id. Mr. Goodlander's strategy was to grow SCC with the development and marketing of cutting edge computer accessories. Id. 18. To that end, his salary even at the height of SCC's success "was never excessive." Id. In 2000, he drew a salary of $75,000; in 2001, $200,000; in 2002, $131,250; and in 2003, $117,383. Id. But he has "earned no income from SCC or any other source since 2003." Id.

In April 2005, Storage Computer Corporation, like so many computer companies, finally fell victim to the dot.com collapse. Id. Mr. Goodlander made what efforts he could to salvage the company, including reducing his salary and eventually eliminating it, but those efforts failed. In August 2003, SCC stopped paying rent to Kristiania Corp., although it continued to operate out of 11 Riverside Drive. Id. The SCC stock has no value and is no longer publicly traded. Id.

Mr. Goodlander is beyond retirement age and engaged in a different market and economic time than when he launched SCC. Id. at 26-7. He also has "no present liquidity, and is at an age where he cannot afford to lose millions of dollars on a business venture." Id. at 27.

With regard to the SAT Trust and EMT Trusts, the Court found that the corpuses of the trusts are not marital property subject to division. Id. The main issue on appeal comes down to whether Mr. Goodlander can be awarded indirectly any part of Ms. Tamposi's interest in the irrevocable EMT Trusts. Id. The Court found that an essentially equal division is fair. Id. at 29. This was a long-term marriage and "Both contributed equally in their own way." Id.

SUMMARY OF THE ARGUMENT

With regard to assets outside of the trusts the court division was only 51% to Mr. Goodlander and 49% to Ms. Tamposi. She also got a multi-million dollar house, the Red Sox money and unfettered interest in a $12,000,000 share of the SAT trust fund. All this for a long term marriage where an equal division is presumed by law.

Mr. Goodlander is entitled to a share of the future distributions from the family SAT Trusts after Ms. Tamposi receives them because she has a vested right in the trust. Because of Ms. Tamposi's interest, the trust is marital property to be considered in a division. Her right is vested because it cannot be impaired or taken away from her without her consent.

In the present case, there is more than a "mere expectancy" in the future distributions of the trust. The EMT sub-trust was created by Ms. Tamposi's father in 1992, prior to his death. Upon his passing in 1995, the EMT trust began distributing income to Ms. Tamposi for her "education, maintenance and health and reasonable comfort." She has an absolute right to the 1/6 interest that her father left for her through the SAT and EMT trust. The trusts have been distributing income to Ms. Tamposi for fifteen (15) years.

Because the right to receive trust income is vested in Ms. Tamposi, it should be considered marital property and therefore subject to division. The presumption of equal division of marital assets is strongly in favor of dividing the past, present, and future flow of income equally among the parties if the underlying asset cannot be divided.

Even if the UTC mere expectancy language enacted effective September 9, 2008, is found to be relevant to a 2007 divorce filing, it should not be applied retroactively to this case since the result is highly injurious to Mr. Goodlander. RSA 21:37 has long stated that: "every

statute which takes away or impairs vested rights, acquired under existing law… must be deemed retrospective." A retrospective statute is found to be unconstitutional if it impairs a substantive, vested right.

In the present case, retroactive application of the recent September 2008, UTC "mere expectancy" language to Mr. Goodlander's October 2008 trial would impair his substantive rights to have his 2007 divorce filing played out in the rules in effect during his marriage as to substantive alimony rights. Ms. Tamposi had a vested right in the SAT and EMT trusts since 1995. To apply the "mere expectancy" language could also deprive her of her vested right to receive distributions under the standard her father set forth and her trustee follows.

Mr. Goodlander has shown a significant impairment and burden by not being able to obtain his deserved share of the trust distributions Ms. Tamposi receives. His standard of living has significantly decreased. He has not made any income since leaving Storage Computer in 2003 seven years ago, yet the court based alimony on a basic needs test and not the RSA 458:19 standard. The alimony standard for divorces codified in RSA 458:19 has not been expressly repealed by RSA 564-B (the UTC) nor has Ms. Tamposi shown evidence of "convincing force" to repeal RSA 458:19, I (a)(b) by implication.

In the present case, there is no convincing evidence that the legislature intended to repeal the alimony standard in RSA 458:19 when the legislature adopted the "most basic needs" test in the UTC. The UTC should be interpreted to apply to direct trust payments outside the scope of RSA 458:19's governing provisions of property divisions and alimony <u>in divorces</u> once the beneficiary receives her distribution.

Ms. Tamposi's family share in the sale of stock in the Red Sox was $1,600,000. The trial court enjoined distribution of those funds pending "further order of the Court." This pre-decree

freezing of the funds placed them on the table for division but yet she gave Mr. Goodlander none of that asset. The trial court's decree in this regard should be reversed and the Red Sox funds be awarded to Mr. Goodlander or assets of like value should be awarded to him.

Permitting the children of the parties to intervene was error. Mr. Goodlander does not agree the intervention was even necessary because the children had an adequate remedy at law which they exercised by the suit now pending against their father. Divorce is difficult enough for parents without making it a three-ring circus and driving parents apart from their children as has happened here where the children dropped out on the first day of the divorce trial after filing suit against their father in Superior Court on the civil docket.

ARGUMENT

I. THE TRIAL COURT ERRED IN NOT CREATING A DIVISION OF ASSETS OUTSIDE OF THE TRUSTS THAT MORE STRONGLY FAVORED MR. GOODLANDER

This was a long-term marriage from 1982 until the divorce decree in 2009. Judge Nicolosi found there to be "equal contributions to the marital enterprise, both monetary and non-monetary." Decree, NOA at p. 19. Ms. Tamposi testified on the appropriate division:

> Q. What percentage of the marital assets should Ted get?
> A. I believe it's fair for 50-50.

Transcript at pp. 868-9.

Mr. Goodlander in his proposed decree recognized that he could not be directly assigned an interest in the SAT Trusts. Petitioner's Proposed Final Decree (11/05/08) Version, ¶20(c), Appendix at pp. 6-8. But he did ask for the following:

> iii. Ms. Tamposi's nontrust interests in Ballinger, Citrus Hills and the other assets listed on Petitioner's Exhibit 84 valued at $6,883,300 are all assigned and awarded to Mr. Goodlander free and clear of any and all interest of Ms. Tamposi. Any buyout of his interest by Elizabeth Tamposi's siblings under operating agreements, partnership agreements, etc. shall also be considered an

offset to the alimony/$3,000,000 liquidity threshold above. Id. at section 2D(c)(iii).

Instead the court divided the non-trust assets by only 51% to Mr. Goodlander and 49% to Ms. Tamposi. Decree, NOA at p. 38-9. This left Ms. Tamposi with 100% of a) access to the Red Sox money, b) her Governor's Island house and c) a $12,000,000 interest in her SAT trusts from 15 years ago. That large a disparity made for a most unfair division:

COURT DECREE ALLOCATION
(NOA page cites below)

ASSETS	**THEODORE**	**ELIZABETH**
Non Trust $4,818,310 after 30% discount off of $6,883,300:	51% or $2,457,338 (p. 13)	49% or $2,360,972 (p. 13)
Furniture, personalty	Rented Room (T. 209)	Gilford "beautiful home" plus boat, jet skis (p. 14)
Gilford House	0	(net) $690,000 (p. 14 & 36)
Red Sox Money	0	$1,600,000 (p. 12)
DEBTS:	**THEODORE**	**ELIZABETH**
	(40,000) owed to Betty (p. 34)	
	(65,000) owed to QPRT (p. 35)	(320,000) QPRT (p. 35)
	(61,000) owed to Christina (p. 36)	
	($295,954) owed to children*	
RESULT:	32% $1,995,384	68% $4,330,972
ATTACHMENT IN CIVIL 08-C-449 (CHILDREN'S SUIT)	($2,200,000)	
NET AVAILABLE	($204,616)	$4,330,972
		Plus EMT has her undisturbed interest in SAT Trusts of 1/6 of $72,000,000 (p. 9 and 38-39)
*The decree at p. 19 (NOA) says Mr. Goodlander owes Christina $61,000. At p. 19 (NOA) the total for all the children is $780,000. However, on page 21 (NOA) the sale proceeds of 11 Riverside in Nashua (Kristiania Corp.'s building) were credited to them in the amount of $484,046. The net owed should be only $295,954 at the time of the decree.		

In In re Salesky, 157 N.H. 698-708 (2008), this Court stated: "Absent special circumstances, the court must make the distribution as equal as possible." (emphasis added). The trial judge starts by considering all the assets of the parties, and then excludes certain ones from the division of property if necessary. But even nonmarital assets may be considered to make an unequal award of the assets left on the table for division. All property, however acquired, is initially subject to equitable division, unless a justifiable reason can be found for its exclusion. See In re Preston, 147 N.H. 48, 49 (2001)(explaining that property, "without regard to title, or to when or how acquired," is subject to equitable distribution).

When a spouse had a vested, though undistributed, legacy under a deceased parent's will, that legacy was included in the computation of an equitable property division. In Lawlor v. Lawlor, 123 N.H. 163 (1983), a master had awarded the wife 75% of the $47,000 proceeds from the sale of the family home while the husband (who expected to receive an estimated $45,000 to $50,000 from his recently deceased mother's estate) was awarded only 25% of the proceeds from the sale of the home. On appeal, the husband argued that the legacy was never an asset shared as part of the marital estate and was therefore his sole property, which ought to be ignored in any computations.

The court rejected that argument, noting that once the mother died, the property was frozen in terms of who would receive it, and only delay of receipt was at issue. In any event, such an amount as would likely to be received could and should be considered in dividing the assets. Lawlor's principles govern this case.

In Schreiber v. Schreiber, 244 So.2d 407, 409-10 (Fla. Dis. Ct. App. 1969), a Florida appellate court held that it was an abuse of discretion for the trial court not to have considered

the husband's vested, but undistributed, legacy in determining his ability to pay alimony and child support.

In In re Hampers, 154 N.H. 275, 286 (2006), a substantial amount of money and property was required to be divided between the parties by the superior court. The husband, an emergency room physician, had an annual salary of approximately $166,000 and a revocable trust worth approximately $15.5 million derived from funds largely inherited from his mother. The wife, a physician's assistant, received an annual salary of approximately $35,000. The parties had only been married for four years. The superior court decided to unequally divide the assets, awarding the wife $2,000,000, $2,500 per month alimony and a $500,000 advance against the property division by the petitioner to purchase a new house for her and the child. The husband received the house, valued at $1,000,000 and the balance of his trust assets.

The Hampers award was less than 50-50 because it was a four year, not a 25 year marriage. But Mr. Goodlander has been given less of the assets than even the wife in Hampers. He is also now 66 years old and past the age of retirement. He will not be able to acquire or inherit assets. Decree at p. 29, NOA and In re Arvenitis, 152 N.H. 653, 656 (2005).

In granting one of the Respondent's requests for findings of fact and rulings of law (#68), the trial court found that Ms. Tamposi had identified on her financial affidavit certain assets as "gifted assets." Sealed Appendix at 15. However, all those assets were not gifted to her by her father at the time of his death. As a matter of trial strategy Mr. Brennan had repeatedly called the assets outside the trust as "gifted" when in fact they are more properly termed non-trust assets owned by Ms. Tamposi totaling almost $7,000,000. The court decree at page 13 of the NOA also said Ms. Tamposi had acquired the non-trust assets "primarily by gift or inheritance from her father." This was repeated error on the facts of this case.

Ms. Tamposi has not been active in the company since 1989 when she went to Washington. T. 739. After her return to New Hampshire in 1992 (Id.), she stayed home and pursued higher education. T. 742-2. Her brother Samuel Tamposi, Jr. is running the businesses full-time along with his brother Stephen in Florida. Sealed Transcript at 17. Samuel Tamposi, Jr. testified in detail as to the same asset list that appears in Ms. Tamposi's financial affidavit which is attached hereto in the Sealed Appendix at pp. 8-15.

At trial, Samuel Tamposi, Jr. described asset by asset which ones were owned by the siblings prior to Samuel Tamposi, Sr.'s death in 1995 and which ones were later gifted. The testimony began by analyzing various properties in which Ms. Tamposi owns a one-sixth or less interest. First in an unsealed exhibit appearing in the Appendix at p. 1 is Plaintiff's #78 which is a diagram of the trust situation. See Sealed T. at p. 19. Next the $19,864,378 in the generation skipping trust set forth in sealed Plaintiff's exhibit #80 was discussed. Sealed T. at 24 and Sealed Appendix at p. 1. Samuel Tamposi, Jr. continued by discussing an entity known as Peter-Sam Investment Properties (sealed exhibit #87) worth several million dollars and which appears as an asset on the Ballinger list (page 2 of sealed exhibit 84) as a major holding.

> Q. If you go to Tab 87, that's Peter Sam.
> A. Those assets were either held prior to bankruptcy by Tamposi Entities, or held by my father. No, they were actually – I believe those were held prior to bankruptcy, all of those assets.
> Q. All right. So they weren't gifted by your father to you six kids?
> A. Not those particular assets.
> Q. Okay. So Peter Sam was not gifted.

T. 38.

In 1991, the six siblings put various Tamposi entities into bankruptcy because of high leverage to various banks during a credit crunch. See Sealed Transcript at pages 12-17. They came out of bankruptcy in April of 1994, and they entered into a "comprehensive settlement

agreement with our creditors and with my father and Gerald Nash, who also had claims." T. 40-42. (Samuel Tamposi, Sr. never filed for bankruptcy). Samuel Tamposi, Jr. described each property on a list of values on a schedule for Ballinger Properties, LLC the second page of Exhibit 84. Sealed Appendix at p. 5. The various amounts of value of the $14,000,000 Ballinger properties are sealed but the names are not as they are part of the unsealed public record transcript and appear in the Decree.

The itemization for each of these various properties by Samuel Tamposi, Jr. went from pages 35 to 50 in the unsealed transcript. The following table (minus values) has been created to reflect a given property and then each page in the transcript where it was described by Mr. Tamposi as either derived by inheritance through his father or in the business that Ms. Tamposi and/or her siblings were engaged in beginning in 1980. The six siblings own various interests in limited partnerships, corporations and other real estate entities held under the name of Ballinger:

BALLINGER ASSETS (EX. 84)		
242 Main Street	Not Inherited	T. 37
100 Northeastern Blvd.	Not Inherited	T. 37
Peter Sam Properties	Not Inherited	T. 38
Hancock Land	Not Inherited	T. 38
BT Realty LP	Not Inherited	T. 38
CNT Investments	Not Inherited	T. 38
KONABA Managements, LLC	Not Inherited	T. 38
Lexington Greens	Not Inherited	T. 39
Northwest Mini	Not Inherited	T. 39
Pine Hill Gardens	Not Inherited	T. 39
SAT Sr. LP	Not Inherited	T. 40
TANA Properties LP	Not Inherited	T. 41
Tamposi LLC	Not Inherited	T. 41
Trafalgar Square Associates	Not Inherited	T. 41
1987 Tamposi LP	Not Inherited	T. 41

Samuel Tamposi, Jr. also testified Ballinger was set up in 1994 after they came out of bankruptcy. Sealed T. 14-15. President Tamposi's testimony when asked to sum up about Ballinger, which is one of the major non-trust assets, is as follows:

> Q. All right. On that page of Ballinger, how many assets, if any, were gifted by your father or his estate to you and your siblings, if any?
>
> A. I don't believe any of these assets were gifted. In our bankruptcy, my father was one of – it was a secured creditor, and part of the work out was that my dad would have the right to satisfy some of his payables from the bankruptcy estate by getting partnership – various partnership interests.

Transcript at 42, emphasis added.

Next, Samuel, Jr. again went through the list on the first page of Exhibit 84 (which is in the Sealed Appendix at p. 3). Ballinger's assets had already been testified about when he turned to the rest of the non-trust assets owned by Ms. Tamposi as follows (again minus values):

ELIZABETH TAMPOSI ASSETS			
Ballinger Properties, L.L.C.	Not Inherited	T. 45	
Brentwood Farms L.P.	Not Inherited	T. 45	
BT Realty Limited Partnership	Not Inherited	T. 45	
Canterbury Lakes, Inc.	Not Inherited	T. 45	
Celina Hills Associates	Not Inherited	T. 45	
Citrus Hills Realty	Unsure	T. 45	*
Citrus Hills Construction Company	Not Inherited	T. 46	
Citrus Hills Golf & Country Club	Unsure	T. 46	*
Constructus LLC	Not Inherited	T. 46	
December Corp.	Inherited	T. 46	*
Florida Showcase Properties, Inc.	Unsure	T. 47	*
Hernando Properties, Inc.	Not Inherited	T. 47	
Manatee Title Company	Inherited	T. 47	*
110 D.W. Highway Associates, L.L.C.	Not Inherited	T. 47	
Pine Ridge Estates	Not Inherited	T. 48	
Pointe Vista Development Corp.	Not Inherited	T. 48	
River Oaks Properties, Inc.	Unsure	T. 48	*
Tamposi Company, Inc.	Not Inherited	T. 49	
Tamposi-Nash Real Estate Group	Not Inherited	T. 49	
486 Properties, Inc.	Not Inherited	T. 49	

Q. Okay. So it's fair to say that on that balance sheet, when we take out the three or four gifted, the bulk of those assets were around in the eighties, going into the bankruptcy. They were not gifts from your father?

A. That's correct.

Transcript at 49.

In fact if you add up the value of the ones either inherited or for which he could not recall the origin (shown by an *) the total comes to less than 10% of the total value of all non-trust assets in her name. See Table of * properties in the Sealed Appendix at p. 4. Thus it was error to describe the entire non-trust asset list as "inherited" or gifted. The above testimony was elicited from the man who runs the companies day to day but, unfortunately, the trial court fell into error weeks later when drafting its decree.

It thus appears the trial judge divided the non-trust assets in only a 51/49% formula because she thought the bulk of them came by gift from Ms. Tamposi's father. This then created a very disproportionate division when all marital assets were considered, let alone the 800 pound gorilla in the form of her $12,000,000 share of the SAT trust. The property award should be reversed and all of the non-trust assets should be awarded to Mr. Goodlander. See Lawlor, supra. In 1995 Ms. Tamposi had assigned her interest in Ballinger to Mr. Goodlander who signed it back to her four years later. T. p. 65. There were no problems with the relationship between Sam Jr. and Mr. Goodlander. T. 298-9. Thus the trial court correctly found that Samuel Tamposi, Jr. testified "that he would not anticipate any difficulties if Mr. Goodlander were awarded part or all of Ms. Tamposi's interests in the non-trust assets." Decree, NOA at p. 13.

II. MR. GOODLANDER IS ENTITLED TO A SHARE OF FUTURE DISTRIBUTIONS OF THE SAT AND EMT SUB-TRUST FROM BENEFICIARY TAMPOSI BECAUSE MS. TAMPOSI HAS A VESTED INTEREST IN THE SUB-TRUST.

Mr. Goodlander and Ms. Tamposi were married for over twenty-five (25) years prior to filing for divorce on May 16, 2007. Decree, NOA at p. 19. Ms. Tamposi is the beneficiary of a sub-trust which distributes her monthly income and did so during the parties' marriage. Decree, NOA at p. 9, 14. Mr. Goodlander is entitled to a share of the future distributions from the sub-trust because property subject to division is "all tangible and intangible property and assets, real or personal, belonging to either or both parties." RSA 458:16-a I.

Under RSA 458:16-a II when there is a divorce, the court will order the equitable division of property between the parties. In determining how to divide assets the court considers a number of factors including "the value of any property acquired by gift, devise or descent." RSA 458:16-a II. However, the question of whether or not a trust asset is on the table is "a pure question of law, subject to de novo review" by this Court. In The Matter of Chamberlin, 155 N.H. 13, 15-16 (2007).

Mr. Goodlander is entitled to a share of the future distributions from the EMT Trust after Ms. Tamposi receives it because Ms. Tamposi has a vested right in the trust. Because of Ms. Tamposi's interest, the trust is marital property which is subject to division. A vested right is "a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent." Black's Law Dictionary (8th ed. 2004). Rights vest at the moment a trust becomes irrevocable, either by operation of the terms of the trust or because of the death of the settler. See. e.g., Dubois v. Smith, 135 N.H. 50, 58 (1991) (explaining that in the context of insurance policies, the right cannot vest unless the insured is somehow prohibited from changing the beneficiary designated in the policy).

The lower court stated that Ms. Tamposi has only a "mere expectancy" right in the trust under of RSA 564-B:8-814(b). However, Ms. Tamposi has more than a mere expectancy, she has a vested right. The language of RSA 564- B:8-814(b) is as follows:

> If a distribution to or for the benefit of a beneficiary is subject to the exercise of the trustee's discretion, whether or not the terms of a trust include a standard to guide the trustee in making distribution decisions, then the beneficiary's interest is neither a property interest nor an enforceable right, but a mere expectancy.

A mere expectancy is the interest of a person who hopes to receive a future beneficence. In re Marriage of Brown, 544 P.2d 561, 565 (Cal. 1976). If a distribution is subject to the exercise of a trustee's totally unfettered discretion then the interest could be considered a mere expectancy. N.H. RSA 564- B:8-814(b); Respondent's Finding of Law ¶ 10, Appendix p. 27.

In Tuttle v. New Hampshire Medical Malpractice JUA, (January 28, 2010), the policyholders' contract rights with the Medical Malpractice Joint Underwriting Agency ("JUA") were found to be a direct financial interest, and more than a mere expectancy by this court. Slip op. at p. 13. In Tuttle, the policyholders' vested rights were found to be a beneficial interest which was defined by the Court as "as a right or expectancy in something (such as a trust or an estate), as opposed to a legal title to that thing." Tuttle, supra, at 13 (quoting Nordic Inn Condo. Owners' Assoc. v. Vebtullo, 151 N.H. 571, 575-76 (2004)). A beneficial interest is considered a vested property right. Tuttle, supra, at 13. See, e.g., Alliance of American Insurers v. Chu, 571 N.E.2d 672, 679 (N.Y. 1991); Ohio State Life Insurance Co. v. Clark, 274 F.2d 771, 777 (6th Cir.1960).

In re Chamberlin, supra, relied upon by the court below was a case where the parties established an irrevocable charitable trust while they were married. 155 N.H. 13, 14 (2007). The trust was established for their personal tax benefit and was created to generate income as well as funding donations to charities. Id. The parties were to receive income from the trust

only if it exceeded the amount of $110,000. Id. The trust never reached this amount prior to the parties divorce. Id. The Chamberlin court held that because the charitable trust corpus did not reach the specified amount, it did not belong to either party at the time of their divorce, and was properly excluded from the marital estate since it was not a vested right. Id. at 17.

But the Court also held that the trust corpus was not the only property interest tied to a trust. Id. at 18. The Court stated that if the trust had exceeded the $110,000, the interest which would have been divided between the parties as income would have been considered marital property and subject to division. Id. Finally, the Court stated that "the marital interest subject to division is not the [corpus] itself but the parties['] interest in the trust." (quoting Findlen v. Findlen, 695 A. 2d, 1216, 1220 (Maine 1997)).

In the present case, there is more than a "mere expectancy" in the future distributions of the trust. The EMT sub-trust was created by Ms. Tamposi's father in 1992, prior to his death. Decree, NOA at p.10. Upon his passing in 1995, the EMT trust began distributing income to Ms. Tamposi for her "education, maintenance and health and reasonable comfort." Respondent's Finding of Fact ¶ 61, Appendix p. 23. Though the trust is administered by an independent trustee who can make distributions, those distributions are subject to the "ascertainable standard" of the education, maintenance and health and reasonable comfort for the beneficiary." Respondent's Finding of Fact ¶¶ 55, 61.

Trustee Shelton agreed, testifying as follows:

> A. The trustee may, from time to time, pay to or for the benefit of the child, and the child's issue, from time to time, living, or any one or more of them, such amounts from the net income and principal of the trust, and in such proportion among them, as the trustee considers necessary for their education and maintenance and health and reasonable comfort, taking into consideration the income and cash resources known to the trustee to be available for such purpose from the other source.

> The difference between this paragraph and the same paragraph relating to the non-exempt trust is that the trustee is not required to take into consideration the income and cash resources available for other purposes, from other sources.

Q. So is it your testimony you have unfettered discretion to do whatever you want?

A. No, of course not.

T. 596-97.

Despite the trustee's clear statement of what she does and how she reads the applicable trust language, the trial court granted a contradictory finding that said the trustee has "absolute discretion" in making distributions. Respondent's Finding of Fact ¶ 60, Appendix p. 23 (versus ¶ 61).

Mr. Goodlander and Ms. Tamposi were married during the time the trust began distributing income in the nineties. Decree, NOA at p.10. The parties used this income while they were married. Ms. Tamposi had more than a mere expectancy in the distribution of the trust funds. The funds began distributing in 1995, upon her father's death and have continued to the present. Ms. Tamposi relies on the income from the EMT trust and other assets in order to maintain the family's standard of living.

Ms. Tamposi has a vested right because the trust cannot be taken away from her. She has an absolute right to the 1/6 interest that her father left for her through the SAT and EMT trust. The trust has been distributing income to Ms. Tamposi for fifteen (15) years. The distribution is subject to a standard and Ms. Tamposi has consistently been receiving income from the trust. Further, because the EMT trust has been reliably distributing for an extended period of time, it can be viewed as a beneficial interest by course of conduct as in Tuttle, therefore, it should still

be considered a vested right for Ms. Tamposi. Indeed, the SAT trusts were to begin distributing income upon the death of her father in 1995 and continue to do so.

Ms. Tamposi can receive funds from the exempt trust as well. T. 153. From January 2007, to October 15, 2008, just prior to trial, she or her trustee had received $1,500,000. T. 153, 160. All family units were treated equally by the two managing brothers. T. 154. Once the two brothers have funds from the trust partnerships they go into a common account. T. 205. Once funds reach "in excess of $50,000 or $80,000 in this particular main account, we will then make distributions to the six subtrusts and the monies will flow to the trustees." Samuel Tamposi, Jr. testifying at T. 205. If Ms. Tamposi's trustee is not giving her what she needs she can relieve her of duty and make herself trustee as she was for years prior to 2007 when she appointed her childhood friend Ms. Shelton. T. 561, 899.

Because the right to receive trust income is vested in Ms. Tamposi, it should be considered marital property and therefore subject to division. The presumption of equal division of marital assets is strongly in favor of dividing the past, present, and future flow of income equally among the parties. See Eastman, et al. v. First National Bank, 87 N.H. 189 (1935) (holding the plaintiffs are owners of equitable life estates in the trust fund and of the remainder giving them absolute vested rights in and to the entire trust estate.)

This Court has held that if future distributions out of a trust are vested, they can be included in the division of marital assets. See Flaherty v. Flaherty, 138 N.H. 337, 340 (1994). In Flaherty, this Court found that the husband had a vested interest in the trust his parents created, though he did not yet "enjoy a present possessory interest in the trust." Id. But the husband's interest in the trust was certain to reach him when the specified event, the death of his last surviving parent, occurred. Id. at 340. Therefore the interest was fully vested as here. Id.

Because the trust was established prior to the divorce and the wife contributed significantly to the marriage for its twenty-three year duration; the interest was reachable by her as marital property. Id. at 342-43. The Court found that the wife was entitled to one half of the husband's one sixth interest in the trust. Id. at 342-43.

Here, like Flaherty, Ms. Tamposi's right to receive income from the trust as a beneficiary is a vested right. As in Flaherty, the right vested the moment the trust became irrevocable, which was the time of her father's death in 1995. Decree, NOA at p.9. After Samuel Tamposi's death, no other person could claim Ms. Tamposi's interest as a beneficiary under the trust for themselves. She owns a fully vested one-sixth interest in the trust as much as anyone can own any personal or real property. Like Flaherty, Ms. Tamposi's interest is vested because the trust has future value which should have been included in the division of marital assets. Further, as in Flaherty, the EMT trust was created prior to the divorce and Mr. Goodlander contributed considerably to the marriage. There was no dispute that during the marriage Mr. Goodlander worked extremely hard. Decree, NOA at p. 15. While he was employed he provided a significant source of income to the family of over $100,000. Id. at 17. Both parties in the marriage "contributed equally in their own way." Id. 29.

Similarly, in Lawlor v. Lawlor, the Court held that the inclusion of a vested, but unrealized inheritance as a marital asset. 123 N.H. 163, 165-66 (1983). The Court reasoned that an inheritance which was obtained after the divorce decree was filed should still be considered a marital asset since the husband's vested interest in his mother's estate was the only viable asset of the parties. Id. at 165-66. Further, in Abrams v. Abrams, 131 N.H. 522, 523 (1989) the husband sought to shelter marital assets from division in divorce proceedings by transferring several hundred thousand dollars into irrevocable trust funds established for his children by his

parents. . The court held that the inheritance which was already realized, acquired, and relied upon to support the marital household, was an asset to be considered in the division of marital property. Id. at 524-25.

The parties relied upon the SAT and EMT trust to support the marital household in part since 1995 and wholly since 2003 when Mr. Goodlander no longer had earnings. Decree, NOA at pp. 12-13, 17. Ms. Tamposi has a vested interest in the distributions from trust because distributions from the trust have already been realized, acquired and relied upon.

A. Even if the UTC "mere expectancy" language is relevant, it should not be applied retroactively in this case because it is highly injurious to Mr. Goodlander.

Even if the UTC mere expectancy language enacted effective September 9, 2008 (SB 465 Ch. 374: 15, of the 2008 Session Laws), is found to be relevant, it should not be applied retroactively to this case since the result is highly injurious to Mr. Goodlander. Appendix at pp. 37-8. The New Hampshire Constitution provides that "[r]etrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." N.H Const. Part I, Art. 23.

Further, RSA 21:37 has long stated that: "every statute which takes away or impairs vested rights, acquired under existing law…must be deemed retrospective." In the Matter of Goldman & Elliot, 151 N.H. 770, 772 (2005). A retrospective statute is found to be unconstitutional if it impairs a substantive, vested right. Bielat v. Bielat, 721 N.E.2d 28, 33 (Ohio 2000). A claim for retroactive violation of a vested right must include a showing of some impairment, burden or deprivation in order to be found injurious. Id. at 37.

Additionally, in Tuttle v. New Hampshire Medical Malpractice JUA, (January 28, 2010) this Court held that if application of a new law would adversely affect an individual's substantive

rights, it may not be applied retroactively. Slip op. at 9 (quoting In the Matter of Goldman & Elliot, 151 N.H. 770, 772 (2005)). In Tuttle, the policy holders were found to have a substantive vested interest in the insurance policies. Though the Court recognized the legislature's power to change and modify existing law it held that such legislative power is not without restrictions. Id. at 16. The Court held that the retrospective application of a legislative enactment cannot deprive a person of a vested right. In Tuttle, the retroactive application of the law to the policyholders was deemed unconstitutional since it substantially interfered with their vested rights.

Moreover, in Lozier v. Brown Co., 121 N.H. 67, 70 (1981), this Court held that the "legislature… cannot constitutionally enact laws that affect existing causes of action, regardless of whether suit upon that action has been filed." In Lozier, the plaintiff's widow filed a suit for wrongful death for the injuries her husband sustained during employment. Subsequently, a worker's compensation statute was enacted which barred this action. Id. at 71. The Court held that the new statute could not be applied retroactively to bar the plaintiff's wrongful death action though she did not file suit until after the effective date of the amendment. Because her husband passed prior to the effective date of the statute, she was permitted to pursue her wrongful death claim. Id.

In the present case, retroactive application of the recent September 2008, UTC "mere expectancy" language to Mr. Goodlander's October 2008 trial would impair his substantive rights. Ms. Tamposi has a vested right in the SAT and EMT trusts dating to 1995 and to apply the "mere expectancy" language would deprive her of her vested right to receive distributions under the standard her father set forth and her trustee follows. T. 596-97. RSA 21:37 blocks any UTC language that contradicts the SAT Trust after the settler's death. Mr. Goodlander had a substantive right, in turn, to an equitable share of the trust distributions as per Flaherty, supra.

Retroactive application of the new UTC standard, which was enacted on September 9, 2008, would be injurious to Mr. Goodlander and violate RSA 21:37 and Part I, Article 23. Because Mr. Goodlander now has no other means of earning income, the application of the mere expectancy standard in the UTC, which would deprive him from receiving indirectly any of the trust distributions to Ms. Tamposi, is unjust.

Further, unlike in Lozier v. Brown Co, supra, Mr. Goodlander and Ms. Tamposi began their legal proceedings prior the enactment of the amendment to RSA 564-B:8-814(b) on September 9, 2008. The parties filed for divorce in 2007. Decree, NOA at p. 19. Additionally, the trust began distributing over a decade prior to those proceedings. Following the court's logic in Lozier, because the trust was distributing prior to the divorce proceedings, and the statute was enacted after proceedings had commenced, the mere expectancy language of the UTC should not apply here.

Additionally, as in Bielat, Mr. Goodlander has shown a significant impairment and burden by not being able to obtain his deserved share of the trust distributions Ms. Tamposi receives. His standard of living has significantly decreased. He has not made any income since leaving Storage Computer in 2003, seven years ago. Decree, NOA at 18. This is a dramatic decrease in his earnings from the time of the marriage. His circumstances have been significantly reduced since the divorce and he is burdened by his lack of income and limited earning ability. Id. at p. 26-27. In fact, when they met prior to marriage, Mr. Goodlander was worth $3,000,000 and Ms. Tamposi only worth $1,000,000. T. 213.

Thus to allow the "mere expectancy" language to be applied retroactively to the trust would further burden Mr. Goodlander since it would deprive him of his right to receive from Ms. Tamposi the funds she has distributed from the trusts.

III. ALIMONY WAS INCORRECTLY CALCULATED BASED UPON AN ERRONEOUS LEGAL STANDARD.

The trial judge correctly concluded that Mr. Goodlander is at the age of retirement (66 last year) and in "a different market and economic time than when he launched" Storage Computer Corporation. Decree p. 26-7 in NOA. Mr. Goodlander has "no present liquidity" and won't make the salary or gains he enjoyed prior to 2005." Id. at 27. The judge also found that Mr. Goodlander "has no funds with which to support himself in even a modest lifestyle, which is not what the parties enjoyed during the marriage." Id. at p. 30. He testified he had $7,000 in his checking account. T. 302. Mr. Goodlander is working as a commission salesman for a company on the West Coast, is not on their payroll and has not earned any money yet. T. 237 and 369.

The company he founded and earned a six figure salary from was shut down in 2005. T. 225-6. He took no corporate money for personal use, never purchased a yacht or received a golden parachute. T. 260. Judge Nicolosi found that at "no point did Mr. Goodlander do anything to better his financial circumstances to the detriment of his children, and no money was ever used for personal luxuries." Decree NOA 22. While he lives in a rented room (T. 209), his ex-wife "is living in a beautiful home" on Governor's Island (Decree NOA at 30) for which she paid $1,750,000 and has put in $2,000,000 more. Id. at 14.

The trial court found that:

> First, Mr. Goodlander is 12 years older than Ms. Tamposi and has no retirement or stable and steady income. Second, his opportunity to create future assets and income is limited by his age, his lack of liquidity, and the debt burden the Court places on him to reimburse the children for the funds improperly taken from their custodial accounts…. Decree NOA at 29.

Yet, rather than use the standard and caselaw of RSA 458:16 the court invoked the much tougher standard of "most basic needs" under the Uniform Trust Code, RSA 564:5-503(b)(2) and awarded Mr. Goodlander only $50,000 a year in alimony. Decree, NOA at 32.

For decades (if not a century) the standard for determining alimony has been the need of one spouse versus ability to pay by the other. In this case both factors go in favor of Mr. Goodlander. While Ms. Tamposi proposed no alimony to Mr. Goodlander (T. 978), she has a great ability to pay lawyers. Her bill from Attorney Richard Couser for the prior battle with her brothers was between $900,000 (T. 589) and $1,000,000. T. 915. She pays $3,000 a month to her children who have ample resources on their own of about $1,000,000. T. 979. She pays two bookkeepers $2,800 a month to pay her bills and keep her accounts. T. 976. From January to August 2008 she deposited $302,000 into her account. T. 984.

Mr. Goodlander's tax expert, CPA Rodger Howells of Concord testified that for 2007 Ms. Tamposi received $567,000 from the non-trust assets and $268,000 from the SAT trust. T. 427-429. This is more than enough income to pay the $15,000 a month in alimony Mr. Goodlander sought in his proposed order. Proposed Decree, Appendix p. 2.

The problem with this case is the hydraulic force of a low alimony ruling. In the normal case it can be offset by transferring sufficient assets so that the less well off spouse can invest the funds and earn income so as to avoid the need for high alimony. Here Betty Tamposi wants to say, in effect, "I won't pay more than your basic needs and I can't transfer anything to you either, but have a nice retirement in your rented room." Something has to give. If there is to be an equitable result, all the nontrust assets (rather than just 51%) should be transferred to Mr. Goodlander especially if this court concludes that alimony is for only basic needs rather than the prior lifestyle of the parties.

The alimony standard for divorces codified in RSA 458:19 has not been expressly repealed by RSA 564-B (the UTC) nor has Ms. Tamposi shown evidence of "convincing force"

to repeal RSA 458:19, I (a) (b) by implication. The applicable statutory language at issue here is as follows:

> (a) The party in need lacks sufficient income, property, or both, including property apportioned in accordance with RSA 458:16-a, 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.

RSA 458:19 (I) (a) (b), emphasis added.

But buried in the UTC is the following:

> A spendthrift provision is unenforceable against: a beneficiary's spouse or former spouse who has a judgment or court order against the beneficiary for alimony but only for and to the extent that such judgment or court order expressly specifies the alimony amount attributable to the most basic food, shelter and medical needs of the spouse or former spouse.

RSA 564-B: 5-503(b)(2), emphasis added.

Generally, for a statute to be repealed expressly, it must be explicitly stated that the statute has been repealed. Here, RSA 458:19 has been reaffirmed and amended in 2000, 2001 and 2005. However, the UTC standard has never been thought of or referred to. The UTC language was in a bill titled "An Act Making Technical Corrections to the Uniform Trust Code" enacted in 2005 (HB 542, Ch. 270:13 of the 2005 Session Laws). Appendix at pp. 39-40. That same session, RSA 458:19 was amended but no mention was made by either statute to the other. They were clearly legislative ships passing in the night.

Further, a divorce practitioner would not be drawn to the UTC amendment for an alimony standard given the title of the bill: "An Act Making Technical Corrections to the UTC." Moreover, the specific section detailing changes to alimony under the UTC is titled "Exceptions

to the Spendthrift Provision." See Appendix at p. 40. There is no reason for a divorce practitioner to be looking in these sections for the divorce alimony standard. The alimony standard in RSA 458:19 clearly stands separate and apart from the UTC "most basic needs" provision.

With no express repeal we turn to repeal by implication. The party in favor of repeal by implication (Ms. Tamposi) must demonstrate such by evidence of convincing force. Opinion of the Justices, 107 N.H. 325, 328 (1966). Further, a statute can be repealed by implication if the two enactments contain irreconcilable language. Gazzola v. Clements, 120 N.H. 25, 28 (1980). However, if a reasonable construction of the two statutes is found when they are read together, implied repeal is not likely to be found. State v. Miller, 115 N.H 662 (1975). Additionally, repeal by implication is a disfavored doctrine when any other reasonable construction of the statute may avoid it. See Gauthier v. Gosselin, 94 N.H. 496 (1947); Ingersoll v. Williams, 118 N.H. 135, 138 (1978); State v. Miller, 115 N.H. 662 (1975); Opinion of the Justices, 107 N.H. 325 (1966).

In Hayes v. Archambault, 106 N.H. 434, 435-36 (1965) a statute dealing with appeals from the municipal court was not repealed by implication simply because a more recent statute regarding appeals was enacted. . In Hayes, the Court held that the legislature did not intend to repeal the older statute with the new, but rather carry the old statute forward and reconfirm an existing interpretation of that statute. Id. at 436. Because the defendant failed to show "convincing evidence" that the newer statute repealed the older, rather than simply reconfirming an existing interpretation of the older statute, the older statute was not repealed by implication. Id.

In the present case, there is no convincing evidence that the legislature intended to repeal the alimony standard in RSA 458:19 when the legislature adopted the "most basic needs" test in the UTC. The UTC should be interpreted to apply to direct trust payments outside the scope of RSA 458:19's governing provisions of property divisions and alimony in divorces once the beneficiary receives her distributions.

First, the UTC is a uniform set of laws that were not tailored to consider specific provisions of New Hampshire divorce law. Second, the UTC deals with trusts, and its relevance to divorce law is not clearly apparent to the bench or the bar. Third, if the legislature intended for the UTC to govern marital property divisions and for the "most basic need" test to be used to set alimony it would have done so through explicit legislative action amending RSA 458:19 using language in the UTC saying "notwithstanding RSA 458:19…" Therefore, there is no "convincing evidence" that the legislature intended for RSA 458:19's governing provisions codifying a century of common law to be repealed.

Mr. Goodlander is entitled to more that his "most basic needs" since the New Hampshire alimony standard is governed by RSA 458:19, not RSA 564-B. The alimony statute was enacted in 1937, with the most recent amendment in 2005. There is long standing reliance on this statute, and in fact, New Hampshire case law explicitly states that alimony should be determined by figuring out more than just the spouses' "most basic needs." See Healey v. Healey, 117 N.H. 618, 620-21 (1977) (rejecting husband's argument to terminate alimony where former wife's independent source of income did not provide standard of living established during the marriage), and Murphy v. Murphy, 116 N.H. 672 (1976).

One way to reconcile the conflicting standard is to hold that the language of the spendthrift and discretionary trust provisions in the statute indicates that those provisions were

only meant to apply to actions by non-spousal creditors and other similar parties seeking to reach the trust corpus before the money reached the hands of the beneficiary. As RSA 564-B:5-502(c) (which applies to spendthrift trusts) states:

> A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary. (emphasis added).

Similarly, RSA 564-B:5-504, which applies to discretionary trusts, simply states that "a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion." (emphasis added). Regardless of the sweeping language of the 100 page UTC and its many intricate provisions, the simple fact is that it should not be read to alter or replace the well-developed common law surrounding equitable division of property in a divorce and the calculation of alimony. Besides the Tamposi trust contains provisions that are not purely discretionary. Trustee Shelton herself agreed on the stand that she had a standard to apply and that it was governed by the health, reasonable comfort, etc. test set forth in the trusts. T. 596-97.

Furthermore, there is no support for the idea that distributions to Ms. Tamposi become anything but her personal property once they reach her. As a recent *Bar Journal* article by a trust expert explains:

> "[W]ith a spendthrift trust, creditors, including a former spouse and children of the beneficiary, cannot reach the trust assets themselves, but may only reach distributions." Arruda, Michelle A., The Uniform Trust Code: A New Resource for Old (and New!) Trust Law, N.H.B.J. (Winter, 2006), at 7 (emphasis added).

That article also discusses four exceptions to the UTC spendthrift provision, which are codified at RSA 564-B:5-503(b). But even these "exceptions" to the general rule stating that trust income may not be disturbed "before its receipt by the beneficiary" do not purport to be exclusive exceptions. They are merely four categories of people against whom a spendthrift provision is unenforceable, but only according to the UTC, and not the divorce laws.

In the Matter of Fowler & Fowler, 145 N.H. 516 (2000), held that:

> [i]t is essential that the amount of alimony awarded be sufficient to cover the supported spouse's needs, within the limits of the supporting spouse's ability to pay. The supported spouse's needs are not, however, limited to the barest necessities. The award should also take into account the standard of living established during the marriage and the financial status of both plaintiff and defendant."

Id. at 521, emphasis added.

In the present case, the UTC "most basic needs" standard was used to calculate alimony. Decree, NOA at 30-31. The trial court has left Mr. Goodlander with only enough money to get by, but not enough to provide him with the standard of living he enjoyed during the marriage. The amount is dramatically less than the $15,000 a month he requested in the proposed decree. Appendix at 2. Mr. Goodlander is 66 years old and has not worked for the past few years, and is beyond retirement age, past the time for suitable employment. Decree, NOA at p. 26-7. Mr. Goodlander's lifestyle has been dramatically altered from what he was accustomed during his marriage to Ms. Tamposi. Therefore, because there was neither an express repeal nor repeal by implication of the alimony statute, the UTC's most basic needs standard should not apply in this case.

IV. THE COURT ERRED IN GIVING $1,600,000 IN RED SOX SALE FUNDS TO MS. TAMPOSI

In the fall of 2008, the lawsuit filed earlier by Ms. Tamposi over the family ownership of a fractional interest in the Boston Red Sox was coming to a head. Attorney Robert Stein represented Samuel Tamposi, Jr. who had been subpoenaed to testify on the first day of the divorce trial. Because of the litigation over the sale the divorce trial court began the trial and then at page 18 of the transcript from October 27, 2008, the court heard the Red Sox issue in the separate Sealed Proceedings Transcript commencing at 11:03 a.m. (The first 20 pages were

actually background by Samuel Tamposi, Jr. and do not discuss calculations relating to the so-called Red Sox money.)[1] At pages 558-9 of the unsealed trial transcript the parties agreed the value of Ms. Tamposi's family share in the Red Sox was $1,600,000. See also Decree, NOA at p. 12.

On October 28, 2008, the trial court enjoined distribution of those funds pending "further order of the Court." See Temporary Restraining Order in the Appendix at pp. 41-2. See also oral order at T. 381. Mr. Goodlander had asked the court to award him the house on Governor's Island to help offset the $12,000,000 SAT trust asset of Ms. Tamposi. If the Red Sox funds could not be used to pay off the loans against that property Mr. Goodlander asked for them in any event. See his Proposed Decree, ¶ 20(c)(ii), Appendix p. 41.

Nonetheless in her decree the trial court awarded the funds entirely to Ms. Tamposi further skewing the division of assets away from the statutorily presumed equality. Decree, NOA at 12.

This was error because the pre-decree freezing of the funds placed them on the table for division and the final decree was not issued until after the funds had been made available. Thus they were a distribution asset "prior to decree" and divisible even under the trial court's analysis. Decree, NOA at pp. 27-8.

The trial court's decree in this regard should be reversed and the Red Sox funds be awarded to Mr. Goodlander or assets of like value should be awarded to him.

V. PERMITTING THE CHILDREN OF THE PARTIES TO INTERVENE WAS AN ERROR.

On September 11, 2007, about three months after the divorce was filed, the two adult children and then minor child sought to intervene in the divorce because they said their interests

[1] The undersigned represents to the court that the parties have consulted Attorney Stein and all agree that the pages from 4 to 20 of the Sealed transcript may be quoted herein.

were so directly implicated. Mr. Goodlander objected but they were permitted to intervene. After moving for reconsideration, the court, Sullivan, J. denied reconsideration of his order. See Orders of September 25 and October 25, 2007, in Appendix at pp. 43-4.

In her decree Judge Nicolosi said on this point in her decree as trial judge:

> The children were initially intervenors in this action, but because they were not inclined to attend the final hearing for various reasons and the Court would not excuse their appearances, they withdrew their petition on the first day of trial. They have filed a civil lawsuit against their father, alleging in essence that he misappropriated a substantial amount of their funds while serving as a fiduciary and custodian. Their participation in the pretrial process did not substantially expand the litigation.

Decree NOA at p. 8.

Mr. Goodlander does not agree the intervention was even necessary because the children had an adequate remedy at law which they exercised by the suit now pending against their father. Indirect evidence of the impact on his legal bills is evident in the testimony of Julie Shelton who is Trustee over Ms. Tamposi's interests in the trusts. She testified that the children's attorney, Arnold Rosenblatt, had been paid by her the sum of $27,000 as of October 30, 2008. See T. 567 and 619.

The involvement by the children obviously cost Mr. Goodlander legal fees to deal with their discover requests, etc. There is a sum he would not have had to pay if his children were not in the case. The $27,000 was on top of $5,000 to Attorney Rosenblatt paid directly by Ms. Tamposi. T. 10-13. This indicates the level of at least $32,000 in fees the children incurred in the divorce.

The public policy reasons to keep children out of a divorce between their parents are evident. First of all if they claim to be in the nature of creditors this court has already ruled that is not the point of a divorce or dissolution proceeding:

> …"we believe it is sound policy to adopt a rule which will not require creditors to intervene in contested dissolution actions in order to litigate their claims. To do otherwise would be to turn a dissolution action into a creditor's proceeding."

In the Matter of Beal and Beal, 153 N.H. 349 at 351 (2006) quoting from Lee v. Lee, 649 P.2d 997, 104 (Ariz. 1982).

A year later in the case of In the Matter of Stapleford and Stapleford, 156 N.H. 260 (2007), this court kept two minor children out of their parents divorce for good public policy reasons saying:

> As discussed above, we find that the best interests of the children are well-protected by the current system. Additionally, we agree with Miller that "[d]ivorce litigation would be complicated exponentially by the involvement of children as parties." Miller, 677 A.2d at 70. If children were allowed to intervene, they could participate in discovery, depose and cross-examine witnesses, and appeal the court's ruling. Should siblings disagree among themselves, they could each hire their own attorney to advocate for their individual preferences. We need not further detail the chaos that would ensue if we were to hold that every mature minor has a due process right to intervene in their parents' divorce litigation.

Id. at 265, citing to Miller v. Miller, 677 A.2d 64 (Me. 1966).

Divorce is difficult enough for the parents without making it a three-ring circus and driving parents apart from their children as has happened here where the children dropped out on the first day of trial after filing suit against their father.

CONCLUSION

The inequitable result below calls for an alimony award based upon the traditional standards for maintaining prior lifestyle even when the recipient is a man. Thus the case should be remanded for a determination of how much above the award would be appropriate. The property award in non-trust assets should be reversed and the percentage increased to 100% for Mr. Goodlander if proper consideration is made for the house Ms. Tamposi received and the $12,000,000 interest in trust assets that cannot be divided herein. Furthermore, the Red Sox

proceeds should have been divided by the trial court and the children's intervention should be reversed as against public policy with an order on remand for the children to reimburse their father for all fees he incurred by their intervention over his objection.

Respectfully submitted,
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By his attorneys,
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Dated: March 8, 2010

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed by first-class mail this 8th day of March 2010, to William E. Brennan, Esq., counsel for the appellant, at 85 Brook Street, Manchester, NH 03104.

_____
Charles G. Douglas, III

REQUEST FOR ORAL ARGUMENT

The appellees request fifteen (15) minutes oral argument and Charles G. Douglas, III, Esquire, will present oral argument.

_____
Charles G. Douglas, III