State of New Hampshire Supreme Court

No. 2009-0444

2009 TERM

NOVEMBER SESSION

In the Matter of

Matt Leiser

and

Nga-Thanh-Tran

RULE 7 APPEAL OF FINAL DECISION OF
PLYMOUTH FAMILY DIVISION

BRIEF OF RESPONDENT/APPELLANT NGA-THANH-TRAN

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QUESTIONS PRESENTED

1. Did the trial court err in its distribution of property by failing to specify written reasons pursuant to RSA 458:16-a, IV for the division of property which it ordered when the division either wasn't equal or when its equal division is not supported by the evidence presented?

   Preserved: Respondent's Motion for Reconsideration (April 24, 2009); Respondent's Response to Objection to Respondent's Motion for Reconsideration (May 15, 2009)

2. Did the trial court err in ordering a parenting plan in which the primary-caregiver parent receives substantially less parenting time than the other parent when no written reasons for such ruling were provided except a statement adopting the Guardian *Ad Litem's* recommendation, which is unsupported by the evidence and seems to base much of its recommendation on the fact that Respondent is not fluent in English and when there is no evidence to support a plan other than one that allows for equal or approximately equal parenting time?

   Preserved: Respondent's Motion for Reconsideration (April 24, 2009); Respondent's Response to Objection to Respondent's Motion for Reconsideration (May 15, 2009)

STATEMENT OF FACTS AND STATEMENT OF THE CASE

In 1999, Matt Leiser and Nga Thanh-Tran traveled to Vietnam to participate in a wedding ceremony / reception. 1 *Trn.* at 11-12.[1] It is unclear whether or not this ceremony legally wed the couple as they were not legal residents of Vietnam at the time. 1 *Trn.* at 12, 42-43. In 2003, Matt and Nga appeared at the Town Hall where they lived and requested a Marriage Certificate which they obtained. 1 *Trn.* at 12, 34, 42; 3 *Trn.* at 6-7.

A full employment history of Matt is unknown; however, he has been in the nail salon business for many years, namely as an owner of various salons for the time periods relevant to this matter. 1 *Trn. passim.* Matt also worked at the various salons that he owned as well as employing others at times. 1 *Trn. passim.* At some point prior to the year, 2006 Matt was apparently the victim of identity theft which left him unable to procure a bank account in his own name. 1 *Trn.* at 151. It was during this time that a salon was opened in North Conway. Matt is listed as the owner on the license for the salon, 3 *Trn.* at 33-34; however, Nga is listed on the bank account for the salon, 3 *Trn.* at 35, and is reported as owner on the relevant IRS tax forms. 3 *Trn.* at 36-37. Nga also worked at various nail salons, 1 *Trn. passim,* one of which she was part owner. 1 *Trn.* at 8. After the 1999 ceremony, they both moved to North Conway. 1 *Trn.* at 29. They opened a shop in North Conway, 3 *Trn.* at 73; however, the ownership is in dispute, they both claim the other was the rightful owner. 1 *Trn.* at 29-30, 82. Matt left soon after they resettled there to open a salon in Belmont. 1 *Trn.* at 30.

Nga lived in North Conway during this time period in order to look after the salon along with another individual hired to do same. 1 *Trn.* at 30-31, 153, 169; 3 *Trn.* at 72. In 2000, while in North Conway, Kelly was born. 1 *Trn.* at 32. During this time, Nga commuted back and forth

[1] The transcript of the September 24, 2008 hearing is referred to herein as 1 *Trn.*
The transcript of the November 25, 2008 hearing is referred to herein as 2 *Trn.*
The transcript of the February 3, 2009 hearing is referred to herein as 3 *Trn.*

between North Conway and Cape Cod, where she owned a salon with other family members.[2] 1 *Trn.* at 30-31, 145; 2 *Trn.* at 19-20; 3 *Trn.* at 75. Nga also took care of Kelly, after she was born, traveling to the Cape less often. 1 *Trn.* at 169. In the meantime, Matt had opened a salon in Belmont at the Belknap Mall. 1 *Trn.* at 30. He stayed there, working long hours, and only traveled to North Conway to spend time with the family on Sundays when he stayed there with them. 3 *Trn.* at 30. 1 *Trn.* at 177. Eventually, the North Conway salon was sold and Nga moved to Belmont with Kelly. 1 *Trn.* at 32; 2 *Trn.* at 20-21. This was sometime around 2001 and Nga was pregnant with Matthew by then. *Id.* Both Matt and Nga worked at the Belmont salon for some time, though Nga less so, in order to care for the children. 1 *Trn.* at 34.

Sometime in 2004 or 2005, Matt purchased a salon in Bedford, New Hampshire, 1 *Trn.* at 34, and this precipitated the sale or transfer of the Belmont salon for $1.00 to one of Nga's brothers. 1 *Trn.* at 35. Matt purchased a home in Brockton, Massachuetts, 1 *Trn.* at 38-39, paying $ 49,400.00 as a down payment and mortgaging the amount of $135,000. 1 *Trn.* at 104-110. The down payment was borrowed from friends and family. *Id.* Nga was not involved in the transaction, 1 *Trn.* at 114, and did not know that Matt owned the property. 1 *Trn.* at 111; 3 *Trn.* at 31-32. The parties agree that they stayed in Brockton at times, 1 *Trn.* at 121-122, but disagree as to whether they actually lived there. 1 *Trn.* at 138, 173-174. The parties moved to Manchester some time in 2005 to another property purchased by Matt. 1 *Trn.* at 40. Again, Nga was not involved in the transaction, 1 *Trn.* at 111-112, and found out that the property was owned by Matt from a third party. 1 *Trn.* at 174-175; 3 *Trn.* at 32. Nga owned property on Cape Cod, purchased in 2001, along with some family members. 1 *Trn.* at 154.

At this point, Matt owns two pieces of property and one business while Nga owns an interest in a property in Massachusetts. 1 *Trn. passim.* Nga was kept in the dark as to the

[2] This salon was no longer in existence at the time of the divorce. 1 *Trn.* at 147, 169.

parties' finances. 2 *Trn.* at 82-83; 3 *Trn.* 20-21. Beginning in April 2006, Matt begins to sell all of this property. 1 *Trn. passim.* In April, he sells the Manchester property and nets $ 16,272.33. 1 *Trn.* at 40-41, 113-114. In October, he sells the Brockton property to his sister for $1.00. 1 *Trn.* at 40. The sister apparently took over a mortgage in the amount of $135,000.00. 1 *Trn.* at 109-110. There were no attempts to place the home on the market. 1 *Trn.* at 116-117. Matt claims that he had to sell because of financial difficulties even though he actually showed an income from the property as a rental unit. 1 *Trn.* at 143. In December, he sells the Key Nails salon for $85,000.00. 1 *Trn.* at 117-119. Matt claims that a portion of the debt incurred from borrowing for the down payment on the Brockton property is still owed by him. 1 *Trn.* at 107-108. This debt, as reported on his Financial Affidavit is for the amount of $29,500.00. FINANCIAL AFFIDAVIT OF MATT LEISER, *Appx.* at 90. On March 2007, Matt filed for divorce. 1 *Trn.* at 139.

Also in 2006, Matt purchased the only salon that he owned at the time of the divorce. 1 *Trn.* at 40. This salon is located in Plymouth, 1 *Trn.* at 42, where the parties lived prior to their separation and where Matt still remains. 1 *Trn.* at 124. The children were and are enrolled in the elementary school there. 2 *Trn.* at 70. Nga lives in Belmont where she rents a part of a home from a relative. 1 *Trn.* at 194. The couple never held any properties, business or personal, jointly. 1, 2, 3 *Trn. passim.* Neither did they have any joint bank accounts. 1 *Trn.* at 47. Nga does not use bank accounts as her expenses are few and relatively small. 1 *Trn.* at 135, 178, 191-192; 2 *Trn.* at 35. The only time she has had a bank account solely in her name was for business purposes when Matthew had the problem with identity theft. 1 *Trn.* at 140-141. They have never filed taxes jointly. 3 *Trn.* at 75, 77.

Up until the temporary hearing, Nga was the primary care giver for the children. 2 *Trn.* at 76, 183-184; 3 *Trn.* 10-12, 14-15. This included the first few years of their schooling. 2 *Trn.* at 104. When the parties separated, Nga stayed with a friend temporarily before moving to her current location. 2 *Trn.* at 33-34. During mediation, Nga was offered more time with the children, 2 *Trn.* at 66-68, but was unable to take the time due to her temporary living situation and her reluctance to impose upon her friend. 3 *Trn.* at 96. Although it was not produced at trial, reference was made to a letter from Matthew's teacher regarding inappropriate clothing (apparently winter clothing, though it is not entirely clear) and lack of snack which Nga addressed promptly upon receipt. 2 *Trn.* at 49-51, 74-75; 3 *Trn.* at 62-63. At some point during the Guardian *Ad Litem's* evaluation, Kelly was brought to the GAL and informed her of problems with the babysitter that was watching them at the time. 2 *Trn.* at 36-40, 67. The GAL did not believe the story and thought Kelly was being coached, *Id.,* although she admitted that she couldn't say for sure that the babysitter did not do the things of which Kelly complained. 2 *Trn.* at 94. The GAL's hierarchy of reasons for her recommendation are the language difficulties, the children staying in Plymouth school systems and credibility of each parent (although she had problems with both of their credibility, she had more problem with Nga's than with Matt's). 2 *Trn.* at 84-87. The GAL's assessment of credibility was in large part due to the parties' explanation of finances, 2 *Trn.* at 80; however, she was also distrustful of Nga's grasp of the language, specifically, she seemed to believe that Nga spoke and understood English better than she let on, 2 *Trn.* at 65, although she is not an expert or linguist. 2 *Trn.* 65. The GAL was without knowledge and/or experience to assess what impact a change in schools would have for children whose second language was English. 2 *Trn.* at 99.

After three separate hearings on the issues, the trial court awarded to Matt his business interest, valued at $15,000.00 and allocated to Matt the debt in his and the business' name as well as the debt he owed to friends and family for the down payment on the Brockton property. Nga was awarded her one-third interest in the home in Falmouth, Massachusetts, valued at $ 53,333.34, and was allocated the debt associated with the car that she drives as well as any other debt in her name. The trial judge noted that this created a negative equity for Matt in the amount of $16,500.00 and a positive equity for Nga in the amount of $20,333.00 and so ordered Nga to pay Matt a sum of $18,415.00 at the statutory interest rate within five years or upon the sale of the Falmouth property, whichever came first. SUPPLEMENT TO FINAL DECREE (April 14, 2009), *Appx.* at 21.

SUMMARY OF ARGUMENT

Nga Tran first argues that the evidence did not support an equal distribution despite the fact that the divorce was granted for irreconcilable differences. Under the facts of this case, an unequal distribution would have been equitable and just. She supports this conclusion by first pointing out that the personal debt of Matt Leiser in the amount of $ 29,500.00 should not have been included as marital property, as a matter of law, as it is not a legally enforceable obligation, but a moral obligation. Alternatively, although the personal debt of Matt Leiser for the amount of $29,500.00 was allocated solely to him, Nga, in effect, is required to pay half of that debt as it was used to offset the difference in the outcome of the property distribution. This "offset" should not have taken place as the debt should have been found to be a result of the diminution in value of assets by Matt or as a moral obligation and thus not marital property subject to distribution.

Nga will next argue that the trial court erred when it adopted the Guardian *Ad Litem's* recommendation without providing separate written reasons for its rulings, seemingly accepting the GAL's conclusions as to assessments of testimony and witnesses that were for the trial court to decide. Finally, Nga argues that the adoption of the GAL's recommendation is an error in itself in that a substantial basis for her recommendation was Nga's less than proficient command of the English language, which should be considered an inappropriate factor in determining parental rights and responsibilities.

ARGUMENT

I. Nga Tran Should Not Be Responsible For The Debt Associated With The Brockton Property

A. The debt associated with the Brockton property should be considered a moral obligation and, thus, not marital property

Property distribution consists of a two-step analysis. *In re Chamberlain*, 155 N.H. 13, 16 (2007). Under RSA 458:16-a, I, the trial court must first determine as, as a matter of law, what assets are marital property, thus subject to distribution, and then it must exercise its discretion in distributing those assets equitably. "Trial court determinations under RSA 458:16-a, I, are reviewed *de novo*... ." *Id.*

The New Hampshire Supreme Court has recognized that a "'moral' obligation for repayment cannot properly be characterized as a debt chargeable to the marital estate. *In the Matter of Harvey & Harvey*, 153 N.H. 425, 437 (2006), *overruled on other grounds by In re Chamberlain*, 155 N.H. 13 (2007)(citing *Azzi v. Azzi,* 118 N.H. 653, 656-57 (1978)). In *Harvey*, the trial court ordered the parties to pay $275,000.00 to the husband's parents for reimbursement of financial contributions they made to the parties' property. The trial court found that it would be equitable to do so even though it did not find that either party had an enforceable legal obligation to reimburse the parents for these financial contributions. *Harvey*, 153 N.H. at 429. Applying *Azzi*, this Court found that, to the extent the husband intends to reimburse his parents, he would be doing so gratuitously and not as a result of an enforceable legal obligation. *Harvey*, 153 N.H. at 437. The trial court had unsustainably exercised its discretion in reducing the marital estate by the amount of such a reimbursement. *Id.*

Other states hold similarly, that a moral obligation is not a legal debt and should not be included to reduce the marital estate. In *Ketterle v. Ketterle*, 814 N.E.2d 385 (Ma. App. Ct.

2004), the husband was awarded a Nobel Prize which included a monetary award. *Ketterle*, 814 N.E.2d at 386-87. The husband wanted to give $83,000.00 of the award proceeds to his mentor. The trial judge, although treating this as a moral obligation and not a legal debt, failed to included the proceeds in the marital estate. *Id.* at 388. This would have increased the wife's award; however, the wife did not appeal this issue and so it was waived. *Id.* at 390. The court made it clear, however, that, while it is in the trial judge's discretion to allow a party to satisfy an individual moral obligation, it should only be done in a way that does allow him to claim entitlement to assets otherwise properly allocated to his wife, whose contributions no doubt assisted in his professional triumph. *Id.*

In the instant case, Matt's family and friends leant him money for a down payment on the Brockton property. There are no loan documents evidencing a legally enforceable obligation. To the contrary, all the checks bear the notation of "gift" somewhere on their face. While it is admirable for Matt to want to reimburse his friends and family for those gifts, the obligation is a moral one, not a legal one, and should not have been included in the marital estate. *See also*, *Kothari v. Kothari*, 605 A.2d 750, 752 (N.J. Super. Ct. App. Div. 1992)(upholding the trial court ruling ordering payment of one-half of monies sent to husband's parents without consent of wife and without any recognition of them as debt repayment); *Culver v. Culver*, 497 N.W.2d 431, 432 (N.D. Ct. App. 1993)(leaving undisturbed the trial court's finding that husband's indebtedness to parents for financial contributions to his education was a "moral obligation" at most).

B. The debt associated with the Brockton property is still due solely as a result of Matthew's conduct which resulted in the diminution of value of marital property, thus an unequal distribution is equitable in this case

The trial court has broad discretion in determining matters of property distribution. *In the Matter of Peter Letendre and Linda Letendre*, 149 N.H. 31, 34 (2002). The Supreme Court will not overturn a trial court's ruling absent an unsustainable exercise of discretion. *Id.*

Under New Hampshire law, "marital property is not to be divided by some mechanical formula, but in a manner deemed "just" based upon the evidence presented and the equities of the case." *In the Matter of Peter Letendre and Linda Letendre*, 149 N.H. 31, 35 (2002)(citing *Rahn v. Rahn*, 123 N.H. 222, 225 (1983)). An equal division is presumed to be equitable unless it decides otherwise after considering one or more of the factors enumerated in RSA 458:16-a, II. The court is required to provide written reasons for the division of property it orders. RSA 458:16-a, III.

In this case, the evidence presented and the equities of the case mandate that the distribution should have been unequal. RSA 458:16-a allows the court to consider, among other factors, "[t]he actions of either party during the marriage which contributed to the growth or diminution in value of property owned by either or both of the parties." RSA 458:16-a, II(f); *In re Martel*, 157 N.H. 53, 56-57 (2008). The Supreme Court, in *Martel,* delineated several factors to consider when applying RSA 458:16-a, II(f), such as: conduct which contributed to the growth in value of the property; the nature of the conduct; the other spouse's knowledge of the conduct; whether the conduct diminished the total marital assets to such an extent that the other spouse is unable to maintain a similar lifestyle following the divorce; and any other factor the court deems relevant. *Martel*, 157 N.H. at 57-58.

After consideration of these factors, the only conclusion that can be drawn is that Matt allowed the property value to decrease, specifically relative to the debt to his friends and family, in that he voluntarily allowed this continued obligation despite the sale of the property to which it attached without any efforts to have it discharged along with the transfer of the encumbered property. Taking each of the above factors individually, there is no evidence that Matt did anything to contribute to the growth of the property. The evidence is to the contrary, that the property declined in value.[3] Although the nature of the conduct is not, in and of itself, sinister, the timing of the transaction and Matt's total lack of effort in seeking fair market value for the property is highly suspicious, or in the least reckless behavior. Nga knew nothing about the property, including its sale. The sale of the property (along with the sales of two other assets) diminished the total marital assets such that Nga is unable to maintain a lifestyle similar to that before the divorce. Nga was living in a home of her own with her family before the divorce and now is renting along with her family members because she is unable to afford to live on her own at this time. Furthermore, she is unable to live in the same town as her children due to the higher rents in Plymouth, requiring her to have a higher income than hers presently. Although mentioned previously, the timing of the sales is another factor for the court to consider when applying RSA 458:16-a, II(f) and it bears repeating. The parties went from owning two properties to owning none and from owning two businesses, to owning one, much lower-valued business, by the time Matt filed his petition for divorce.

[3] It is not disputed that the real estate market suffered a sharp decline in the recent years; however, no evidence was introduced that the decline was as steep as Matt would like everyone to believe. Nga presented evidence of the value of the Brockton property which was not entered as a full exhibit, but marked for identification purposes. If the value is accepted, then the loss on the property would have been approximately 266,000.00. The valuation presented was not an appraised value, but a value placed on the property by the town for purposes of taxation. While it is widely accepted that tax assessed value and fair market value are rarely one and the same, Matt's assertion that 135,000 represented fair market value would require a suspension of all knowledge of real world finances. It is simply not to be believed. However, although it is not necessary to place a value on the property for purposes of this appeal, this notion should go to give consideration of RSA 458:16-a, II(f) greater weight.

Matt testified that he did not place the property on the market, nor did he provide evidence that his sister could not have refinanced to include this debt in her mortgage of the property. In the average real estate transaction, the seller is usually motivated to include whatever debt encumbers the property in the sale price. No one wants to continue to pay for property in which he or she no longer retains an interest. Furthermore, Nga presented testimonial evidence that she, not only knew nothing about Matt's ownership of the property, but she was not involved in the transaction. This is buttressed by the absence of Nga's name on the property's deed.

Thus, while the trial court was correct in allocating the debt to Matt, it erred in ostensibly charging Nga with one-half of the debt by using the figure to compute an equal distribution. "A trial court is not precluded from awarding a particular asset in its entirety to one party." *Letendre*, 149 N.H. at 36. Because liabilities are also part of the marital property, this proposition applies equally to those. RSA 458:16-a, II does not require a trial court to consider all the factors enumerated, nor does it require that a court give them equal weight. *In re Costa*, 156 N.H. 323, 327 (2007). Although the statute does not require malicious intent, nor does it require that the conduct occur in anticipation of divorce, *see Martel*, 157 N.H. at 58, these two components should go to the weight given to this consideration.

Other states have had the opportunity to apply factors similar to those discussed in *Martel* . In *Koutroumanos v. Tzeremes*, the Rhode Island Supreme Court reviewed a lower court's sole assignment of $77,000.00 credit card debt to the husband, but otherwise equal division of marital property.[4] *Koutroumanos,* 865 A.2d 1901, 1098-99 (R.I. 2003). The credit card debt was incurred as a result of stock transactions handled only by the defendant. *Id.* at 1099. The trial

[4] The Rhode Island Supreme Court upheld the property distribution, but did make an adjustment for what it considered an oversight by the trial court in light of the intent to distribute the marital property, aside from the credit card debt, equally. *Koutroumanos,* 865 A.2d at 1099.

court found that most of the losses were beyond the control of the parties. *Id.* Even though the losses were not found to be the fault of the defendant, the debt resulted largely from defendant's reckless investment practices. *Id.* In addition, the plaintiff was found to have been kept completely in the dark as to all financial matters. *Id.* In the case at hand, Matt was also reckless for failing to attempt to obtain fair market value for his home, or in the least, relieve his family of the entire debt associated with the property.

II. Nga Tran Should be Awarded a Parenting Plan That Provides for Equal or Approximately Equal Parenting Time

The trial court has broad discretion in matters involving custody and visitation. *In re Peirano*, 155 N.H.738, 747 (2007)(quoting *In the Matter of Choy & Choy*, 154 N.H. 707, 713 (2007)). "[R]eview is limited to determining whether it clearly appears that the trial court engaged in an unsustainable exercise of discretion." *Peirano*, 155 N.H. at 747. The discretion of the trial court extends to matters necessary in its decision making, such as assigning weight to the evidence and assessing the credibility and demeanor of any witnesses. *Id.* "Conflicts in the testimony, questions about the credibility of witnesses and the weight to be given testimony are for the trial court to resolve." *Id.*

In deciding an award of primary parental responsibilities, the trial court must necessarily consider the relative abilities of both parents to promote the welfare of the child. *In re Kosek*, 151 N.H. 722, 725 (2005); *Pozzo v. Pozzo*, 113 N.H. 436, 437 (1973). In doing so, a court will arrive upon a decision after consideration of many factors. *Pozzo*, 113 N.H. at 437. Guidelines for determining the best interest of the child were outlined in the *Pozzo* decision, *Id.*, and have been codified in RSA 461-A:6. The guidelines include such factors as the qualifications and fitness of each parent; the parents' ability to control and direct the children; the age, sex and health of the children; the environment of the proposed home and its likely influence on the children. *Pozzo*, 113 N.H. at 437. RSA 461-A:6 enumerates many other factors that shall be considered when determining parental rights and responsibilities, among them are the relationship of the child with each parent and the ability of each parent to provide the child with nurture, love, affection and guidance, RSA 461-A:6, I(a); the ability of each parent to provide or have provided adequate food, clothing, shelter, medical care, and a safe environment, RSA 461-A:6, I(b); the children's developmental needs and the ability of the other parent to meet them,

RSA 461-A:6, I(c). Also contained in the statute are several factors pertaining to the relationship between each parent and the children and the continued support and fostering thereof by the opposite parent. RSA 461-A:6, I(e), (f), (g), (i). A trial court may also consider any additional factor that it deems relevant. RSA 461-A:6, I(l).

The trial court below accepted the recommendations of the Guardian *Ad Litem*, agreeing with her assessment that the best interest of the children are served by the children remaining in the Plymouth area under the primary care of their father and, thereby entered Matt's parenting plan as it more closely reflected the recommendations of the Guardian *Ad Litem*. Although the trial court recites that the decision was based upon the best interest of the children, there are no findings or rulings that support that decision other than its acceptance of the recommendations of the Guardian *Ad Litem*. Although the recommendation of a GAL is a factor for the trial court to consider, it is not dispositive and the recommendations should not be afforded greater presumptive weight than other evidence in the case. *Peirano* , 155 N.H. at 748. It is clear that the trial court considered the testimony of the parties, evidenced by the extended dissertation of facts in its supplement to the final decree. However, the opinion is devoid of any mention as to any resolution of conflicts in testimony, credibility of witnesses and assignment of weight to the evidence presented. It is unclear from the opinion whether the trial court made these assessments or relied upon the GAL's conclusions as to the aforementioned factors. If the recommendations of the GAL as well as her conclusions regarding the parties and evidence[5] were given presumptive weight, this is clear error on the part of the trial court and is contrary to well-settled law in New Hampshire.

[5] Much of the evidence proffered at trial relative to parenting issues was provided to the GAL and factored into her recommendations.

Not only is affording presumptive weight to the recommendations of the GAL clear error, but those recommendations consider a factor that is not included in any outline, guideline, or enumeration of factors to be considered when determining parental rights and responsibilities. That factor is the less than proficient grasp of the English language possessed by Nga. Indeed many parents with less than a proficient grasp of the English language have been awarded primary parenting responsibilities despite this fact. *See Burnett v. Burnett*, 2008 Tenn. App. Lexis 158 (Tenn. Ct. App. 2008)(upholding trial court award of children's primary residential parenting to mother even though she was limited by language difficulties); *Banciu v. Banciu*, 282 Ga. 616 (2007)(including in the summary of facts an award to mother of primary physical custody of the parties' youngest son even though it appeared she had difficulty with the English language); *Daniel v.Ilanit*, 2007 Ohio 5461 (2007)(reciting trial court's ruling that mother, whose English skills are limited, was designated as legal custodian and residential parent over parties' minor son); *Ketterle v. Ketterle*, 814 N.E.2d 385 (Mass. App. Ct. 2004)(noting that mother, lacking fluency in English, was awarded primary residential responsibility of two of three children).[6]

Nga's struggle with the English language seems to be of great import in the GAL's report. It ranks highest on her hierarchy of reasons for recommending that Matt have primary residential responsibility of the children and in recommending a less than equal parenting schedule. She also mentions the advantage of having the children remain in the Plymouth school

[6] It should be noted that in none of these cases was the issue of custody appealed on grounds insinuating the language barrier. The cases are merely used to illustrate that language is not a proper consideration when determining parental rights and responsibilities. Difficulties with language are, however, a proper consideration when determining financial issues. *Ketterle,* 814 N.E.2d 385 (2004); *Daniel*, 2007 Ohio 5461 (2007); *Banciu*, 282 Ga. 616 (2007); *Burnett*, 2008 Tenn. App. Lexis 158 (Tenn. Ct. App. 2008). In a Nebraska case, the issue was brought up on appeal. *Maska v. Maska*, 742 N.W.2d 492 (Neb. 2007). The Supreme Court of Nebraska found that the mother's national origin and language was not considered by the trial court because such consideration was not stated in the court's decree. *Maska*, 742 N.W.2d at 497. That is not the case here. The trial court adopted the recommendation of the GAL and that recommendation expressly considered Nga's language in arriving at her recommendation.

district. Nga would have no problem driving the children to and from their school in Plymouth. This would require a commute of approximately 30 to 40 minutes from her current residence in Belmont. This is approximately the average time that a child who rides the bus to school would spend commuting or a comparable commuting time to that of a child who attends private school and, thus is not unreasonable. This arrangement would address the concerns of the GAL that the children stay in the Plymouth school district. If assistance with homework is a concern, Nga has addressed this with the GAL. Nga has family that is fluent in the English language and they would be able to assist if she were unable to do so herself. Moreover, the children are currently enrolled in an afterschool program that provides assistance with the children's homework. The children are in the first years of elementary school; it is unlikely that they are going to be receiving substantial amounts of homework that cannot be addressed at the after school program or which is of such complexity that Nga, herself, or her family would be unable to provide assistance. Although it is likely that the difficulty of school work will increase in the years to come, it is certainly hoped that it will; it is also anticipated that Nga's command of the language will correspondingly increase. Furthermore, it is likely, given the frequent moves in the past, that Matt and the children will someday leave the Plymouth area. It would be markedly unfair to base a decision on the loyalty to a certain school district, when history indicates no such reluctance to relocate for pursuit of employment and/or career opportunities. It is true that it is a bit early to discern if the children's school is a significant factor in a decision to relocate, but this lack of empirical data should not be held against Nga.

Not only is the factor of language inappropriate to consider, but it appears that all evidence in support of a shared parenting plan was overlooked or not given the weight it deserved. Considering the statutory and *Del Pozzo* factors outlined above, Nga is a qualified and

fit parent. The fitness of both parents was not questioned, although there was testimony regarding a letter from the son's teacher regarding clothing and snack that appears to be the only slight as to Nga's parenting abilities. The children stayed with Matthew after the temporary hearing in order to keep them enrolled in the Plymouth schools. Up until that time, Nga was the primary caregiver except for a period of time during which Matthew stayed home and she worked. She worked off and on, but not on a full-time basis. She met all the children's needs as Matthew worked very long hours in those days. Both parents are able to control and direct the children; there was no testimony to the contrary. Both parents' home environments are positive. Nga lives with and has the added support of family members. The children are bonded to both parents, especially to their mother as that is whom they have spent the majority of time with in the past, and each parent is able to provide the child with nurture, love, affection and guidance. They are both able to provide for and meet the needs of the children. Both parents are able to meet the children's developmental needs. RSA 461-A:6, I(c) does not prohibit a parent's enlisting assistance in meeting the developmental needs of the children. It is clear that the best interests of the children would be served by a parenting plan that provides for equal or approximately equal parenting time.

CONCLUSION

Based on the foregoing, Nga Tran requests this Court to find that either the debt is a moral obligation and, thus, not includable in the marital property for distribution or the debt incurred by Matt Leiser for the down payment on the Brockton property be allocated solely to him and not used to calculate an equal distribution and that the parties be awarded a parenting plan that is consistent with an equal or approximately equal parenting schedule.

Respectfully submitted,

Nga Thanh-Tran,
By her Attorneys,

Dame & Lucas, PLLC,

November 9, 2009

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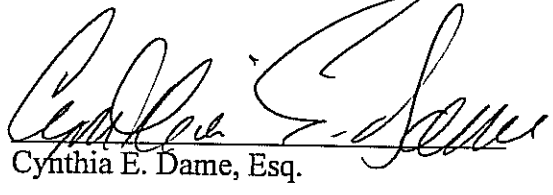
REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Nga Tran requests that Attorney Allen J. Lucas or Attorney Cynthia E. Dame be allowed 15 minutes for oral argument because there are public policy issues at stake in this matter and because the court below unfairly allocated debt to Nga Tran which should have been the sole responsibility of her spouse and unfairly awarded primary residential responsibility to Matt Leiser.

I hereby certify that on November 9, 2009, copies of the foregoing will be forwarded to Doreen Connor, Esq.



Dated: November 9, 2009

Cynthia E. Dame, Esq.

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