THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2009 TERM

Case No: 2009-0536

In the Matter of Cindy G. Bouchard and Jeffrey A. Bouchard

BRIEF FOR RESPONDENT/APPELLANT JEFFREY A. BOUCHARD

Rule 7 Appeal from the Derry Family Division

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All of these issues were properly raised during the Final Hearing, in the Motion to Reconsider, and in the Defendant's Notice of Appeal.

STATEMENT OF THE FACTS

The Respondent/Appellant, Jeffrey Bouchard, and the Petitioner/Appellee, Cindy Bouchard, had a short-term marriage, having married on August 17, 2002 (T. 51), filed for divorce on December 17, 2007, (T. p. 115) and separated on February 20, 2008. T. p. 52. The parties have two minor children together: Nathan (dob: 5/21/03) and Chanel (dob: 10/15/04). (see Respondent's Appendix to Brief, pg. 2, hereinafter "R. App., p.___",

Jeffrey Bouchard is a master electrician and has been employed with Gemini Electric (Gemini) for twelve years. (See Transcript pg. 166, hereinafter "T. p. __"). Gemini provides electrical contracting for heavy commercial and industrial projects. T. p. 30. When the economy was good, Jeffrey received overtime through Gemini, worked side jobs outside of Gemini (T. p. 81), and sold scrap metal and copper wire for additional income T. p. 83. With a poor economy, however, Jeffrey lost his additional income. Several witnesses involved in construction testified that the industry was suffering from a recession. Matthew Connors, the owner of Gemini, testified that Gemini made financial changes as the business "…hunkered down for the economy." T. p. 32. Gemini "…scaled back reviews [and] scaled back raises" (T. p. 32-33), "…laid off twelve [electricians] in the last four months" (T. p. 46), and "…eliminated the bulk of [their] overtime prior to the beginning of fiscal year '08." T. p. 46. Mr. Connors testified specifically that "[a] tremendous amount of overtime has been curtailed and eliminated." T. p. 46.

Although Cindy Bouchard believed that Jeffrey had additional income from Gemini, Mr. Connors denied Jeffrey ever turned down a raise, as he had "…never had an employee turn a raise down". T. p. 33. He explained that although in the past there had been specific jobs

allowing for overtime for Jeffrey, currently there were no overtime jobs available for Jeffrey (T. p. 33), especially as Jeffrey's work availability was limited due to his extensive weekend parenting time. T. p. 44. Mr. Connors clarified that although Jeffrey had apprentices that he supervised when on the job, those apprentices that had accrued over-time had done so because of their own weekend availability. T. p. 44. Mr. Connors himself supervised apprentices on the weekends because Jeffrey was unable to do so himself.. T. p. 44. Mr. Connors explained that the only other financial assistance to Jeffrey was a loan of some $8,315.28 to Jeffrey to prevent Jeffrey's home from entering foreclosure. T. p. 49. Cindy verified that Jeffrey spent every weekend with his children. T. p. 116.

Despite Cindy's continued insistence that Jeffrey had significant overtime and side jobs, Cindy's own father, Christian Dumont, reiterated that the construction industry, and the economy in general, was very slow. T. p. 21. Mr. Dumont explained that in the past, and before the divorce filing, Jeffrey would have additional side work through him "if we had a job" (T. p. 12, 20-21), but Mr. Dumont complained that with the poor economy "I don't even have work for myself right now." T. p. 21.

Jeffrey Bouchard also explained the effect of the poor economy on his employment. He testified that over the past year he had seen many people laid off from Gemini, including people that had been there for a long time. T. p. 167. Jeffrey lost his significant overtime in 2008 because of weekend parenting time (T. p. 178) and because he was "put on construction sites which [have] no overtime." T. p. 177. Although he still collected scrap metal, Jeffrey explained that the market "dramatically" reduced in price from $2.70 per pound to $.80 per pound. T. p. 169-170. With less construction projects because of the economy, there was less scrap metal used on construction sites, and therefore less scrap to sell. T. p. 170. While Jeffrey had a side

business known as Jeffrey A. Bouchard, Electrical Contractor (T. p. 170), because he had time with his children every weekend Jeffrey had greater difficulty in obtaining side jobs because he was not available on the weekends: "…now its more difficult for me because to be dependable, you need to be there full-time, so you need to be there on the weekends." T. p. 171. Jeffrey did not "…have hardly any offers on side work." T. p. 174. Jeffrey was also unavailable to work side jobs on weeknights due to lack of time. T. p. 173. Jeffrey's change in financial status was further evinced by the testimony of his mother, Marielle Bouchard, who had provided evidence that she had been paying Jeffrey's bills from May 2008 until the date of the Final Hearing, totaling some $20,443. T. p. 23, 24.

Cindy Bouchard admitted that money issues caused a breakdown in the parties' marriage. T. p. 52. Cindy stopped working after the birth of their first child, leaving Jeffrey to pay all bills on his own. T. p. 52. Into the short marriage, Cindy began lying to Jeffrey about her credit card purchases (T. p. 53, 55) and hid from Jeffrey that she was behind on her credit card bills. T. p. 56, 57. Jeffrey did not understand why they were having money problems: "…I was working a lot of jobs, so I passed on all the bills to my wife so that she could pay them off. But the thing is we never had any money and it just didn't make any sense to me." T. p. 57, 187. Eventually, Jeffrey found a credit card bill hidden by Cindy in the car totaling some $12,000. T. p. 187. When confronted, Cindy admitted that there "was a whole bunch more credit cards." Id. Cindy thought the total amount of the bills that she had hid from Jeffrey was $30,000.00, but testified that it could have been "like fifty, 60,000. I don't know." T. p. 60.

To pay off the debt that Cindy said had occurred because "she got out of hand," Jeffrey took out an equity loan, cashed out his stocks, and "worked even more side work to get it paid off." T. p. 109, 189. Despite already wasting significant marital assets, Cindy continued to lie

about using credit cards (T. p. 109), even going as far as obtaining another credit card and using it after she had agreed not to do so (T. p. 110) and obtaining a separate Post Office Box for the credit card statements. T. p. 192. Cindy agreed that over the course of 2007 and 2008 that she incurred more than $90,000 of credit card and debt (T. p. 110-111) and that some $42,000 in credit card debt was paid off in 2007 before she filed for divorce. T. p. 110.

Although Cindy had incurred more than $90,000 in debt, and although Jeffrey asked her to find employment (T. p. 7, 69), Cindy had not worked since 2003. T. p. 88. In fact, at the final hearing, Cindy admitted to lying during the temporary hearing to both the court and to Jeffrey about her employment circumstances. Cindy had submitted a false financial affidavit to the court at the temporary hearing and had lied to the court that she had a job when she in fact did not. T. p. 99-100. Cindy's false testimony went so far as to complain how Jeffrey's contact with her interfered with her "fake" work schedule, testifying that Jeffrey "…would wake her up at night because she works late." T. p. 185. She told Jeffrey that she "…worked until 1 in the morning. And [Jeffrey] would wake her up at night and she wouldn't get enough sleep because she had to be at work." T. p. 185. Cindy also falsely testified about needing childcare because of working, stating to the court that she "…had [Jeffrey's] mom come to the house last week to take care of the children while I was working until they went to bed." T. p. 101.

Cindy easily admitted to the court that her temporary hearing documents and testimony were lies. When asked if her lies regarding employment were *misstatements*, Cindy made explicit that her statements were lies: "…that was a lie….It wasn't a misstatement. It was a lie. I didn't want to have to tell them the truth…So I'll admit to lying." T. p. 101. Essentially, any reference made in her signed, sworn affidavit, or made in court documents or in court testimony regarding employment, were lies.

Cindy's lies to the trial court continued with lies about her plans for future employment. Cindy admitted to misleading the court about her desires and attempts to work by lying that she was going to get a full-time job in the fall of 2008. T. p. 102, 103,105. In fact, Cindy made no attempt to seek a part-time job or to work on the weekends, and never told the court that she had the intention instead to sign up for school. T. p. 106. At the final hearing, after explaining all her past lies to the court, Cindy stated that she then had plans to enter a LNA program and then a RN class (T. p. 89-90) and, rather than working, was seeking alimony until she received her degree. T. p. 90-91. Cindy never provided the trial court with proof that she had indeed entered any educational program. In fact, Jeffrey's mother had found Cindy a job but she chose not to accept it, (T. p. 186) despite admitting to being physically fit and able to work. T. p. 114. Cindy also admitted that her lies extended to Jeffrey, as she lied to him "[b]ecause I had told him I was going to work and I didn't go to work." T. p. 107.

Despite Cindy's persistent belief that Jeffrey was still receiving over-time, she did not provide any evidence to the court to substantiate this belief. T. p. 86-87, 119. Cindy's witness, Richard Goodwin, a former Gemini employee who abruptly left Gemini after he did not receive a raise he felt appropriate and after having a falling out with Jeffrey (T. p. 80), testified that he, too, believed Jeffrey was receiving over-time under the table. T. p. 143. Like Cindy, Mr. Goodwin did not have any evidence to support this belief, and admitted that he did not know if Jeffrey was in fact doing side jobs (T. p. 145) or what specific projects Jeffrey was involved with at Gemini (T. p. 148) or if Jeffrey was indeed still receiving money for scrap metal, just that he "assume[d]" that he was. T. p. 148. Because Mr. Goodwin had left Gemini in September or October of 2008, and the final hearing occurred in May of 2009, Mr. Goodwin lacked any personal or direct knowledge of Jeffrey's present financial circumstances.

Although Mr. Goodwin emphasized that Jeffrey was hiding money from his wife, Mr. Goodwin admitted to having a relationship with Cindy, to going out to dinner with her and to having sex with her. T. p. 164-165. Mr. Goodwin also admitted that his feelings towards Jeffrey were not positive because before he abruptly left Gemini he was upset with Jeffrey because Mr. Goodwin believed Jeffrey had the power, and should have used that power, to obtain a larger raise for Mr. Goodwin. T. p. 180. In fact, Mr. Goodwin did not even know the last time that he had spoken with Jeffrey, but thought it was "[p]robably mid—late October, maybe November." T. p. 158.

By Notice of Clerk's Decision dated 5/19/09, the trial court awarded Cindy an unequal property award settlement, despite granting a divorce on the basis of irreconcilable differences and despite finding this to be a short-term marriage. R. App. p. 12, 48. The unequal property award was made despite the trial court's findings that Cindy had indeed lied to the court:

> "the court has been presented with evidence that [the Petitioner] <u>has not been forthright with the Court relative to whether she has been employed during the pendency of the divorce, as well as whether her expenditures were mainly for the household or primarily for her sole benefit.</u> The court, from the testimony presented, cannot make a determination as to exactly what was purchased by the Petitioner, but the Court does believe that the Petitioner "ran up $42,000 in credit card debt"(emphasis added). R. App. P. 12.

The unequal property award to Cindy included 65% of the net proceeds from the sale of the marital home, the majority of the personal property (including an award of furniture that she would only place in storage (T. p. 94.) and that would leave Jeffrey without a bed(T. p. 211.)), and one-half of Jeffrey's 401k. R. App. p. 4-10. Despite having no plans for employment, Cindy was permitted to claim one child as a dependent for tax purposes on every even year. R. App. p. 4. Jeffrey was ordered to pay some $1,424 per month in child support, and some $1,000 per month in alimony for one year, $750 the next year, and $500 the last year. R. App. P. 3.

Jeffrey was also ordered to maintain health insurance for the benefit of Cindy, was held liable for the remaining marital debt, and was ordered to remit one-half of the 2007 income tax refund despite evidence that that same refund was intercepted by the state for child support purposes. T. p. 97-98.

In determining Jeffrey's' income for the purposes of alimony and child support, rather than rely upon Jeffrey's present income of some $55,116.00 per year, the trial court "…averaged the Respondent's income from 2006 – 2008 to derive a yearly income of $72,408". R. App. p. 13. The Respondent filed a Motion to Reconsider on 5/27/09. R. App. p. 22. The Motion to Reconsider was denied on 7/10/09. R. App. p. 44. This appeal now follows.

SUMMARY OF THE ARGUMENT

This is a case where although it was found that the petitioner wife repeatedly lied both to the trial court and her former husband, and although the wife substantially depleted the marital assets by generating some $90,000.00 in credit card and other debt, the wife's lies were rewarded with an unequal property award distribution in addition to child support and alimony. The lower court exercised unsustainable discretion in rendering decisions that lacked evidentiary support and its decision must be reversed.

Significantly, the lower court exercised unsustainable discretion and acted directly contrary to explicit case law when it employed "income-averaging" to determine Jeffrey Bouchard's income. "Child support should be determined on the basis of present income." Rattee v. Rattee, 146 NH 44, 46 (2001). The trial court's use of income-averaging to determine Jeffrey Bouchard's income was in error and requires a reversal of its order.

Not only did the lower court err by engaging in income-averaging to determine Jeffrey Bouchard's income, but it also erred by refusing to address the economic climate of the construction industry. Although in past years Jeffrey had accrued additional income from overtime with Gemini and from "side jobs", several witnesses (including Cindy's father) testified consistently the economic climate of the construction industry had changed so that there was less work available in general and for Jeffrey, specifically. Furthermore, no witness with direct or first-hand knowledge verified that Jeffrey continued to receive significant overtime income or had "side jobs" outside of Gemini so as to justify the trial court's finding that Jeffrey had a present income higher than that reflected in his financial affidavit.

It was an unsustainable exercise of discretion for the trial court to rely upon Mr. Bouchard's former co-worker, Richard Goodwin's testimony, to determine Jeffrey Bouchard's

income as Mr. Goodwin was a biased witness who lacked personal knowledge. First, Mr. Goodwin was a biased witness involved in a romantic and sexual relationship with Cindy Bouchard. T. p. 164-165. Certainly, lesser weight should have been applied to Mr. Goodwin's testimony when he not only admitted to having sex with the Petitioner, but also where his testimony directly advanced Cindy Bouchard's goals of receiving monies from Jeffrey Bouchard. The trial court further erred in relying upon the testimony of Richard Goodwin to determine Jeffrey Bouchard's present income when Mr. had not worked with Jeffrey since September or October of 2008, some seven or eight months before the final hearing. The trial court's decision must be reversed.

The trial court erred in its award of alimony to the Petitioner as Cindy Bouchard lacks the need for alimony, Jeffrey Bouchard lacks the ability to pay alimony, and Cindy has the ability to become self-supporting through appropriate employment—but merely lacks the desire to do so. Based upon Jeffrey Bouchard's actual income of some $4,593.00 per month (or $55,116.00 per year), he does not have the ability to pay alimony to Cindy in addition to his other financial obligations. Importantly, an award of alimony to Cindy does not encourage her to establish an independent source of income; rather, it rewarded her for her repeated lies to the court about her employment status and rewarded her despite admissions of voluntary unemployment. The trial court also erred in its award of both alimony and child support when it failed to attribute <u>any</u> income to Cindy Bouchard, despite finding her voluntarily unemployed, underemployed, and with the ability to work.

Not only was the trial court's award of alimony inappropriate in light of Cindy's voluntary unemployment and her behavior in depleting marital assets, but it was also inappropriately awarded as it was based upon Cindy's testimony despite her repeated lies to the

court. During the final hearing, Cindy easily admitted to lying during the temporary hearing to both the court and to Jeffrey about her employment circumstances. Cindy had submitted a false financial affidavit to the court at the temporary hearing, and had lied to the court that she had a job when she in fact did not. T. p. 99-100. Cindy made explicit that her statements were lies: "…that was a lie….It wasn't a misstatement. It was a lie. I didn't want to have to tell them the truth…So I'll admit to lying." T. p. 101. Cindy's lies to the trial court continued with lies about her plans for future employment.

Not only did Cindy Bouchard directly lie to the trial court regarding her employment circumstances, but the testimony of both Jeffrey and Cindy verified that Cindy had a history of lying throughout the parties' marriage. Into the short marriage, Cindy began lying to Jeffrey about her credit card purchases (T. p. 53, 55) and hid from Jeffrey that she was behind on her credit card bills. T. p. 56, 57. To pay off the debt that Cindy had incurred, Jeffrey took out an equity loan, cashed out his stocks, and "worked even more side work to get it paid off." T. p. 109, 189. Despite already wasting significant marital assets, Cindy <u>continued</u> to lie about using credit card (T. p. 109), even going as far as obtaining another credit card and using it after she had agreed not to do so (T. p. 110) and obtaining a separate Post Office Box for the credit card statements. The trial court noted Cindy's lack of truthfulness in its order, stating "…after review of the parties' testimony [this court]…has been presented with evidence that she has not been forthright with the Court relative to whether she has been employed during the pendency of the divorce, as well as whether her expenditures were mainly for the household or primarily for her sole benefit." R. App. p. 12. It flies in the face of common sense that the Court could, on the one hand, believe Cindy Bouchard's testimony relative to Jeffrey Bouchard's income and

employment, while on the other hand noting Cindy's own lack of candor to the trial court regarding her own income and employment.

The trial court erred in awarding Cindy Bouchard an unequal property award in light of her voluntary unemployment, diminution of the marital assets, and a substantial award of the personal and other marital property. The trial court's conclusions that an unequal property award division was appropriate because Cindy had "primary rights and responsibilities/custody of the children" was flawed as Jeffrey Bouchard had substantial parenting time occurring every weekend from Friday at 4:00 p.m. until Sunday at 7:00 p.m. R. App. p. 43. In addition, the court's justification for an unequal property settlement based upon Cindy's need to support herself and the parties children was misplaced as Cindy was already awarded child support and alimony and the trial court failed to impute any income to her despite finding she had an ability to work and was voluntarily unemployed. R. App. p. 11-18, 49. New Hampshire also allows for an unequal distribution of property where the actions of one party during the marriage contributed to the diminution of value of property owed by the parties during marriage. Certainly, Cindy Bouchard's actions in generating significant debt justified an unequal property distribution—to Jeffrey. As the evidence in the case below did not support an unequal division of the property, the trial court erred and its decision must be reversed.

The trial court exercised unsustainable discretion in its decision to permit Cindy Bouchard to claim one child as a dependent in all years even when it had already substantially benefited Cindy with an inequitable division of the marital assets and provided her with income in the form of an alimony and child support award. The trial court further erred in permitting Cindy the privilege of claiming a child as a dependent in all even years as its consequence was to financially reward the Petitioner despite her inappropriate actions during the marriage and

through her lies to the court. In light of the fact that Jeffrey received a smaller property award while being required to pay both child support and alimony, and to maintain one-half of the Petitioner's medical insurance premium, Jeffrey should have received the benefit of claiming a child as a dependent for tax purposes—especially as Cindy remained voluntarily unemployed.

The trial court exercised unsustainable decision when ordering the Respondent to evenly divide with the Petitioner the 2007 Federal Income Tax return in light of evidence that Jeffrey Bouchard's income tax return was already intercepted by the Child Support Enforcement Office and indirectly provided to Ms. Bouchard. Ordering the Respondent to again provide her with some $2,804 would be duplicative and erroneous.

I. Whether the trial court erred and exercised unsustainable discretion when, in ordering child support, and contrary to the holding in Rattee, it: averaged the Respondent's income; ignored the Respondent's present income; ignored the economic crisis of the construction industry, and where the court placed great credibility on the testimony of a former employee who had recently had sexual intercourse with the Petitioner and had not been employed by the Respondent's employer since October or November 2008.

Although trial courts are afforded broad discretion in determining property distribution when fashioning a final divorce decree, the trial court's decision will be overturned when the trial court exercises unsustainable exercise of discretion. In the Matter of Chamberlin, 155 N.H. 13, 16 (2007). This Court will "uphold the trial court's decision with regard to child support unless it is unsupported by the evidence or tainted by an error of law." In the Matter of State of New Hampshire and Estate of Crabtree, & a., 155 N.H. 565,570 (2007). In the case below, the trial court exercised unsustainable discretion in its determination of Jeffrey Bouchard's income and entered rulings that were not supported by the evidence. It's decision must be reversed.

Most significant, the lower court exercised unsustainable discretion and acted directly contrary to case law when it employed "income-averaging" to determine Jeffrey Bouchard's income for child support purposes. "Our case law is clear that trial courts should not employ income-averaging over a number of years to determine child support obligations." Rattee v. Rattee, 146 N.H. 44, 46 (2001). "Child support should be determined on the basis of present income." Id. Rather than average income, any changes in income from one year to the next may be addressed via court modification. "We note that this does not leave the plaintiff without recourse when the defendant's income changes. Either party may seek an adjustment in child support by petitioning 'for a modification of support payments at any time a change of circumstances warrants it.'" Id.; see also RSA 458:32.

In the case below, the trial court clearly acted contrary to Rattee when determining Jeffrey's income as the court explained in its order that it was relying upon income-averaging to determine Jeffrey's income for the purposes of alimony and child support: "[t]he Court, in order to be fair to all parties, has averaged the Respondent's income from 2006-2008 to come up with a yearly income of $72,408". R. App. p. 13. The trial court's use of income-averaging to determine Jeffrey Bouchard's income was in error and its decision should be reversed.

Not only did the lower court err by engaging in income-averaging to determine Jeffrey Bouchard's income, but it also erred by refusing to address the economic climate of the construction industry. At the final hearing, Jeffrey Bouchard, his employer, Matthew Connors, and Cindy Bouchard's father, Christian Dumont, all testified to the economic crisis facing the construction industry. Christian Dumont owns his own company in the construction field, developing residential subdivisions. T. p. 20. Mr. Dumont testified that due to the economy, the construction industry was very slow, stating "I don't even have work for myself right now." T. p. 21. Matthew Connors testified that although Gemini was in existence for some nineteen years (T. p. 44), his company was suffering from an "[e]xtremely difficult" economy, (T. p. 45), had laid off twelve electricians within the last four months, and had taken several measures to try to contain company costs by eliminating the bulk of overtime. T. p. 46. Lastly, Jeffrey himself testified that he was very happy to have a job as over the last year he had seen many people laid off. T. p. 167. Nothing should be viewed within a vacuum and the trial court should not have ignored the current economic crisis—especially when provided the testimony of three

witnesses directly in the midst that crisis and where one witness was the Petitioner's own father.

Significantly, no witness with direct or first-hand knowledge verified that Jeffrey continued to receive significant overtime income or had "side jobs" outside of Gemini so as to justify the trial court's finding that Jeffrey had a present income higher than that reflected in his financial affidavit. Cindy's testimony focused upon Jeffrey's employment *before* the present economic crisis and centered upon her unsubstantiated belief that Jeffrey must have additional income. Essentially, Cindy drew the unsubstantiated conclusion that because Jeffrey was a hard worker in the past, having worked some "eighty to ninety hours a week" (T. p. 85) when the parties were together during an economic upswing, that Jeffrey must continue to be receiving the same monies during an economic recession while the parties were separated. Ms. Bouchard's logic was faulty and unsupported by the evidence presented below.

It was an unsustainable exercise of discretion for the trial court to rely upon Mr. Goodwin's testimony to find that Jeffrey Bouchard had additional income because Mr. Goodwin was a biased witness who lacked personal knowledge. Although this Court accords "considerable weight to the trial court's judgments on the credibility of witnesses and the weight to be given testimony" (Walker v. Walker, 158 N.H. 602, 608 (N.H. 2009)), the weight given to Mr. Goodwin's testimony by the trial court was inappropriate. First, Mr. Goodwin was a biased witness involved in a romantic and sexual relationship with Cindy Bouchard. T. p. 164-165. Certainly, lesser weight should have been applied to Mr. Goodwin's testimony when he not only admitted to having sex with the Petitioner, but also where his testimony directly advanced Cindy Bouchard's goals of receiving monies from

Jeffrey Bouchard. Mr. Goodwin's bias extended beyond his relationship with the petitioner; both Mr. Goodwin and Jeffrey Bouchard testified to the two having a deteriorating relationship as Mr. Goodwin held Jeffrey responsible for a raise smaller than he thought he should have received. T. p. 180.

Secondly, the trial court further erred in relying upon the testimony of Richard Goodwin to determine Jeffrey Bouchard's present income when Mr. Goodwin had not worked with Jeffrey since September or October of 2008, some seven or eight months before the final hearing. Mr. Goodwin lacked present, first-hand evidence that Jeffrey continued to have additional income. Mr. Godwin did not actually know if Jeffrey was doing any side jobs (T. 145), could only "assume" Jeffrey was selling scrap metal within the June to September 2008 time frame, did not know for sure whether Jeffrey was working overtime at specific Gemini job locations (T. p. 148); and did not "…specifically know if they offered" a raise to Jeffrey. T. p. 154. In fact, Mr. Goodwin did not even know the last time that he had spoken with Jeffrey, but thought it was "[p]robably mid—late October, maybe November." T. p. 158. Like Cindy, Mr. Goodwin was generalizing—because Jeffrey had been such a hard worker in the past and had engaged in side jobs, he merely assumed that Jeffrey continued to do so. Such general characterizations were not supported by evidence, especially in light of the economic climate, and the trial court erred in giving such evidence significant weight to find Jeffrey had a larger present income. Its decision should, therefore, be reversed.

II. Whether the trial court exercised unsustainable discretion when it awarded the Petitioner alimony where: the Petitioner had the ability to work and was voluntarily unemployed; the Respondent lack the ability to pay alimony; the trial court failed to attribute any income to the Petitioner, and, significantly, where the trial court accepted the Petitioner's employment testimony at the final hearing despite the Petitioner's own admissions that her prior employment in-court testimony was a blatant lie.

While the "…trial court has broad discretion in determining and ordering…the payment of alimony…", the trial court's findings will overturned it if exercised unsustainable discretion in doing so. In the Matter of Nassar and Nassar, 156 NH 769, 772 (2008). This Court reviews the trial court's "…interpretation of the law *de novo*." Id. A trial court is permitted to award alimony if it finds that:

> "(a) [t]he party in need lacks sufficient income, property, or both…to provide for such party's reasonable needs, taking into account the style of living to which the parties have become accustomed during the marriage; and (b) [t]he party from whom alimony is sought is able to meet reasonable needs while meeting those of the party seeking alimony, taking into account the style of living to which the parties have become accustomed during the marriage; and (c) [t]he party in need is unable to be self-supporting through appropriate employment at a standard of living that meets reasonable needs…."

RSA 458:19; Nassar, Supra.

In the case below, the trial court erred in its award of alimony to the Petitioner, as Cindy Bouchard lacks the need for alimony, Jeffrey Bouchard lacks the ability to pay alimony, and Cindy has the ability to become self-supporting through appropriate employment—but merely lacks the desire to do so.

"The primary purpose of alimony is to encourage the recipient spouse to establish an independent source of income." In the Matter of Fowler, 145 N.H. 516, 518 (2000). The rehabilitative alimony principle "…is based upon the realization that 'modern spouses are equally able to function in the job market and to provide for their own financial needs.'" Nassar, 156 NH at 777. "Alimony should, therefore, generally be 'designed to encourage the recipient to establish an independent source of income." Id. An award of alimony to Cindy Bouchard does

not encourage her to establish an independent source of income; rather, it rewards her for her repeated lies to the court about her employment status and rewards her despite admissions of voluntary unemployment.

While the rehabilitative alimony principle is not controlling where a court determines that it is necessary for the supported spouse to maintain a part-time work schedule in order to care for the parties' child, the findings below reveal that it is not necessary for Cindy to maintain a part-time work schedule as the children are in school (R. App. p. 46, 49) and Jeffrey has the children every weekend, beginning on Friday evening. T. p. 44. Thus, it was not Cindy's parenting time that was dictating her lack of work, but rather, it was her lack of interest. An award of rehabilitative alimony in this circumstance was inappropriate.

An award of alimony is also inappropriate if the recipient spouse "clearly has an ability to work more hours…to become more self sufficient." Nassar, at 778. In Nassar, this Court held that the record did not justify an award of life-time alimony as the Nassar wife was in good health, had no minor children to support, had marketable job skills, and, importantly, the standard of living to which the wife had become accustomed, and to which she would attempt to reproduce through her own means, was indisputably modest. Id. These factors, combined with her ability to work more hours, revealed that the life-time alimony award was unwarranted. Id. As with the Nassar wife, Cindy Bouchard clearly has the ability to "work more hours…to become more self sufficient". Like the Nassar wife, Cindy is in good health, has marketable job skills (see R. App. p. 49, 85), and, importantly, the marital standard of living to which she had become accustomed was modest. In fact, the modest standard of living that the Bouchard's had enjoyed while married was due to Cindy's own behavior by sneaking behind her (then) husband's back to generate significant credit card and other debt. As both Cindy and Jeffrey

lived at a modest standard because of Cindy's behavior while married, then Cindy certainly could continue to live at a modest standard following the divorce. The record below, and particularly Cindy's behavior in depleting marital assets and generating significant debt, reveal that Cindy's award of alimony was unwarranted. The trial court's decision must be reversed.

The trial court further erred when it failed to attribute any income to Cindy Bouchard, despite finding her voluntarily unemployed, underemployed, and with the ability to work. R. App. p. 49. In determinations of child support, RSA 458-C:2, IV(a) authorizes "[t]he court, in its discretion, [to] consider as gross income the difference between the amount a parent is earning and the amount a parent has earned in cases where the parent voluntarily becomes unemployed or underemployed, unless the parent is physically or mentally incapacitated." In the Matter of Sarvela and Sarvela, 154 NH 426,435 (2006). In the case belowe, Cindy Bouchard was neither physically nor mentally incapacitated. T. p. 114. In fact, the trial court found that she had the ability—just not the desire—to work. R. App. p. __ Cindy Bouchard was voluntarily underemployed or unemployed and some income should have been attributed to her. The trial court erred in failing to do so.

An alimony award must be within the husband's ability to pay. RSA 458:19. Based upon Jeffrey Bouchard's actual income of some $4,593.00 per month (or $55,116.00 per year), he does not have the ability to pay alimony to Cindy. After deducting Federal Income Taxes and other withholdings, including medical insurance payments, Jeffrey's net monthly income is approximately $3,500.00. R. App. p. 57-60. Under the trial court's order, Jeffrey was ordered to pay Cindy approximately $2,400.00 per month (including child support and alimony), leaving Jeffrey with approximately $1,000.00 per month to live on. Because Jeffrey lacked the ability to

pay alimony, as reflected in his actual income, the trial court exercised unsustainable discretion in awarding Cindy alimony. Its decision must be reversed.

Not only was the trial court's award of alimony inappropriate in light of Cindy's voluntary unemployment and her behavior in depleting marital assets, but it was also inappropriately awarded as it was based upon Cindy's testimony despite her repeated lies to the court. While this Court accords "considerable weight to the trial court's judgments on the credibility of witnesses and the weight to be given testimony," (Walker, 158 N.H. at 608), the lower court erred in finding any of Cindy Bouchard's testimony credible where she had admitted to a history of lying—both to Jeffrey Bouchard and directly to the trial court itself. During the final hearing, Cindy easily admitted to lying during the temporary hearing to both the court and to Jeffrey about her employment circumstances. Cindy had submitted a false financial affidavit to the court at the temporary hearing, and had lied to the court that she had a job when she in fact did not. T. p. 99-100. Cindy's false testimony went so far as to complain how Jeffrey's contact with her interfered with her "fake" work schedule, testifying that Jeffrey "…would wake her up at night because she works late." T. p. 185. She told Jeffrey that she "…worked until 1 in the morning. And [Jeffrey] would wake her up at night and she wouldn't get enough sleep because she had to be at work." T. p. 185. Cindy also falsely testified about needing childcare because of working, stating to the court that she "…had [Jeffrey's] mom come to the house last week to take care of the children while I was working until they went to bed." T. p. 101.

Cindy easily admitted to the court that her temporary hearing documents and testimony were lies. When asked if her lies regarding employment were *misstatements*, Cindy made explicit that her statements were *lies*: "…that was a lie….It wasn't a misstatement. It was a lie. I didn't want to have to tell them the truth…So I'll admit to lying." T. p. 101. She easily

admitted her statements to the court that "[l]ast week was my first week of working outside of the home since we had the children" were also lies. T. p. 101. Essentially, any reference made in her signed, sworn affidavit, or made in court documents or in court testimony to employment, were lies.

Cindy's lies to the trial court continued with lies about her plans for future employment. Cindy admitted to misleading the court about her desires and attempts to work by lying that she was going to get a full-time job in the fall of 2008. T. p. 102, 103,105. In fact, Cindy made no attempt to seek a part-time job or to work on the weekends, and never told the court that she had the intention instead to sign up for school. T. p. 106. At the final hearing, after explaining all her past lies to the court, Cindy stated that she then had plans to enter a LNA program and then a RN class (T. p. 89-90) and, rather than working, was seeking alimony until she received her degree. T. p. 90-91. Cindy never provided the trial court with proof that she had indeed entered any educational program. Cindy also admitted that her lies extended to Jeffrey, lying to him "[b]ecause I had told him I was going to work and I didn't go to work." T. p. 107.

Not only did Cindy Bouchard directly lie to the trial court regarding her employment circumstances, but the testimony of both Jeffrey and Cindy verified that Cindy had a history of lying throughout the parties' marriage. Into the short marriage, Cindy began lying to Jeffrey about her credit card purchases (T. p. 53, 55) and hid from Jeffrey that she was behind on her credit card bills. T. p. 56, 57. Cindy thought the total amount of the bills that she had hid from Jeffrey was $30,000.00, but testified that it could have been "like fifty, 60,000. I don't know." T. p. 60. To pay off the debt that Cindy had incurred, Jeffrey took out an equity loan, cashed out his stocks, and "worked even more side work to get it paid off." T. p. 109, 189. Despite already wasting significant marital assets, Cindy <u>continued</u> to lie about using credit card (T. p. 109), even

going as far as obtaining another credit card and using it after she had agreed not to do so (T. p. 110) and obtaining a separate Post Office Box for the credit card statements.

The trial court itself noted Cindy's lack of truthfulness in its order, stating "…this Court, after review of the parties' testimony, believes that the Petitioner has had a problem controlling her credit card expenditures and has been presented with evidence that she has not been forthright with the Court relative to whether she has been employed during the pendency of the divorce, as well as whether her expenditures were mainly for the household or primarily for her sole benefit." See Order, R. App. p. 12. It flies in the face of common sense that the Court could, on the one hand, believe Cindy Bouchard's testimony relative to Jeffrey Bouchard's income and employment, while on the other hand noting Cindy's own lack of candor to the trial court regarding her own income and employment. A witness with an admitted history of lying, both on paper and under oath during a hearing, it not a witness to be believed at any other point in the case. The trial court erred is applying any weight to Cindy Bouchard's testimony and its decision must be reversed.

III. Whether the trial court erred and exercised unsustainable discretion in failing to provide for an equal distribution of the marital property when the parties had a short-term marriage with a divorce based upon irreconcilable differences, where the Petitioner wasted marital assets and incurred significant debt, and where, in making the unequal property award, the trial court disregarded the Petitioner's voluntary unemployment, the Parenting Plan, and both child support and alimony awards.

Under New Hampshire law, it is presumed that an equitable distribution of marital property is an equal division. RSA 458:16-a.; see also In the Matter of Watterworth and Watterworth, 149 N.H. 442, 453 (2003). "Absent special circumstances, the court must make the distribution as equal as possible." In the Matter of Salesky and Salesky, 157 N.H. 698, 708 (2008). If an unequal distribution is made, the trial court must note specifically that

one or more of the factors outlined in RSA 459:16-a is applicable. Id. The trial court must specify written reasons for its division of property. RSA 458:16-a, IV. "If the court's findings can reasonably be made on the evidence presented, they will stand." Salesky, 157 N.H. at 708. If, however, the findings are unreasonable and not based upon the evidence presented, they must be reversed. In the case below, the trial court specified written reasons for its unequal division of property, but those reasons were not substantiated by the evidence presented. The trial court erred in providing an unequal division of the marital property and its decision must be reversed.

The trial court erred in awarding the petitioner 65% of the proceeds from the sale of the marital home when the case below did not support any of the factors for an unequal property distribution found in RSA 458:16-a(II)(a)-(o). Significantly, although the Petitioner had requested a marriage based upon fault (a factor that allows for unequal distribution of assets under RSA 458:16-a, II (L)), the trial court granted the parties' a divorce based upon irreconcilable differences. See R. App. p. 12. Despite finding this to be a short-term marriage and granting a divorce based upon irreconcilable differences, the trial court "…belive[d] that the Petitioner [was] entitled to an unequal property distribution, due to the disparity in the parties' income and the fact that she has primary rights and responsibilities/custody of the parties' minor children and she will need to be able to support herself, as well as the children." See R. App. p. 13-14. By this decision, the court failed to note that the only disparity in the parties' income was due to the Respondent's own decision to remain voluntarily unemployed and underemployed. R. App. p. 49. Following the trial court's logic, despite the Respondent's own admissions of lying regarding her employment

and to making no efforts for employment, because she was so unemployed she deserved an additional portion of the marital assets. This was both illogical and inappropriate.

The trial court's conclusions that an unequal property award division was appropriate because Cindy had "primary rights and responsibilities/custody of the children" was further flawed as Jeffrey Bouchard had substantial parenting time with his children. No witness disputed Jeffrey exercises substantial parenting time with his children, to include every weekend beginning Friday night at 4:00 p.m until Sunday night at 7:00 p.m. R. App. p. 43. Thus, although technically awarded "primary rights" under the Parenting Plan, that same parenting plan outlines that Jeffrey has his children two and one half days and two nights each week. A parenting plan technicality does not justify an unequal property division award.

In addition, the court's justification for an unequal property settlement based upon Cindy's need to support herself and the parties children was misplaced as Cindy was already awarded some $329 per week in child support (or some $1,425 per month) in addition to some $1,000 per month in alimony, along with fifty percent of Jeffrey's 401K valued at some $40,638.00. R. App. p. 4-10. Were Cindy's ability to support herself a legitimate issue, when the trial court found her to be voluntarily unemployed or unemployed and to have the ability to work, it should have imputed some income to her. Certainly, Cindy was able to support herself and her children with some $2,425 per month, in addition to any monies should she choose to seek employment. Cindy should not be rewarded for her decision to remain voluntarily unemployed or underemployed with an unequal division of the marital assets.

New Hampshire RSA 458:16-a(II)(f) also allows for an unequal distribution of property where the actions of one party during the marriage contributed to the diminution of value of property owed by the parties during marriage. Certainly, Cindy Bouchard's actions in generating significant debt justified an unequal property distribution—to Jeffrey. Cindy agreed that over the course of 2007 and 2008 she incurred more than $90,000 of credit card and debt (T. p. 110-111) and that $42,000 in credit card debt was paid off before she filed for divorce. T. p. 110. Despite generating debt and depleting marital assets, Cindy admitted to getting another credit card and using it after she agreed that she was not going to. T. p. 110. There is no doubt that Cindy Bouchard's action caused a severe diminution in the parties' assets. Rather than acknowledging the damage Cindy's actions had on the parties' assets (as per RSA 458:16-a(II)(f)), the trial court instead rewarded Cindy for her behavior by awarding her a disproportionate share of the parties' assets. This was inappropriate, an unsustainable exercise of discretion, and must be reversed.

The trial court further erred in granting Cindy Bouchard 65% of the proceeds from the sale of the marital home, creating an unequal property distribution, when the court had already awarded her a significant portion of the marital property. R. App. p. 4-10. Cindy was awarded one-half of the Jeffrey Bouchard's 401K (401K valued at some $40,638.00), more than one-half of the parties' personal property, was awarded a significant amount of child support, and monthly alimony. Id. As the evidence in the case below did not support an unequal division of the property, the trial court erred and its decision must be reversed.

IV. Whether the trial court erred and exercised unsustainable discretion in permitting the Petitioner to claim one child as a dependent in all even years, rather than permitting the Respondent to claim both children in all years, when the Respondent was ordered to pay child support, alimony, and one-half of the

Petitioner's medical insurance premium and where the Petitioner was voluntarily unemployed.

The trial court exercised unsustainable discretion in its decision to permit Cindy Bouchard to claim one child as a dependent in all years even when it had already substantially benefited Cindy with an inequitable division of the marital assets and provided her with income in the form of an alimony and child support award. At the final hearing, Cindy stated that she only wanted to claim the children as a dependent for tax purposes when she was gainfully employed; however, Cindy informed the trial court that she had no immediate plans to work. T. p. 88-89. Despite Cindy's statement, the trial court permitted Cindy to claim one child as a dependent in all even years regardless of her employment status. R. App. p. 4. Thus, the trial court's order was not only contrary to Cindy's own testimony and requests, but directly contrary to the trial court's own finding that Cindy was voluntarily unemployed or underemployed, with the ability to work. See R. App. p. 49. As the trial court's decision was inapposite to its own orders, and inequitable in light of the surrounding facts and circumstances, its decision was in error and must be reversed.

The trial court further erred in permitting Cindy the privilege of claiming a child as a dependent in all even years as its consequence was to financially reward the Petitioner despite her inappropriate actions during the marriage and through her lies to the court. Allowing Cindy to claim a child in all even years allows Cindy to reap certain tax benefits that should not be entitled to, not only because she is not working, but also because Cindy's actions of accruing significant credit card and other debt seriously depleted the marital assets. R. App. p. 50. Not only does it not make sense to permit Cindy Bouchard to claim a child as a dependent for tax purposes when has no plans for

employment, but it was also erroneous to permit her to claim a child as a dependent in all even years when she already received a substantial—and unequal—portion of the property award. In light of the fact that Jeffrey received a smaller property award while being required to pay both child support and alimony, and to maintain one-half of the Petitioner's medical insurance premium, Jeffrey should have received the benefit of claiming a child as a dependent for tax purposes—especially as Cindy remained voluntarily unemployed. The trial court's division of the property was inequitable, contrary to case law, and an unsustainable exercise of discretion. It must be reversed.

V. Whether the trial court erred and exercised unsustainable discretion when, despite receiving little to no testimony on the subject, the court ordered the Respondent to evenly divide with the Petitioner the 2007 Federal Income Tax Return when the Petitioner refused to file a joint return, and where, because the refund was intercepted by the Child Support Enforcement office, the Petitioner had already received her share of the return.

The trial court exercised unsustainable decision when ordering the Respondent to evenly divide with the Petitioner the 2007 Federal Income Tax return in light of evidence, including that from the Petitioner herself, that Jeffrey Bouchard's income tax return was already intercepted by the Child Support Enforcement Office. In its order, the trial court ordered that "[a]ny tax refund or debt due or anticipated by the parties resulting from their having filed a federal and/or state income tax return for this or any prior year shall, upon receipt, be endorsed by both parties and be equally distributed between them, to include the 2007 tax refund which shall be equally divided, with the Respondent paying the Petitioner $2,804 (less the GAL fees)…" See R. App. p. 17. In her direct testimony, Cindy Bouchard admitted that Jeffrey Bouchard's 2007 tax refund was intercepted by the Child Support Enforcement Office. "The State took it—found it in his bank account and took the whole check from

the—from the tax—the tax return. They took the whole thing." T. p. 97-98. Jeffrey further verified the interception on his direct examination. T. p. 168. The trial court even found that the same 2007 income taxes were intercepted. R. App. p. 49. Thus, because the tax refund was intercepted by the Child Support Enforcement office to apply to Jeffrey Bouchard's child support obligations and arrearages, the Petitioner already indirectly received her one-half share of the 2007 income tax return. Ordering the Respondent to again provide her with some $2,804 would be duplicative and erroneous.

Furthermore, the trial court inappropriately rendered an order on the subject of the 2007 income tax return when the only testimony about the return, aside from the fact that it had already been paid to Cindy via the Child Support Enforcement Office, was testimony that Cindy refused to file jointly. The trial cannot make an order without first having evidence or testimony on the subject. As the only testimony regarding the 2007 income tax return was that Cindy had already received her portion and that she refused to file jointly with Mr. Bouchard, the trial court's decision must be reversed.

CONCLUSION

In sum, the lower court's decisions represented error and the trial court's decision regarding child support, alimony, and property award distribution must be reversed for several reasons. First, the lower court exercised unsustainable discretion when it employed "income-averaging" to determine Jeffrey Bouchard's income, contrary to the explicit holding not to do so in Rattee v. Rattee, 146 N.H. 44, 46 (2001). Second, the trial court erred in finding that Jeffrey Bouchard's present income was a figure other than the $55,116.00 per year as the evidence submitted does not support any other figure. Third, the trial court erred in finding Mr. Bouchard to have income outside of his employment with Gemini where there was no first-hand or direct

evidence from any witness that Mr. Bouchard was otherwise employed. Fourth, the court exercised unsustainable discretion in relying upon Richard Goodwin's testimony regarding Mr. Bouchard's alleged other employment when Mr. Goodwin was a biased witness who was involved in a sexual relationship with the Petitioner, and where Mr. Goodwin had not had any contact with or worked with Mr. Bouchard in some seven or eight months. Fifth, the trial court erred in its award of alimony to the Petitioner, as Cindy Bouchard lacks the need for alimony, Jeffrey Bouchard lacks the ability to pay alimony, and Cindy has the ability to become self-supporting through appropriate employment. The trial court further erred when it failed to attribute any income to the Cindy Bouchard, despite finding her voluntarily unemployed, underemployed, and with the ability to work—but not the desire to do so. Sixth, the trial court erred in attributing any weight to Cindy Bouchard's testimony in light of her repeated lies to the court. It flies in the face of common sense that the Court could, on the one hand, believe Cindy Bouchard's testimony relative to Jeffrey Bouchard's income and employment, while on the other hand noting Cindy's own lack of candor to the trial court regarding her <u>own</u> income and employment. Seventh, the trial court erred in awarding the Petitioner an unequal property award when not only had the petitioner depleted the marital assets by her inappropriate use of credit cards, but where the petitioner was already awarded significant assets, alimony, child support, and a divorce was granted on the basis of irreconcilable differences. Eighth, the trial court exercised unsustainable discretion in its decision to permit Cindy Bouchard to claim one child as a dependent in all years even when it had already substantially benefited Cindy with an inequitable division of the marital assets and provided her with income in the form of an alimony and child support award. Ninth, the trial court exercised unsustainable decision when ordering the Respondent to evenly divide with the Petitioner the 2007 Federal Income Tax return in light

of evidence that that same income tax return was already indirectly provided to the Petitioner.

Mr. Bouchard asks this Court to reverse the trial court's decision.

Respectfully submitted,
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_____ _____
Date Melissa S. Penson Bar # 15290

CERTIFICATE OF SERVICES

I hereby certify that an original and eight (8) copies of the Petitioner/Appellant's Brief this _____ day of December, 2009, been delivered to the Clerk, New Hampshire Supreme Court. In addition, two (2) copies of this Brief and two (2) copies of the Appendix have been mailed to David Groff, Attorney for the Petitioner/Appellee.

_____
Melissa S. Penson, Esq. Bar # 15290

REQUEST FOR ORAL ARGUMENT

The Respondent/Appellant respectfully requests oral argument of not more than 15 minutes.

_____ _____
Date Melissa S. Penson, Esq. Bar #15290