STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2009-0608

In the Matter of Matthew Stacy and Mary Teczar

RULE 7 APPEAL FROM THE
HILLBOROUGH COUNTY (NORTH) SUPERIOR COURT

BRIEF OF RESPONDENT/APPELLANT MARY TECZAR

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Statement Of Facts And Statement Of The Case

The parties married in 1997 and together raised two children until their divorce in December 2005. At the time of the divorce Mr. Stacy owned and operated a very successful construction company and Ms. Teczar, who was admitted to the bar a few years prior, was attempting to establish her own law practice.

At the time of the divorce the parties, both represented by counsel, filed an agreed upon Permanent Stipulation, Uniform Support Order and Parenting Plan and were thereafter granted a divorce. (Exhibits A.,B.,C.) By this negotiated Stipulation Mr. Stacy was to pay alimony the first year at a rate of $2100.00 per month, which was to be reduced to $1500.00 per month the second year, and terminate at the conclusion of the second year.

While the support guidelines would have been considerably greater, ($5,111. per month), the parties negotiated a child support order of $3200.00 per month. (Exhibit D) This amount was based upon their respective financial positions at the time, and what each assumed their positions would be in the future. (Tr. 8/7, 19/21-20/10*) This settlement gave Mr. Stacy the tax advantage of paying a portion of the Order as alimony, and also the benefit of setting a short term for alimony.

On January 9, 2009, after the alimony period had expired, Mr. Stacy filed a Petition for Modification-Child Support requesting the court to reduce the child support amount approved in the Permanent Stipulation of December 2005. (Exhibit E) Mr. Stacy filed pro se and did not request an evidentiary hearing or allege substantial change of circumstances, but merely requested a financial review. (Tr.4/2)

Approximately a week before the scheduled hearing, Ms. Teczar was informed that Mr. Stacy would have Attorney Richards representing him and received a deposition subpoena. Ms. Teczar was deposed by counsel and obtained the services of her current attorney who was admitted pro hac vice three days before the scheduled hearing.

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*Transcript references are Tr. 1/ 2, with the first number referencing the page, and the second the line and is found in Exhibit H.

On April 28th, 2009 a non-evidentiary hearing was held before Marital Master Bruce F. Dalpra. This hearing was limited by the Court to a total of fifteen minutes of argument and consists of less than twenty pages of argument. (Tr.3/17) At the outset, counsel for Ms. Teczar filed a written request for a continuance and argued that Mr. Stacy's income was not accurate. Counsel informed the Court that further time was needed to both consult with financial experts and do further discovery regarding what counsel suggested was underreported income on Mr. Stacy's Financial Affidavit. (Exhibit F, Tr.3/20-5/22) The continuance request was objected to by Mr. Stacy's counsel and denied by the court.

The ensuing hearing consisted only of argument except that the court requested and reviewed the tax records of Mr. Stacy who filed both individual returns and an S Corporation return. (Tr.15/10-15, 15/23-16/1)

At the hearing, counsel for Mr. Stacy, argued that Mr. Stacy's income had decreased since his divorce and was now only approximately $12,500.00 per month, as compared to the numbers used at the time of the divorce which was $18,166.00 per month. Counsel for Mr. Stacy argued that, as a result of the significant decrease in income, the current child support should be reduced by a specific percentage amount equal to the difference between the guideline amount and the negotiated amount of child support at the time of the divorce. Counsel did not suggest that the parties actually used a percentage calculation when negotiating the Permanent Stipulation.
(Tr. 8/3-11, 10/1-4)

Despite the brief time to review Mr. Stacy's financials, counsel for Ms. Teczar informed the Court that Mr. Stacy underreported his income on his Financial Affidavit. (Tr.12/15-21) Counsel for Ms. Teczar reasoned, that because Mr. Stacy was sole owner and the only officer of his business, that the amount he submitted to the Court as "gross income" was incorrect because he did not include significant amounts of income available for child support purposes under New Hampshire law. One such amount was Mr. Stacy's S Corporation income, in the amount $45,819, which was permissibly shielded from income for federal income tax purposes as a depreciation deduction. Counsel stated that this amount would clearly be available as income for child support purposes. (Tr. 12/22-13/4) Counsel also argued other items should also be added back into Mr. Stacy's income for child support purposes.

Counsel for Ms. Teczar suggested that it was incumbent upon the Court to determine which of these items needed to be included in gross income. After the addition of income, only then, should Mr. Stacy's child support obligations be calculated at the higher income.

Counsel argued that no downward deviation from the Guidelines was warranted as parenting schedules had remained equal during this period. (Tr.14/10-20)

The Court took no evidence, and none was proffered, about factors that might be considered by the Court when deviating from the Guidelines for a "shared parenting" arrangement.

After the hearing the court issued findings and orders on May 4th, 2009 making the following findings, in relevant part:

> "the ordinary business income…is to be included in the Petitioners income for income available for (sp) child support", thus adding back in to Mr. Stacy's income $45,819 which represents corporate earnings attributable to Mr. Stacy's S Corporation, but had been excluded by his attorneys calculations and from Mr. Stacy's Financial Affidavit. (Exhibit G)

The Court found Mr. Stacy's income for child support purposes to be $16,500 monthly, (as compared to his attorney's calculation of $12,500). The Court then calculated Mr. Stacy's monthly child support obligation to his children to be $3859.24 and then reduced the amount to $2500.00 per month.

The Court, in its Order then stated:

> "that a deviation from the guidelines is warranted given the shared parenting time of the children. The Court is not persuaded by the Petitioner's argument that the same percentages should be utilized in the downward deviation. **There is no reliable evidence to demonstrate that the parties utilized any percentage method of reduction in their original child support agreement.**"(emphasis added)

No other findings were made explaining or supporting an adjustment from the Guideline amount, however the Court did make specific findings that there was **"no reliable evidence to demonstrate that the parties used a percentage method of reduction"** (emphasis added). Despite there being no other record support for the reduction, the Court reduced the child support

from the Guideline amount of $3859.00 to the arbitrary amount of $2500.00. This amount represents a downward deviation from the Guideline amount of approximately 35% despite the Court finding that no percentage calculation was ever used by the parties.

Issues Presented

I.

Whether the Court erred in ordering a downward deviation of child support from the calculated New Hampshire Child Support Guideline amount.

(A)

Whether the Court erred in departing from the New Hampshire Child Support Guidelines when a change of circumstances was neither pled nor proved.

(B)

Whether the Court erred in justifying a downward deviation from the New Hampshire Child Support Guidelines based solely on shared parenting.

(C)

Whether the Court erred by altering the negotiated child support amount where no significant change of income was proven.

(D)

Whether the Court erred in ordering a departure from the New Hampshire Child Support Guidelines without conducting an evidentiary hearing as to all relevant circumstances.

Summary Of Argument

Counsel suggests that the Court erred when it ordered an arbitrary reduction of child support from the Guideline amount of $3859.24 to $2500.00 based solely on the fact that the parties share parenting as a result of a negotiated shared parenting plan.

Counsel suggests that this downward deviation was error for four separate, but interrelated reasons. First, Mr. Stacy requested only a financial review, and did not allege a change in circumstances. As a result, the courts review should have been limited to a simple calculation of numbers, which the court found to lead to a child support amount of $3859.24. Choosing to downwardly depart from that amount was error absent other evidence to support such a finding, and absent a change of circumstances being alleged and proved.

Second, where at the time of the divorce, Mr. Stacy's monthly available income was alternately either "$16,666.00 under Rattee" or "$18,166.66 otherwise" and the court found that Mr. Stacy's income available for support at the time of the hearing was $16,500.00, there was no significant change in finances to warrant altering the negotiated Divorce Stipulation amount of $3200.00 per month.

Third, the court erred in choosing to reduce child support by approximately 35% from the Child Support Guidelines based solely on the fact that the parties have shared parenting since the time of the divorce and without written findings of special circumstances nor other significant changes.

Finally, if the court were going to consider a deviation from the Child Support Guidelines based upon shared parenting, then it was incumbent on the court to permit an evidentiary hearing so that the parties may establish what factors may warrant or mitigate against such a deviation, and the failure to conduct such a hearing is error.

Argument

I.

The Court Erred In Ordering A Downward Deviation Of Child Support Because Mr. Stacy's Gross Income Had Neither Substantially Nor Significantly Changed Since The Date Of The Permanent Stipulation and Child Support Order Of December 2005

(A)

A Change Of Circumstances Was Neither Pled Nor Proved

In his petition for a review of child support, Mr. Stacy requested **only** a review of the financial situation of the parties. Because Mr. Stacy requested only a financial review, and did not allege a change in circumstances, the court's review should have been limited to a simple calculation of numbers given the current financial position of the parties. The court did exactly that and thus calculated a guideline child support amount of $3859.24. Counsel suggests that this is the correct amount for child support and the court ought to vacate the lower courts order and instead fix child support at this amount.

New Hampshire law is clear that:

> "[t]here shall be a rebuttable presumption….that the amount of the award which result from the application of guidelines ….is correct. A written finding or a specific finding by the presiding officer on the record that the application of the guidelines would be unjust or inappropriate in a particular case, *as determined by using the criteria set forth in RSA 458-C:5,* shall be sufficient to rebut the presumption in such case."
> RSA 458-C:4 II (emphasis added), and *In the Matter of Baker & Winkler*, 154 N.H. 186,187, 908 A.2d 806 (2006)

Legally, the Guideline amount is presumed to be the correct child support amount, and it was Mr. Stacy's burden to show, by a preponderance, that the Guideline amount was either "unjust" or "inappropriate" by record evidence. Having failed to do so, Mr. Stacy ought to be bound by his choice to ask for a financial review, and the presumption of correctness of the guideline calculation ought to end the legal inquiry in this case.

Yet there is another reason to set child support at the full guideline amount. Mr. Stacy came into court knowing his financial situation and filed a financial affidavit that significantly underreported his income. He was the sole owner and director of his company and was well aware that he had shielded almost $50,000.00 in income in his S Corporation by purchasing a new truck. While Stacy was legally permitted to take the entire amount as depreciation on his Federal taxes, he attempted to use the tax rules to hide income that was otherwise available for child support purposes. To use the common vernacular, Mr. Stacy got caught in his attempt to underreport his income, and the Court ought not to be lenient when such attempts to unfairly diminish child support are discovered.

Rewarding Mr. Stacy, by lowering his child support payments, for his failed attempt to hide income, is not in the interest of justice and is certainly not in the best interests of his two minor sons. Further, rewarding Mr. Stacy does not set a good precedent for all those who come to court in the future and rely upon opposing parties, and their attorneys, to fairly report income. Thus to set the child support amount pursuant to the guideline calculations is both presumptively legally correct, and an appropriate admonition by the Court to Mr. Stacy, and all others in the future, for attempting to avoid his obligation to his children by providing false or misleading financial information.

(B)

The Court Erred In Justifying A Downward Deviation
From the Child Support Guidelines Based Solely On Shared Parenting

In order to receive a deviation, for child support, from the Guideline amount, the moving party must plead special circumstances, prove his case by a preponderance of the evidence, and it must be in the best interest of the child(ren). RSA 458-C:5 (I) & (II) The resulting court order must state the foundational evidence upon which it relies in writing. RSA 458-C5(I) In this matter, after the court reviewed the parties financial affidavits the court found that Mr. Stacy's actual monthly income available for child support to be $16,400.00, and that the guideline child support amount was therefore $3859.24 per month.

Despite there being no other record support for the reduction, other than shared parenting, the court nevertheless ordered that the Guideline amount

should be reduced from $3859.00 to $2500.00 per month. This resulted in a downward deviation, in an arbitrary percentage amount, from the Guideline amount with no written findings concerning the special circumstances listed in the statute.

With a scant twenty pages of transcript in this matter even a cursory review makes it is abundantly clear that there is simply nothing in the record that provides support for the finding that "**a deviation from the guidelines is warranted given the shared parenting time of the children**." No other findings were made explaining or supporting an adjustment from the Guideline amount, however the court did make specific findings that Ms. Teczar's argument was correct and stated that there was "no reliable evidence to demonstrate that the parties used a percentage method of reduction".

New Hampshire law is unequivocal that:

> "[e]qual or approximately equal parenting responsibilities in and of itself shall not eliminate the need for child support and **shall not by itself constitute a ground for an adjustment**." RSA 458-C:5 I.(h)(1)(emphasis added)

Further, New Hampshire law is clear that if the Marital Master wished to deviate from the presumptively correct child support amount he may do so but must make "specific finding[s]…. on the record that the application of the guidelines would be unjust or inappropriate in a particular case, *as determined by using the criteria set forth in RSA 458-C:5,* shall be sufficient to rebut the presumption in such case."RSA 458-C:4 II (emphasis added) *In Re Carr,* 156N.H. 498, 505-6, 938 A.2d 89 (2007)

The criteria of section RSA 458-C:5 regarding deviation from the guideline calculation amounts, as a result of parenting schedules, are clear that:

> (2) In considering requests for adjustment to the application of the child support guidelines based upon the parenting schedule, the court may consider the following factors:
>
> (A) Whether, in cases of equal or approximately equal residential responsibility, the parties have agreed to the specific apportionment of variable expenses for the children, including but not limited to education, school supplies, day care, vacation and summer care, extracurricular activities, clothing, health insurance costs, and uninsured health costs, and other child-related expenses.

(B) Whether the obligor parent has established that an equal or approximately equal residential responsibility will result in a reduction of any fixed costs or child rearing incurred by the oblige parent.

(C) Whether the income of the lower earning parent enables that parent to meet the costs of child rearing in a similar or approximately equal style to that of the other parent.

Clearly the language of the statute requires the court to base any reduction from the child support guideline amount by using these economic criteria. *In Re Carr,* 156N.H. 498, 505-6, 938 A.2d 89 (2007) This is not discretionary language. The legislature prescribed that departures may only be made when specific findings are made and that the application of the guidelines in a particular case "would be unjust or inappropriate" as "determined by using he criteria set forth in RSA 458-C:5 it is incumbent on the court to do so. *Carr at 506, In the Matter of Forcier & Mueller,* 152 N.H. 463, 465, 879 A2d 1144 (2005)

Master Dalpra clearly had neither record evidence regarding these criteria nor did he attempt to justify his departure from the guideline amount by using these criteria. This was an unsustainable act of discretion and as such his order should be vacated as it regards that downward departure from the guideline amount, and the guideline amount be ordered at future child support.

C)

No Significant Change of Income Was Proven To Warrant Alteration Of The Parties Negotiated Agreement

At the time of the final divorce hearing, in December of 2005, Mr. Stacy filed a Financial Affidavit with the court, which was signed by both Mr. Stacy and his counsel, and stated that *gross income was "$16,666. under Rattee" and "$18,166.66" otherwise*. (emphasis added) (Exhibit H) At the modification hearing held on April 28, 2009, Mr. Stacy's Financial Affidavit stated that his gross income was $12,500.00 per month. The Court, however, found Mr. Stacy had underrepresented his income and held that his gross income, for child support purposes, was, in fact, *$16,400.00* .

While Mr. Stacy claimed a decrease in income by as much as $6,000.00 per month, the Court's findings make clear that his monthly income decreased

by either or $266.00 per month, or at most by $1,766. per month from December 2005, when the parties negotiated their Permanent Stipulation. As a result no significant change in income has been shown*, as none exists*, to merit altering the parties negotiated child support amount.

While it is true that the parties did agree to a downward adjustment of child support from the Guideline amount in December of 2005, other factors were at play in that negotiation, at that time, which included alimony and tax issues.

Mr. Stacy gained financially, in 2005, from that agreement. He avoided a child support payment, which according to the guideline calculations at the time, would have been in excess of $5,000. per month, as compared to the negotiated amount of $3200. per month. That term alone was a savings of over $1800. per month, which over the last four years amounts to a savings to him of more than $90,000.00.

Second, in negotiating a brief fixed term alimony which was $2100.00 per month in 2006 and 1500.00 per month in 2007, and terminated completely in 2008 he gained tax advantages from permissible deductions for alimony, as compared to child support, and avoided the risk of longer and greater terms of alimony which might otherwise have been ordered given the relative financial positions of the parties at the time.

While counsel suggests that the full guideline amount of child support ought to be ordered, in the alternative, the court could hold that no significant change in circumstances has occurred. In so finding, it would be appropriate to conclude that both parties freely negotiated their agreement in 2005, and that the agreement was fair then and is fair now, and accordingly order that the original agreement of $3200.00 per month ought to remain in place.

(D)

Before Permitting A Departure From The Child Support Guidelines
The Court Should Permit Both Parties A Full Hearing

Mr. Stacy filed a petition requesting a modification of child support and based that request upon the fact that 3 years had passed since the last child support order. Mr. Stacy's filing did not put Ms. Teczar or the court on notice of any other issues. Understandably, given that the Petitioner did not request other than a financial review, the court limited the hearing to fifteen minutes of

argument. However, once it became clear that counsel for Mr. Stacy was suggesting a departure from the child support guidelines pursuant to Chapter 458-C:5, based upon shared parenting, the court should have acted. The Court should have granted Ms. Teczar's request for a continuance or denied Mr. Stacy any adjustment to the child support guideline amount especially absent record evidence to support an adjustment.

While counsel suggests that this court ought to enter an order consistent with the argument in sections (a) thru (c) above, counsel suggests, in the alternative, that if the court is not so inclined, then the proper avenue would be to remand the matter for a full evidentiary hearing in which the parties can submit evidence regarding the criteria identified in Chapter 458-C:5.

Conclusion and Request For Orders

Based upon the arguments stated above counsel requests this Honorable Court to:

1. Vacate the order of May 4th, in so far as it deviates from the child support guideline calculations and set the amount of child support at that calculated by the guidelines, that being $3859.24, or

2. In the alternative alter the order of May 4th to reinstate the negotiated child support amount of $3200.00 monthly, or

3. Order a further evidentiary hearing permitting the parties to fully plead and respond to the request for a downward deviation from the child support guidelines based upon shared parenting and/or changed circumstances, and/or

4. Grant such other relief and make such further orders as the Court deems equitable and just.

Oral Argument Request

Counsel requests that the matter be scheduled for oral argument, and says that Raymond Buso, counsel for the respondent pro hac vice, will appear for her if the court permits oral argument.

Respectfully submitted,

February 26, 2010

_____

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Certificate of Service

I, Raymond Buso, attorney for the respondent/appellant, Mary L. Teczar, certify that, on this 26th day of Februrary, 2010, I provided a copy of Respondent's Brief and Record Appendix to
Matthew Stacy, the plaintiff/appellee, by mailing the same postage prepaid to his address of record
17 Thornton Ferry Road II,
Amherst, NH 03031.

I, Raymond Buso, attorney for the respondent, Mary L. Teczar, certify that, on this 26th day of February, 2010, I provided a copy of Respondent's Brief and Record Appendix to counsel who has previously appeared for the Petitioner, though he has not filed notice of appearance on this appeal,

Attorney Edward Richards
65 Temple Street,
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by mailing a copy postage prepaid and first class.

_____

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EXHIBIT H
TRANSCRIPT