The State of New Hampshire

Supreme Court

IN THE MATTER OF TONI JEROME AND RAYMOND JEROME

Docket No. 2003-380

Brief for the Respondent, Raymond Jerome

On appeal from the Grafton County Superior Court

Pursuant to NH Sup. Ct. Rule 7

On the brief and orally
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I. Statement of the Case

The facts of this case were stipulated by the parties in a signed document entitled Stipulation of Facts for Final Order, accompanied by supporting memoranda of law from each side. Respondent's Memorandum of Law as submitted to the Trial Court is appended to this brief.[1] No evidentiary hearing on the final merits hearing was held. The temporary hearing was on offers of proof only. The orders made by the Grafton County Superior Court are based strictly upon that record, and as such, on appeal, the only facts to be considered by the Supreme Court are those apparent from the trial court's file record and the stipulations for the final merits determination with accompanying documents.

[1] Petitioner had failed to include this document in her Appendix, choosing only instead to include her own Memorandum of Law.

II. Statement of the Facts and Factual Analysis

The Stipulation of Facts for Final Orders adequately and succinctly sets out the facts of this appeal. Petitioner in her brief has liberally strayed from the proper facts of this case in her presentation of the facts. She has added facts that are foreign to the record of this case to suit her arguments that are clearly not supported by the record.

The first misstatement of fact in Petitioner's Statement of Facts is the description of the settlement and nature of the damages for the personal injury action that eventually gave rise to the annuity. The factual conclusion Petitioner sees need to achieve is that nothing at all of the eventual settlement of the personal injury suit in California was for lost wages or lost earnings. The record does not permit that factual conclusion.

Specifically, on page 8 of Petitioner's brief, Petitioner acknowledges that the Jeromes brought suit and made a settlement demand, but then describes that that they were "seeking recovery for Ms. Jerome's medical expenses, as well as her psychological and emotional trauma. The Jeromes did not make a demand for lost wages or lost future income." Petitioner's Brief, page 8 (emphasis added.)

In actual fact, the recovery sought was for both of the Jeromes, not just for Ms. Jerome. She sought recovery for her injuries and he sought damages for his loss of consortium. Count 7 of the Jeromes complaint as filed with the California court is a claim for loss of consortium (Appendix page 51-52). In the Jeromes settlement demand

of July 16, 1986 (Appendix pp. 54-60), the attorney references the clients as being both Ms. Jerome and Mr. Jerome (Appendix p. 54) and articulates the damage to the marital and sexual relationship of the parties, accompanied by medical records of both Mr. and Ms. Jerome (Appendix pp. 58-59.) The eventual settlement agreement and release achieved in this case covered both parties. Lump sum cash payments to each of the two parties in the amount of $420,000 to Ms.Jerome and $20,000 to Mr. Jerome are spelled out in the settlement agreement Attachment A (Appendix p. 67); see also Stipulations for Final Orders, stipulation #7, Appendix p 29). The settlement further provided for an annuity that the parties believe was purchased for the remaining $560,000 of the settlement proceeds from the insurance company, and which was titled to Ms. Jerome under the settlement agreement. (Appendix pp. 61-68.)

Petitioner also asserts in Petitioner's Statement of Facts as if it were a fact that, "The Jeromes did not make a demand for lost wages or lost future income" (Petitioner's Brief p.8). This statement is false. Specifically, Paragraph 18 of the Jeromes complaint to the California court (Appendix p. 39) states as follows:

> As a further proximate result of the said conduct of the Defendants, and each of them, Plaintiff was prevented from attending to her usual occupation and sustained a loss of earnings. Plaintiff is informed and believes, and alleges, that she will thereby be prevented from attending to her usual occupation for a period in the future and will sustain further loss of earnings and earnigs (sic) power. Leave of Court will be sought to amend this Complaint to set the exact amount when the same has been ascertained.

This paragraph of the introductory facts set out in the complaint is then incorporated into all the other counts of the complaint by reference. (Appendix pages 40-41; 42, 44, 47, 49, 51 (Counts 2 through 7)) Prayer 3 of the California complaint seeks damages, "For loss of earnings and earnings power, according to proof." (Appendix p. 52.) No such fact appears anywhere in the Stipulation of Facts for Final Order submitted by the parties to the Trial Court. [2]

The Permanent Stipulations in the parties' divorce allocated all forms of property between the parties, including real estate located in Bethlehem and $50,000 cash to Mr. Jerome. It also allocated pension assets, cars, stocks, debts, and so on between the parties. Ms. Jerome received the right to receive the annuity payments under the annuity contract as part of the property settlement in the divorce.

Other subsidiary facts as bear upon the arguments presented in this brief are referred to in the context of the argument presented.

[2] The settlement demand letter (Appendix pp. 58-59), references Ms. Jerome's psychiatric treatment, her continuous anxiety and fears of being attacked, the need for the Jerome's move to New Hampshire in response to this incident, and future medical/psychiatric treatment and trauma. The settlement demand dated after the California complaint was filed sought only the policy limits of the existing coverage, and thus did not need to go into detail of the how much time from work may have been lost for medical or psychiatric treatment to that date, time lost from work to move to New Hampshire, or how much would be lost in earnings potential or wages for future psychological trauma or treatment. It is therefore only reasonable to infer from these facts that lost wages were part of this claim, and more significantly, it is absolutely unsustainable for Petitioner to assert as a fact as Petitioner does in her brief *that lost wages were **not** part of this settlement.*

III. Summary of Argument

The standard of review for a child support case such as this requires there be an error or law or an abuse of discretion by the Trial Court. Annuities, regardless of their source of origin, are includable as gross income for child support by RSA 458-C and by this Court's interpretations of the purposes and policies of that statute. Most of the annuity payments to Petitioner are actually earnings on the personal injury settlement making it all the more correct to include it for the child support calculation in this case. Whether an asset is awarded as part of marital property division is irrelevant to the question of its includability in child support calculation. The personal injury settlement the Jeromes received was long ago converted into an annuity, and therefore has lost whatever character it may have had as a personal injury settlement for it not to be included in gross income. A personal injury settlement payable in the form of a periodic monthly payment for life with guaranteed five year $100,000 bonuses for its duration should be included as income for child support.

Adjustment of the support level retroactive to the date of the petition for modification is within the Trial Court's authority even where the Trial Court has made a temporary order previously that did not include that income. No abuse of discretion or error of law has been established, and therefore the Trial Court decision should be affirmed.

IV. Legal Analysis: The Trial Court's order should be affirmed.

1. Petitioner will not meet the standard of review for a child support case such as this because she does not show an error or law or an abuse of discretion.

The New Hampshire Supreme Court has described the standard of review to govern as case such as this as follows:

> "Trial courts have broad discretion to review and modify child support awards. See Nicolazzi v. Nicolazzi, 131 N.H. 694, 696 (1989). They are in the best position to determine the parties' respective needs and their respective ability to meet them. Id. Accordingly, we will set aside a modification order 'only if it clearly appears on the evidence' that the court's exercise of discretion was unsustainable. Butterick v. Butterick, 127 N.H. 731, 736 (1986) (quotation omitted); cf. State v. Lambert, 147 N.H. 295, 296 (2001) (explaining unsustainable exercise of discretion standard)."

In The Matter of Frederick J. Feddersen and Shelley Cannon, ____ N.H. ____ (decided February 28, 2003) "We will not disturb the trial court's rulings regarding property settlement or child support absent an abuse of discretion or an error of law." Rattee v. Rattee, 146 N.H. 44 (2001) (citing Hillebrand v. Hillebrand, 130 N.H. 520, 522-23 (1988))

Petitioner's first argument on appeal is that the child support award includes the annuity as income to Petitioner and therefore awards Mr. Jerome an interest in that annuity that was not awarded to him in the parties' permanent divorce stipulations. Her argument contends that inclusion of the annuity as income results in a modification of a legally nonmodifiable permanent property award, and is therefore an error of law. This brief contends that the law is well settled that inclusion of the income stream from an asset that was awarded in a property settlement of a divorce does not modify that property settlement at all, but rather is dictated by the plain language and statutory intent of the child support statute.

Petitioner's second argument seeks to advance a new rule of law that a personal injury settlement which compensates a victim only for medical injuries and emotional harm is not income for child support purposes. Her contention, therefore, is that the failure of the Trial Court to apply such a rule in the case at bar is an error of law. This brief argues that the factual nature of the underlying personal injury settlement is not at all supportive that no wages or lost earnings were part of this settlement, and that whatever the original nature of that personal injury settlement may have been in 1987 when the California tort case was settled, that settlement became an annuity for all future purposes by the parties' own agreements with the insurer settling the case. Whatever characteristics of a personal injury award the once may have had no longer apply and an annuity is expressly included as one of the components of gross income in the child support statute. No exception or special rule for annuities that originate from personal injury awards, whether comprised of lost wages or lost earning capacity or not, is

suggested by the language of the statute. To carve out such an exception judicially as a new rule of law would violate the express terms of the statute and defeat the policy purposes that our Courts have ascribed to that statute in numerous current cases.

2. Annuities, regardless of their source of origin, are includable as gross income for child support.

The question whether Ms. Jerome's annuity payment is or is not includable in her gross income for purposes of child support is governed by RSA 458-C. The purpose of RSA 458-C is stated in the statute as follows:

> 458-C:1 Purpose. – The purpose of this chapter is to establish a uniform system to be used in the determination of the amount of child support, to minimize the economic consequences to children, and to comply with applicable federal law by using specific guidelines based on the following principles:
>
> I. The custodial parent shall share responsibility for economic support of the children, irrespective of any non-custodial parent's child support order.
>
> II. The children in an obligor's initial family are entitled to a standard of living equal to that of the obligor's subsequent families.
>
> III. The percentage of net income paid for child support should vary according to the number of children and, with limited exemptions, not according to income level.

For the purposes of RSA 458-C, definitions of key terms are included in Section 2, the most important of which for the case at bar is the definition of "gross income":

> IV. "Gross income' means all income from any source, **whether earned or unearned**, including, but not limited to, wages, salary, commissions, tips, **annuities**, social security benefits, trust income, lottery or gambling winnings, interest, dividends, investment income, net rental income, self-employment income, alimony, business profits, pensions, bonuses, and payments from other government programs (except public assistance programs, including aid to families with dependent children, aid to the permanently and totally disabled, supplemental security income, food stamps, and general assistance received from a county or town), including, but not limited to, workers' compensation, veterans' benefits, unemployment benefits, and disability benefits; provided, however, that no income earned at an hourly rate for hours worked, on an occasional or seasonal basis, in excess of 40 hours in any week shall be considered as income for the purpose of determining gross income; and provided further that such hourly rate income is earned for actual overtime labor performed by an employee who earns wages at an hourly rate in a trade or industry which traditionally or commonly pays overtime wages, thus excluding professionals, business owners, business partners, self-employed individuals and others who may exercise sufficient control over their income so as to recharacterize payment to themselves to include overtime wages in addition to a salary.

{Emphasis added.} No exception for annuities that are apportioned as part of a marital property settlement or that originate from a personal injury award is contained in the statute. Nor is any other asset that may be acquired from the proceeds of a personal injury award such as rental property or a business asset or financial investments

suggested by the statute excluded from gross income for child support. Petitioner's argument for such an exception in this appeal is erroneous.

3. The fact that most of the annuity payments to Petitioner are actually earnings on the personal injury settlement underscores the correctness of including it for child support purposes.

The parties to the case stipulated as a fact that the annuity at issue here was purchased in 1987 for $560,000 as well as to the stream of payments that Ms. Jerome has received and will continue to receive from the annuity over the course of her lifetime. That stream of payments is analyzed in Respondent's Memorandum of Law Regarding Child Support Obligation Inclusive of Annuity Payments to Obligor found in the appendix to this brief. That analysis is incorporated in this brief by reference. Summarized, that annuity purchased for $560,000 will pay total payments over the life expectancy of Petitioner of $3,149,975.40. As such, $2,589,975.40 of the lifetime return to Ms. Jerome will be interest earned on principal, or 82.222% of the total payments. Only 17.778% will actually be a return of principal. Petitioner did not challenge this calculation in her memorandum arguments to the Trial Court as they all compute mathematically from the facts stipulated by the parties.

Rather than purchasing an annuity with this $560,000 of principal, in theory Ms. Jerome could have invested that principal in stocks, bonds, real estate, or other investment and received returns of principal and earnings in a manner different than that

afforded by this annuity. Had she done so, one would have to consider whether she would also seek to exclude from child support any other such return on investment that she received from the invested principal.

The child support definition of gross income includes all returns on investment, whether earned or unearned from any of these sources, annuities included. Petitioner has not chosen to argue in this appeal that return of principal from a personal injury settlement should be excluded from child support income, versus the earnings portion on that principal. Her decision to so craft this issue on appeal is probably because so much of the annuity payments (82.222%) would still be captured as income in her case. Respondent had presented this analysis as one of several alternatives to the Trial Court to ameliorate the error made in the temporary order in which the entire annuity had been excluded.

Whether such a calculation and other similar analyses of returns on personal injury settlements should govern child support calculations in the future ought not be decided in this appeal because Petitioner has not argued the case this way. If, however, this Court proceeds in such a direction, the Court should be aware of the complexities presented by other situations where mixed returns of principal and earnings are received over a period of time from an asset. The prospects for complex legal and factual arguments over how much is a return of principal and income from something simple like this annuity would make a field day for lawyers, accountants, and investment advisers structuring asset returns as principal during child support paying years and as income

during non-support years to shelter them from child support. Such practices are not to be encouraged by law under the child support statute. The statute's purpose is to be a sure and readily discernible guide as to what is and is not income without a lot of "fancy dancing" and legal machinations. Neither the courts nor parties to cases can tolerate such a framework, and the children will suffer both by the prolonged litigation over support that such a rule would promote, not to mention the lowered levels of support children should be entitled to enjoy under the statute.

4. Whether or not an asset is awarded as part of marital property division is irrelevant to the question of its includability in child support calculations.

This very issue upon which Petitioner relies in her first argument is precisely addressed in Rattee v. Rattee, 146 N.H. 44 (2001), resolved in the following controlling language:

> As one court has observed, it is not necessarily "double-counting" "to treat a pension as marital property, award it entirely to the earner spouse (with an offsetting award of marital property to the nonearner spouse) and then to take the earner spouse's receipt of pension benefits into account in determining whether there should be any alimony award to either spouse." White, 237 Cal.Rptr. at 767 (quotations omitted). Similarly, it is not necessarily "double-counting" to treat the parties' share of the company as marital property, award it to the defendant, offset the award to the plaintiff, and then use the income from the asset to determine the level of child support.

> Finally, we find persuasive the Wisconsin Supreme Court's reasoning in Cook, 560 N.W.2d 246, where the court held that the rule against "double-counting" does not bar consideration of a pension both as property for purposes of property division and as income in calculating child support. Id. at 252. In so holding, the court stated:
>
> The property division is an allocation of assets between the parents; each spouse receives something from the division....
>
> In contrast, the child of divorced parents receives nothing from the property division. A child support order gives the child fair support from the non-custodial parent's income including pension proceeds such as military retired pay. Thus, when a ... court treats a pension which was subject to property division as income for child support purposes, the pension is counted for the first time between the parent and the child. As between the parent and the child, the pension is not being counted twice.

(Emphasis added.)

The plain meaning of the statute includes all these kinds of income because the purpose of the statute is to capture the full income streams a parent enjoys to aid in the support of the child, rather than to parse the subtleties of whether the obligor parent received an asset as part of a property division in the divorce. The plain meaning of the statute invites no such differentiation of how income generating assets are obtained in determining their includability as income for child support. Doing so would violate the purpose of the statute, which is to give a child the benefits of his or her parents' true

incomes and economic station in life through payment of child support to the parent primarily responsible for the child's living expenses.[3]

Following this reasoning and legal authority, the award of child support based on a stream of income flowing from an annuity awarded to Ms. Jerome as a marital property settlement is not a modification of that property settlement. Mr. Jerome has not been awarded a part interest in that annuity by virtue of an award of child support based in part on that stream of income. Rather for the first time, now occasioned by the change in custody of the parties' minor child from mother to father, a child support award needs to be made to give the parties' child Michael the benefit of that annuity now that he lives with his father.

5. Petitioner's effort to characterize the annuity as a personal injury settlement does not save it from being included in gross income.

Petitioner's second argument seeks to characterize the annuity at issue in this case as being a personal injury settlement, and therefore outside the bounds of the gross income determination. She advances this argument apparently because she has no argument why an annuity which is expressly included as gross income under the child support statute should now be excluded. She prefers making the contention that personal

[3] If the statute invited such differentiations, the arguments to courts would surely follow how assets acquired post-decree, and therefore not specifically awarded in the divorce decree, could be traced back to an asset that was awarded as marital property in the decree, and should therefore be excluded from the child support calculation. "Oh, your Honor, I sold that business, but I used all the money to buy this rental property, and so the rental income from this new rental property should be excluded from my income for child support calculations also," the argument would go.

injury settlements are not specifically mentioned as included, and that therefore they should not be included.

Petitioner's argument requires that one ignore that the parties decided in 1987 to convert the personal injury settlement into an annuity. They themselves decided while still married and not necessarily contemplating divorce, that they would turn the personal injury settlement into two new forms of property: lump sum payments of cash and an annuity. By making that election for whatever reasons they did at the time, they now must accept the consequences of that decision, for better and for worse, and for all time. Neither party can shuffle back and forth when it suits them to treat this annuity as anything other than an annuity, subject to all the legal rights, obligations, and immunities that attend it.

By Petitioner's method of analysis, one could also call "net rental income" that is enumerated as income for child support under the statute with a name like "landlord earnings." But that would not move that income stream outside of the statute. How about calling something "owner pay" rather than "business profits?" Should calling something "retirement pay" rather than "pension" or "social security benefits" place it outside the child support statute where both of those terms are included in income? An old axiom states, "If it waddles like a duck and quacks like a duck, it's a duck." Calling an annuity a personal injury settlement because that is what it once was many years ago does not make an annuity anything other than an annuity. Ms. Jerome's annuity from her

personal injury settlement is still an annuity, and under the statute is part of gross income for child support calculation.

Petitioner proceeds by characterizing the annuity as a personal injury award, and proffers to this Court the legal proposition at page 14 of her brief what essentially would amount to a new rule of law in New Hampshire:

> *A personal injury settlement, which compensates a victim only for medical injuries and emotional harm cannot be considered income for child support.*

It now becomes apparent why Petitioner tried so hard to distort the facts about wages and lost earnings in her statement of facts. She needed that point to present a narrowly crafted exception to what clearly would be the governing rule on this annuity stream of payments. Her argument fails on the facts, because as the Analysis of Fact section of this brief points out, there is no basis upon which to conclude that this personal injury settlement did not include lost wages or earnings. There is, rather, all indication that the claim for lost wages and earnings was put forward in the substantive counts of the complaint in California and was prayed for in the prayer for damages. That this pleading preceded the settlement letter and that the settlement letter encompasses numerous forms of harm that involve loss of earnings and lost wages suggests that lost wages and lost earnings were a part of this settlement. The factual record of this case clearly does not

support the assertion that lost wages and earnings was not part of the settlement, and thus the proposition of law Petitioner advances in her brief fails on the facts of the case.

As it is Petitioner who advances the theory for the exception of the law she seeks for certain kinds of personal injury compensation, it is her burden to have carried the proof at trial or in the record necessary to support her claim. Her failure to do so factually makes her contention on appeal specious.

6. A personal injury settlement payable in the form of a periodic monthly payment for life with guaranteed five year $100,000 bonuses for its duration should be included as income for child support.

The approach taken by New Hampshire in determining whether an item is or is not to be included in gross income for child support cases is well articulated in In the Matter of Robert P. Dolan and Cathy L. Dolan, 147 N.H. 218 (2001), which states the approach as follows.

> We first address whether post-divorce exercised stock options are includable as income for the purposes of calculating child support. RSA chapter 458-C establishes a uniform system for determining child support obligations. For the purposes of calculating a parent's child support obligation, RSA 458-C:2, IV (Supp. 2000) defines "gross income" as all income from any source, whether earned or unearned, including but not limited to, wages, salary, commissions, tips, annuities, social security benefits, trust income, lottery or gambling winnings, interest, dividends, investment income, net rental income, self-employment

income, alimony, business profits, pensions, bonuses, and payments from other government programs . . . .

Under this broad definition, we hold that the exercised stock options must be included as income for the purposes of calculating child support. According to the petitioner, he regularly receives stock options from his employer and they operate as an incentive. "Although the profits which are realized when an employee exercises an option to purchase his employer's stock, at a discounted price, are not explicitly mentioned in the statute, such options are analogous to a 'bonus'." Kenton v. Kenton, 571 A.2d 778, 782 (Del. 1990). They are also included within the phrase "all income from any source." RSA 458-C:2, IV; see also Kenton, 571 A.2d at 782.

Categorizing the exercised stock options as income serves the policy goal of minimizing the economic consequences of divorce to children. See RSA 458-C:1 (1992). If the exercised stock options are not deemed income for child support purposes, a person could avoid child support obligations merely by choosing to be compensated in stock options instead of by a salary. Moreover, children would be deprived of the standard of living equal to that of the subsequent family of the parent paying child support. See id.

Other courts considering this issue have treated exercised stock options as income for the purposes of calculating child support. See, e.g., Kenton, 571 A.2d at 782-83 (post-divorce profits realized from exercise of stock option are income for child support purposes); In re Marriage of Campbell, 905 P.2d 19, 20-21 (Colo. Ct. App. 1995) (post-divorce proceeds from actual exercise of stock options are income for child support purposes). The cases upon which the petitioner relies do not address whether stock options are income for child support purposes, and thus are inapplicable to this case. See, e.g., MacAleer v. MacAleer, 725 A.2d 829, 833 (Pa. Super. Ct. 1999); Powell and Powell, 934 P.2d 612, 613 (Or. Ct. App. 1997).

The petitioner argues that his exercised stock options are assets and thus should not be includable as income for child support purposes. Exercised stock options,

> in fact, have a dual nature. Cf. **Rattee** v. **Rattee**, 146 N.H. ___, ___, 767 A.2d 415, 419 (2001) (asset may be property for equitable distribution purposes upon dissolution of marriage and income from the asset may be used to determine child support obligation). They are like assets because they represent a right to purchase an ownership interest in a corporation's stock. They have characteristics of income because they permit "the owner to capture the appreciation in value of the stock prior to its actual purchase." Seither v. Seither, 779 So. 2d 331, 333 (1999). The stock options at issue, like income, were given to the petitioner as a form of compensation, and, unlike most assets, were not alienable.
>
> In this case, we believe that treating the petitioner's post-divorce exercised stock options as income for child support purposes is necessary to meet the policy goals of the child support laws. Only by doing so may we minimize the economic consequences of divorce on the children and ensure that they enjoy a standard of living equal to that of the petitioner's subsequent family. See RSA 458-C:1.

In Dolan, the question of inclusion of the stock options for child support calculations was more difficult because stock options are not specifically enumerated in the statute as an income source.

In New Hampshire, treatment of personal injury awards has been addressed in the context of whether the personal injury award is or is not marital property subject to equitable division by the Superior Court in the divorce. See In the Matter of Patricia and Warren Preston, 147 N.H. 48 (2001) (holding that it is marital property subject to equitable division.) New Hampshire has also just recently decided In The Matter Of Frederick J. Fedderson and Shelley Cannon, supra that a patent infingement award is includable in a child support calculation. Feddersen again takes the broad view of the includability of income sources for child support calculation. Nothing in Feddersen

suggests why one kind of judgment or settlement of a claim against another (patent infringement) should be treated any differently than any other kind of settlement such as an award for personal injuries. Feddersen's reliance upon the analysis in the Dolan case as to inclusion of stock options as income for child support suggests that no distinction would be warranted. The fact that many personal injury awards might be lump sum or non-recurring in nature, under the Feddersen decision would not preclude such awards from being included in gross income.[4]

Inclusion of personal injury awards in child support calculations is well developed in the law of other states. The cases from other jurisdictions, however, clearly support the reasoning advanced in this brief for inclusion of the personal injury annuity in the child support calculation. 5 ALR 5th 489 (1998). Whole sections of that ALR article are excerpted here in a footnote[5] to guide the Court on the question of whether a personal

[4] Note that Feddersen discusses how a non-recurring award is to be calculated into income as a current lump sum and not averaged over the life of the duration of the child support obligation or over some other period of years. In the case at bar, a $100,000 lump sum payment made every five years to Toni Jerome under the provisions of the annuity was averaged into her income in addition to the regular monthly payments she receives. This calculation was suggested by Raymond Jerome in the record of the trial and actually gives Toni Jerome an advantage because the $100,000 payment in the year in which child custody changed could have been included in the first year's child support under the Feddersen and Rattee precedents. Toni Jerome has not challenged that method of calculation in this appeal apparently for the benefits it has bestowed upon her, and thus it would be inappropriate for this Court on appeal to consider that subject. In the event that this Court sua sponte reverses or remands on that basis, Raymond Jerome would reserve the right on remand to seek the support award to flow from that $100,000 bonus payment.

5

CONSIDERATION OF OBLIGOR'S PERSONAL-INJURY RECOVERY OR SETTLEMENT IN FIXING ALIMONY OR CHILD SUPPORT

A court has discretion in determining the sources of income to be included or excluded in computing an award of alimony or child support. One source of income that the courts have considered is an obligor-spouse's or parent's personal-injury recovery or settlement. In the case of Villanueva v O'Gara (1996,2d Dist) 282 Ill App3d 147, 218 Ill Dec 105, 668 NE2d 589, 59 ALR5th 841, the court held that it was error to include the entire amount of a father's personal-injury settlement when calculating a modification of a child-support award. The court held that only the amount representing reimbursement for lost earnings should be taken into account in deciding the petition to increase child support. The case was remanded so

that the lower court could determine what portion of the father's personal-injury settlement proceeds pertained to lost earnings. This annotation collects and discusses the cases that address the issue of whether an obligor-spouse's or parent's personal-injury recovery or settlement should be included or excluded in fixing alimony or child support.

[a] Scope

This annotation collects and discusses the cases addressing the issue of whether an obligor-spouse's or -parent's [FN1] personal-injury recovery or settlement should be considered in fixing the amount of alimony or child- support payments. [FN2]

A number of jurisdictions have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the court opinions that fall within the scope of this annotation. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed herein, including those listed in the Jurisdictional Table of Cited Statutes and Cases.

. . .

The amount to be awarded as child support rests within the sound discretion of the trial court, and each case must be decided on a case-by-case basis. [FN3] One issue that the courts have addressed in fixing child support is whether an obligor's personal-injury recovery or settlement should be included.

Some courts have made the decision regarding whether an obligor's liquidated, personal-injury award or settlement should be included or not included when fixing child support, by determining if the award or settlement constitutes a "financial resource" or "asset." All courts looking to this category have decided that a personal-injury award or settlement was a financial resource or asset (§ 3). Some courts have based child-support calculations on a determination of whether a personal-injury award or settlement constitutes "income" or "gross income." Some courts have held that the entire amount was income (§ 4), while one court decided that no part of an award was income (§ 7). Other courts have determined that only the portion of the obligor's personal-injury recovery that represents lost wages constitutes income, and can be used to calculate child support (§ 5). One court found sufficient evidence that the entire award was intended to so compensate the obligor and used the entire amount in its calculations (§ 5[a]). In situations were such courts had insufficient evidence of the purpose of an award, one court excluded the entire amount (§ 5[b]), but others remanded the case in order that it be ascertained for what the personal-injury settlement was intended to compensate the obligor (§ 5[c]). Finally, one court, looking to child- support guidelines that require a court to consider a parent's "gross income," took into account interest earned on a personal-injury recovery (§ 6). In one jurisdiction, the statutory provisions governing the computation of child support expressly include a "personal-injury award" when it is intended to replace income. The one court to interpret the provision found that the recovery before it fell within the scope of the statute (§ 8).

A few courts have considered whether an obligor-parent's economic circumstances or other circumstances had changed as a result of his or her receipt of the personal-injury award or settlement. Some courts decided that the receipt constituted a change in circumstances, and included the sum when fixing child-support payments (§ 9). One court, however, determined that, although the obligor-father received a personal-injury settlement, the total of his economic circumstances did not improve and there was no change of circumstances that justified an increase in child support (§ 10).

Courts have determined that it is not relevant to such computations that the obligor was injured prior to becoming a parent (§ 11). Courts that have been asked to determine the relevance of the form in which a personal-injury recovery was received, have determined that lump-sum payments are "income" although like property (§ 12[a]) and that personal-injury awards payable as annuities fall within the scope of statutes expressly defining "annuities" as an element of "income"(§ 12[b]). A few courts have held that a

injury award should be included in a child support calculation. The subject of the treatment of a personal injury settlement paid in the form of an annuity from the same ALR article is excerpted extensively as well in Footnote 6[6]. These authorities amply

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personal-injury recovery was not a "nonrecurring payment from an extraordinary source not included as income" within the meaning of a child-support statute and therefore should not be used to calculate child support (§ 12[c]).

Courts have reached varying conclusions as to whether an unliquidated or pending personal-injury claim can be looked to when fixing child support. One court held that it could not modify a child-support award based upon an anticipated personal-injury settlement (§ 14), while another court held that a pending personal-injury claim is subject to child-support payments (§ 13).

When calculating child support based on the receipt of a personal-injury award or settlement, courts have allocated the proceeds over the time that the child would be a minor (§ 15[a]), over the time period between payments (§ 15[b]), and over the year following the receipt of a lump sum (§ 15 [c]). One court found proper the imputation of income to an obligor-parent based on investment income foregone (§ 16[c]), but others have found it improper to impute income to a parent based on the tax-free status of an award (§ 16[a]), or based on his or her avoidance of financing fees due to the ability to make cash purchases (§ 16[b]).

An award of alimony also rests in the sound discretion of the trial court and the amount awarded must be fair and just under all the circumstances of the case. [FN4] Some courts have awarded alimony out of an obligor-spouse's personal-injury recovery (§ 17), while other courts have refused (§ 20). Additionally, other courts considered an obligor-spouse's personal-injury award or settlement in fixing alimony only to the extent that the amount represented lost earnings and medical expenses incurred by the marital estate (§ 18). One court looked only to the interest earned on the funds recovered as compensation for personal-injury (§ 19). Courts have also considered whether unliquidated personal-injury claims can be considered when computing alimony. Some courts have held that alimony can be awarded from a pending award or settlement (§ 21), while other courts have held that it should not be so awarded (§ 22).

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[b] Annuity

In the following cases, the courts held that annuities from personal-injury settlements or settlements may be considered in setting child support because "annuities" were expressly included by the governing statute.

Where the child-support guidelines expressly included as "gross income" payments from annuities, the court in Capano v. Capano, 1992 WL 91573 (Del. Fam. Ct. 1992), held that annuity payments resulting from a structured, personal-injury settlement were not exempt either from being considered as "income" for purposes of determining the amount of child support or from wage attachment. Upon settlement of a personal-injury lawsuit, the father received a periodic lump-sum payment, and nontaxable, monthly annuity payments guaranteed for 360 months, and thereafter throughout the lifetime of the father. The father argued that the personal-injury settlement he received was compensatory damages for his mental and physical disabilities and not an award for lost wages, lost earnings, or unearned income. The court pointed out that according to the "Melson Formula" for calculating child support, "gross income" includes, but is not

limited to, annuities. This was evidence, the court said, that Delaware intended to require the inclusion of annuities from personal-injury settlements and settlements in child-support calculations. Therefore, the court held that the father's monthly annuity benefits should be included in determining the amount of the father's child-support obligation under the Melson formula. The court also determined that it could issue an order attaching the payments pursuant to Del. Code Ann. tit. 13 § 513 (b)(5), which defines "income," as "any form of payment made by the obligor's employer to him or her, and includes annuities." The court reached these conclusions notwithstanding any provision of the Internal Revenue Code, or the fact that the annuity is based in any way on lost wages or employment.

Construing Minn. Stat. § 518.54 subd. 6 (1990), which defines income for child-support purposes, in part, as any form of periodic payment to an individual including, but not limited to annuities, the court in Sherburne County Social Services on behalf of Schafer v Riedle (1992, Minn App) 481 NW2d 111, held that periodic annuity payments from a structured settlement of a personal-injury action were income for the purposes of determining a father's child-support obligation. Not only is the definition of income broad, the court pointed out, it explicitly includes payments from an annuity. Moreover, in the absence of any legislative intent to limit the definition, the court must conclude that the legislature intended to include any periodic payments from an annuity, regardless of the annuity's source. The court affirmed the trial court's decision to include the payments when calculating his child-support obligation, but reversed and remanded the specific amount of child support awarded.

Also construing Minn. Stat. § 518.54 subd. 6 (1994), and relying on Sherburne County Social Services on behalf of Schafer v Riedle (1992, Minn App) 481 NW2d 111, this section, the court in Mower County Human Servs. ex rel. Meyer v Hueman (1996, Minn App) 543 NW2d 682, ruled that annuity payments received by a father every five years from a settlement of a personal-injury action were a reliable source of income and were properly included in the calculation of his child-support obligation. The mother moved to establish child support when the parties, who were never married, separated. The father held two annuity contracts in conjunction with a settlement resulting from a personal injury he received when he was a minor. Under one contract he was to receive $1,250 monthly from July 1995 until July 2023. Under the other contract, he was to receive periodic lump-sum payments every five years. He also was scheduled to receive $775,0000 in periodic payments after the child's emancipation. Later, the father moved to modify child support because he was unemployed, and he sought to reserve child support until July 1, 1995 at which time he would pay $312.50 per month, based upon his anticipated receipt of monthly annuity payments. He also agreed to pay $1,250 in July 1995, 2000, and 2005, which were months in which he would receive additional large annuity payments. The court reasoned that the annuity payments, paid regularly every five years in a predetermined amount, consequently were a reliable source of income and constituted income properly included in the calculation of child support.

Construing Mo.R.Civ.P Rules, Rule 88.01, Form 14, which specifically includes income from annuities as part of gross income for purposes of determining child-support obligations, the court, in Taranto v. State of Missouri Dept. of Social Services, 1998 WL 60420 (Mo. Ct. App. W.D. 1998), [FN25] § 4, followed the reasoning of both Sherburne and Mower to hold that annuities received as part of a personal-injury settlement would be included as income for child-support purposes. Additionally, the court stated that the payments were to be included regardless of whether they were considered income for income tax purposes. The court did note, however, that the trial court could adjust, upward or downward, the actual amount of the payments to be included depending on the circumstances of the case.

Construing the Child Support Guidelines, Appendix IX-E:B(1)(9) and (15), which includes "annuities" as an element of a parental obligor's "gross income," the court in Cleveland v. Cleveland, 249 N.J. Super. 96, 592 A.2d 20 (App. Div. 1991), held that it was proper to consider a father's personal- injury settlement when determining the proper amount of child support. The father received a lump sum every five years. The trial court treated the situation as if an equal portion, 1/60th, had been received as income each month for 60 months. The appellate court said that "gross income" includes an "annuity" and an "annuity" includes principal. Moreover, the court reasoned, it was required, in cases not governed by court rule, to consider "all sources of income and the assets of each parent."

support the inclusion of a personal injury award that has been embodied in a structured annuity settlement as includable in child support given the unqualified language of RSA 458-C concerning earned and unearned income sources and annuities, along with the liberal interpretation to be accorded that statute as applied by this Court.

7. Adjustment of the support level retroactive to the date of the petition for modification is within the Trial Court's authority even where the Trial Court has made a temporary order previously that did not include that income.

In regards to the retroactivity of this order, the law is clear. RSA 458-C:3 Child Support Formula provides in part as follows: " (c) If a petition for modification is granted, it shall be effective from the date of service of the petition upon the respondent." (Emphasis added.) ; cf. RSA 458:17, VIII, :32 ; Maciejczyk v. Maciejczyk, 134 N.H. 343, 345-46 (1991). In In The Matter Of Frederick J. Fedderson and Shelley Cannon, supra, the Court stated the law this way:

> The petitioner next contends that the trial court impermissibly used his 2001 income to revise its temporary order retroactively. We find no such error. As the petitioner concedes, by statute, the trial court had the discretion to make its modified support order retroactive to May 1998, the date on which the petition to modify was filed. See RSA 458:17, VIII (Supp. 2002); Maciejczyk v. Maciejczyk, 134 N.H. 343, 345-46 (1991).

Toni Jerome does not advance the argument that the Trial Court abused its discretion by making the award of child support retroactive to the date of the petition for modification.

Rather, she asserts that the Trial Court was precluded as a matter of law from making its final order retroactive to the date of the petition because it had made a temporary child support order previously.

Toni Jerome's argument on this point misapplies the law of temporary versus final orders in domestic relations cases. Temporary orders are just what they present themselves to be, *temporary*. They are a provisional order to apply until a final adjudication is made upon a fuller presentation of the facts and conclusive resolution of all the issues. Temporary orders are not appealable, save for an extraordinary situation on an interlocutory basis. Temporary orders are applied in domestic relations cases to address the realities of domestic relations cases that need interim orders. Temporary orders routinely address custodial issues for children, payment of child support, maintenance of marital debt, and handling of marital assets. See RSA 458:16 (granting Superior Court full panoply of authority to adjudicate matters on a temporary basis in divorce, annulment and legal separation cases; see in particular RSA 458:16, I (e) as to authority to provide for the custody, support and maintenance of children; see also 458:35 Support of Children [7]; see also Rules of Superior Court for Domestic Relations Cases, Rule 189 Temporary Hearing.[8]

[7] RSA 458:35 "In cases where husband and wife are living apart, the court, upon petition of either party, may make such order as to the custody and maintenance of the children as justice may require…."

[8] Rule 189 TEMPORARY HEARING. Upon request of either party contained in a petition or cross-petition, or upon motion at any time during the pendency of an action, the clerk shall schedule a temporary hearing. Temporary hearings will be of thirty minutes' duration and conducted upon offers of proof, unless otherwise ordered by the court upon good cause shown. The parties may request a more lengthy hearing by motion setting forth the reasons for said request and the length of time required. Such motions shall be heard at the time of the originally scheduled temporary hearing, if not earlier ruled upon.

In Greenglass v. Greenglass, 118 N.H. 570 (1978) the Court specifically held that a temporary custody order made in a divorce case is to be given no presumptive weight, and does not trigger the higher standard of Perreault v. Cook , 114 N.H. 440 (1974) in a final adjudication of custody; rather, final adjudication is to be based upon a full consideration of the best interests of the child.

A closely related question to the one at hand concerning modification of a temporary award in a final merits determination was considered by the Court in Nicolazzi v. Nicolazzi, 131 N.H. 694 (1989). Nicolazzi considered the extent of authority of a trial court to order child support on an ongoing basis following a final merits determination while the trial court's final order was under appeal. Nicolazzi gives the trial courts broad discretion to determine whether to continue application of the temporary order provisions or to impose the final order requirements prospectively while the final order is under appeal.

If one steps back from Nicolazz*i* just a bit, the power to decide as part of a final order whether the final order or the prior temporary order is to govern into the future is precisely the power to modify the temporary decree. In Nicolazzi, the Court concluded that the Trial Court had specifically considered the subject of which order should apply during the pendency of an appeal, and had ruled that the temporary, not the final, order should apply if an appeal was taken.

> We explicitly acknowledge the trial court's discretion in setting the levels of alimony and child support to be paid during appeal, *Rollins v. Rollins*, 122 N.H. 6, 9--10, 440 A.2d 438, 440--41 (1982), and similarly grant that court broad discretion in awarding and modifying alimony and child support generally, *see, e.g., Richelson v. Richelson*, 130 N.H. 137, 146, 536 A.2d 176, 182 (1987) (child support modification); *Bisig v. Bisig*, 124 N.H. 372, 375--76, 469 A.2d 1348, 1350 (1983) (alimony modification); *Marsh v. Marsh*, 123 N.H. 448, 451, 462 A.2d 126, 128 (1983) (alimony award); *Kennard v. Kennard*, 81 N.H. 509, 514, 129 A. 725, 728--29 (1925) (alimony and child support). Recognizing that it is in the best position to determine the parties' respective needs and resources both before and after the final decree and during the pendency of any appeal, we disturb the trial court's alimony and support awards on appeal only where there is a clear abuse of discretion. *See, e.g., Marsh supra; Kennard supra.*
>
> …
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> It would be contrary to the broad discretion we grant the trial court in matters of alimony and child support to adopt the rule Mrs. Nicolazzi suggests, because it would deprive the court of the ability to take the special circumstances in which the parties may find themselves during appeal into account. Furthermore, no ill consequences will result from our refusal to adopt this rule. The trial court can certainly evaluate the adequacy of the temporary award to support the obligee spouse and dependent children during appeal, and our courts have adequate means of insuring that the appellee does not suffer a loss due to a frivolous appeal by the opposing party, *see, e.g., Wright v. Wright*, 119 N.H. 102, 104, 398 A.2d 837, 838 (1979).

131 N.H. at pp. 696-697.

Temporary orders are made on short notice and typically resolved on abbreviated offers of proof and legal argument. They are made before discovery has been conducted and before witnesses or other factual matters are fully developed. When other factors

bearing upon the matters adjudicated on a temporary basis become apparent, the temporary orders are modified to do justice between the parties in either a further temporary order or a final adjudication.

Petitioner seeks to distinguish Feddersen, supra from the case at bar because the temporary order in Feddersen contained language that the temporary order was "temporary in nature and subject to further review at the final hearing." No such special language is necessary under the holding of Feddersen. The language of the temporary order in that case just made it all the more persuasive against the argument advanced by the child support payor that he had somehow relied upon the temporary order to his detriment and that it would be unjust to change that temporary adjudication later. The law is so well settled around this principle of the provisional nature of a temporary child support order as to make such language surplusage, particularly in a case such as the one at bar where both parties were represented by counsel at both the temporary and final hearings in the case.

In the case at bar, the Trial Court's earlier misapplication of the law as of the temporary hearing order should certainly not relieve Toni Jerome of the obligation to have supported her child from the date of the modification petition as the law requires.[9]

[9] At pages 5-6 of the Trial Court's decision (Notice of Appeal pp. 24-25) the Trial Court stated, " The Court reasoned, at the time of the temporary hearing, because the structured settlement was considered marital property at the time of the divorce, and because the award involved settlement for personal injuries and not for lost wages or income, the annuity was not included as gross income. Now that the Court has had the time and benefit of well briefed memoranda of law, the Court is persuaded by the Respondent's argument that its previous order was in error."

Parties, their counsel, and trial courts should be encouraged by the procedure of temporary and final hearings to present the best cases that information allows at temporary hearings, and then for fuller presentations and considerations to be given when time permits at a final hearing, without any binding or conclusive effect being given to temporary orders. The treatment of temporary orders that Petitioner suggests in her brief would make such temporary orders final and nonmodifiable in later proceedings and render the temporary hearing process completely unworkable. Temporary hearings would need to have full discovery, evidence presented on a full scale basis, findings of fact and memoranda of law in far more situations than they do now because the stakes would be so high. The trial courts of the State need to have the latitude to correct injustices that may arise from hastily convened temporary hearings and incorrectly decided temporary orders. By the time of the final determination on the merits, the parties and the courts will have had the benefit of more time and fuller information to correct prior errors or injustices. Stripping that authority by the position advanced by Petitioner would be a mistake.

Petitioner's contentions in this appeal would remove the broad discretion of the Trial Court to adjust temporary orders. Reliance on the trial courts' discretion and closeness to the parties' situations wisely guided the holding in Nicolazzi. Petitioner's contentions would eviscerate Nicolazzi to be left standing for the sole and worrisome proposition that the only time a trial court could modify a temporary decree was in a final decree pending appeal. Nicholazzi and Maciejczyk as well as RSA 458:35 stand for

precisely the opposite, namely that trial courts do have and should exercise discretion reaching back to the date of the petition for modification to adjust child support to do justice between the parties. This is precisely what the Trial Court did in this case, and her decision was well within her discretion.[10]

[10] The Trial Court's exercise of discretion to make the modification retroactive to the date of the peitition for modification created the arrearage ordered as part of the final decree in the amount of $6282.94. In sustaining the Trial Court's exercise of discretion in this regard, this Court need look no further than the financial affidavits of the parties found in the appendix to this brief. As of the June 17, 2002 temporary child support hearing Ms. Jerome disclosed assets of $48,000 in jointly owned real estate, $35,000 in a checking account, and $10,000 in investments. In her financial affidavit for the final hearing determination she showed assets of a joint real estate asset worth $275,000 with no mortgage thereon and remaining checking and investments of $1,000. She therefore chose to spend $44,000 of liquid assets toward a house or other expenses during the pendency of this case, and owned a comfortable house for herself and Mr. Belair free of debt.) Mr. Jerome, in custody of the minor child in this case since May 2002, showed a portfolio of mixed assets of retirement accounts, life insurance cash value and savings of well under $40,000as of both the temporary and final hearings in the case. (All above facts are found in the financial affidavits of the parties reproduced in Appendices to this Brief .) The Trial Court ameliorated any apparent hardship that such an arrearage might have created for Ms. Jerome in the Uniform Support Order by making the arrearage payable at the rate of only $400 per month. This treatment in effect gave Ms. Jerome 15.71 months to pay it off. This is just an example of the kind of discretion that the law of our State should be encouraging trial courts to exercise in the matters before them, not rules of law that tie their hands and lock them into errors made on "quickie" temporary order determinations.

V. Conclusion: The Trial Court decision should be affirmed.

The annuity that Toni Jerome receives is to be included in gross income for child support. Nothing in the nature of that annuity either as having originated from a personal injury settlement or on the questionable extent to which it may be comprised of lost wages or other mixed forms of damages takes that annuity out of the clear language of RSA 458-C. Including the annuity promotes the clear policies of the child support statute by benefiting a child with the income sources enjoyed by both of his or her parents. Adjustment of the award at the final adjudication retroactive to the date of the petition for modification is clearly within the Trial Court's authority, and nothing advanced in this appeal from Petitioner suggests there being any abuse of the Trial Court's discretion.

Respectfully submitted,
Raymond W. Jerome

by his attorneys
BRAITERMAN LAW OFFICES

Date

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ORAL ARGUMENT

Respondent requests presentation of oral argument in support of his case, at which time Attorney David J. Braiterman will argue the case on his behalf.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief has been mailed this date, to Andrew Piela, Esq., attorney for Petitioner.

Date

David J. Braiterman, Esq.

APPENDIX