

State of New Hampshire  
Supreme Court

NO. 2005-0313

2005 TERM

DECEMBER SESSION

IN THE MATTER OF

DONALD L. BAYLY

and

JUDITH A. BAYLY

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RULE 7 APPEAL OF FINAL DECISION OF SALEM FAMILY DIVISION

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BRIEF OF PETITIONER, DONALD BAYLY

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## QUESTIONS PRESENTED

- I. Did the court err in considering Judith Bayly's alleged disabilities in determining the amount and length of alimony given that there was no expert testimony establishing the existence of her claimed maladies?  
Preserved: *Trn.* at 78, 81, 88, 103-04, 118.
- II. Did the court properly exercise its discretion when it awarded Judith Bayly nearly one-half of Donald Bayly's take-home pay in alimony for a period of twelve years?
- III. Did the court properly exercise its discretion when, in requiring Donald Bayly to maintain life and health insurance for the benefit of Judith Bayly, it did not provide Judith automatic notification of the insurance, meaning that she will have to periodically check on its existence?
- IV. Did the court properly exercise its discretion by denying Judith Bayly's request for an additional \$12,000 in attorneys fees when it heard evidence regarding her need and Donald Bayly's ability to pay, and when Judith's attorney was retained on a *pro bono* basis?

## STATEMENT OF FACTS AND STATEMENT OF THE CASE

Donald and Judith Bayly were married in 1977, and separated in March 2004 when Judith kicked Donald out of the marital residence. *Trn.* at 9. Although Judith says she stayed in the marriage because she loved him, *Trn.* at 108-109, the couple's relationship effectively ended many years ago. *Trn.* at 28-29. They have no children.

According to both Judith and Donald, the major cause of their breakdown was their mutual inability to competently manage finances. *See* DIVORCE DECREE, *Appx. to Judith's Br.* at 65. Donald has made a good salary throughout the marriage and now earns about \$100,000 per year. *See id.* Although neither have money-consuming bad habits, *Trn.* at 17-22, the couple owns no major assets, has few savings, little money, and a trail of unpaid bills including an IRS lien in excess of \$53,000. DECREE; *see also* FINANCIAL AFFIDAVITS, *Appx. to Judith's Br.* at 26 (Judith's) & 32 (Donald's).

Both Donald and Judith have significant medical issues. Donald is a diabetic – with its associated problems – and is prone to migraines. *Trn.* at 25-26, 30. Judith is obese, and thus has a placard allowing her to park in handicapped spots. *Trn.* at 102. She claims numerous other maladies, *Trn.* at 78-82, 86-88, 97-98, 134, 144-147, but offered no expert proof of them. Judith has many years of experience in, is qualified as, and has the various licenses for, an emergency medical technician (EMT) in several states, a 911 dispatcher, an emergency medical trainer, a commercial artist, and a dog trainer and groomer, *Trn.* at 22-24, 134-141. She teaches courses to law enforcement regarding the rights of those with disabilities who use service animals. *Trn.* at 137. Judith is also something of an entrepreneur, having established an agency which supports “people with disabilities who use service animals, be they guide dogs, hearing dogs, mobility

assistance, psychiatric support dogs.” *Trn.* at 136. In this capacity she has appeared on the *Oprah Winfrey Show*, the *Maury Povich Show*, the *National Geographic Channel*, *Animal Planet*, and the *Discovery Channel*. *Trn.* at 137-139.

Nonetheless, Judith claims her maladies prevent her from working, *Trn.* at 89-90, and although she has been once rejected, suggests she might soon begin receiving social security disability benefits. *Trn.* at 127-28.

Based on this, the Salem Family Division (*Bruce F. DalPra, Master & Lucinda V. Sadler, J.*) awarded Judith \$3,000 per month in alimony – roughly one-half of Donald’s take-home pay – for a period of 12 years. Not satisfied, Judith here suggests the court unwisely exercised its discretion.

## SUMMARY OF ARGUMENT

Donald Bayly first suggests that Judith Bayly's maladies are not as confining as she alleges, and might be – in Judith's word – "psychosomatic." He argues that to the extent the trial court based its alimony determination on the existence of a disability, it was in error.

After noting the high level of deference this Court allows to divorce courts' determinations of alimony, Donald reviews the evidence heard by the trial court as to each party's assets and liabilities, and their respective needs and abilities to fulfil them. He also notes the high percentage of his income provided by the existing award, and argues that it would be unreasonably high if it were set at Judith's requested level.

Finally, he notes the high level of deference this Court also pays to lower courts' awards of attorneys fees. He concedes his own portion of the fault in the couple's poor financial management, and contrasts it with Judith's failure to take some of the blame. He recalls the evidence heard by the trial court that their finances were shared, with equal access by both parties, and that despite her not working outside the home, Judith took little part in improving the situation. Donald thus concludes that the court's decision to not award fees was justified.

## ARGUMENT

### **I. To the Extent the Court Awarded Alimony Based on Judith's Alleged Medical Maladies, the Award was Erroneous**

Judith is clearly obese and has a hard time walking. DECREE, *Appx. to Judith's Br.* at 65.

Although she made no effort to show it was current, Judith at least at one time had a valid windshield placard allowing her to park in disabled spots. *Trn.* at 102; *see* RSA 261:88 (requiring note from doctor, valid for 5 years); N.H. Admin. Rules, SAF-C 521.

But she also alleges a multitude of diseases for which she offered no expert proof: seizure disorder, *Trn.* at 78, polycystic ovary syndrome, *Trn.* at 79, cervical spondylosis, *Trn.* at 80, spinal stenosis, *Trn.* at 80, type II diabetes, *Trn.* at 80, asthma, *Trn.* at 82, degenerative bone and joint disorders, *Trn.* at 87, 144, diabetic neuropathy, *Trn.* at 95, sleep apnea, *Trn.* at 88, and hypoglycemia *Trn.* at 98. In her testimony, Judith explained each of these maladies, and what she believes is her prognosis. *Trn.* at 78-82, 86-88, 97-98. She has been told to lose weight, and has been prescribed options to accomplish this. *Trn.* at 144-145. She believes, however, that her obesity is a metabolic disorder. *Trn.* at 134.

Judith sees doctors very frequently – as much as several times a week – often on an emergency basis. *Trn.* at 32, 83-85. She has some medical training as an EMT, and clearly displays plenty of medical knowledge. *Trn.* at 144-147.

Donald believes many of her maladies are largely fictitious, *Trn.* at 31, that Judith has been successful in manipulating the health system, and that she doctor-shops for an agreeable diagnosis. *Trn.* at 34. He believes most of her problems are related to her weight, which he (along with some of Judith's doctors) considers controllable. *Trn.* at 36-37. During closing statements,

Donald's lawyer was searching for a word: "We have a concern that a lot of her illnesses are – I don't want to say –." At that point, Judith herself interjected and offered the term, "Psychosomatic." *Trn.* at 166.

For her obvious obesity she was able to persuade a doctor to label her as disabled for the purposes of getting a windshield placard. *Trn.* at 141. Judith proffered a variety of doctor's reports mentioning her various claimed diseases and testified about them over Donald's repeated objections that the existence of medical conditions, Judith's prognoses, and appropriate cures all need to be proven by expert testimony. *See Trn.* at 78, 81, 88, 103-04, 118; N.H. R. EVID. 702; *Estate of Joshua T. v. State*, 150 N.H. 405, 408 (2003) (expert testimony necessary in medial malpractice when "observation and analysis [is] outside the common experience of jurors") (quoting *Thorpe v. Dept. of Corrections*, 133 N.H. 299, 304 (1990)); *Reed v. County of Hillsborough*, 148 N.H. 590, 591 (2002) (lay testimony suffices if the medical issues "are so immediate, direct and natural to common experience as to obviate any need for an expert medical opinion."). Some of the objections were sustained; others not.

Whether the award of alimony was based on Judith's alleged conditions is unclear from the record. It is reasonable to assume, however, that because Judith is educated and experienced in a variety of areas, she has some substantial earning capacity. In the absence of her claimed maladies it is unlikely her alimony award would have been so much for so long. To the extent the trial court based its alimony determination on the existence of a disability, it was in error.

## II. There is no Basis on Which to Increase the Generous Award of Alimony

When reviewing alimony awards, this Court gives the trial court “broad discretion,” and [a]bsent an unsustainable exercise of discretion, . . . will not overturn its ruling or set aside its factual findings.” *In re Gronvaldt*, 150 N.H. 551, 555 (2004) (citations and quotations omitted). This deference extends to both amount and length of alimony. Moreover, “the purpose of alimony is not to provide a lifetime profit-sharing plan.” *In re Sutton*, 148 N.H. 676, 679 (2002).

Donald makes a little over \$100,000 per year, giving him take-home pay of \$6,240. *See* EXHIBIT A – DONALD BAYLY’S NET DISPOSABLE MONTHLY INCOME, *Appx. to Br.* at 13. Despite her claims, Donald believes Judith could work if she wanted. The court awarded her \$3,000 per month in alimony for a period of 12 years (or sooner if she remarries or dies). *DECREE, Appx. to Judith’s Br.* at 65. The award thus gives her just shy of half Donald’s income. Moreover, the award extends for 12 years – nearly one-half the time the couple was married.

Just three years ago this Court decided *In re Sutton*, 148 N.H. 676 (2002). Like here, *Sutton* involved a lengthy marriage. Unlike Judith Bayly, however, the wife in *Sutton* had no experience or skills to work outside the home. The husband in *Sutton* made over \$252,000 – two-and-a-half times what Donald Bayly makes – and his salary was expected to increase to over \$415,000 in the coming decade. Moreover, unlike the Bayly’s, the *Sutton* family assets were considerable: a 401(k) worth \$637,000, two other pension and retirement plans of significant value, and a marital home valued at \$300,000. *Sutton*, 148 N.H. at 677-78.

This Court approved an award to the *Sutton* wife of \$4,000 per month or about 15 percent of the husband’s current income, until retirement (a period of ten or twelve years). The same \$4,000 monthly award that Judith Bayly is requesting here, JUDITH’S BRIEF at 14, would be about

65 percent of Donald's income. Thus, despite her protestations, Judith's alimony award is, if anything, generous. Moreover Judith provides no basis on which to chose \$4,000 as the appropriate amount of alimony; the suggestion is purely arbitrary.

She does, however, request that this Court direct the trial court to increase the award, and lengthen it, to her liking. JUDITH'S BRIEF at 14-15.

As we have repeatedly emphasized, discretion of the court in [divorce awards] is broad and we will not substitute our judgment for that of the master or the trial court.

*Buckner v. Buckner*, 120 N.H. 402, 404 (1980). There is no known legal basis for this Court to specify a particularized amount or length of alimony. And Judith has not alleged that the lower court failed to take into account some necessary factor in making these determinations.

Given the standard of review, this Court must affirm.

Finally, in addition to paying alimony, the lower court ordered Donald to provide life and health insurance for the benefit of Judith. She complains, however, that she should get automatic notification that the insurances are maintained. This means, one must conjecture, that Judith must place a periodic phone call or write a periodic letter to the insurer in order to have peace-of-mind that she is continually covered. That is not too great a burden, and Judith cites no law saying it is. As with her other allegations, this Court defers to the trial court regarding the award of insurance, *In re Letendre*, 149 N.H. 31 (2002), and this Court must therefore affirm.

### **III. Judith's Request for Additional Attorneys Fees Was Properly Denied**

As fully explained by Judith in her brief, JUDITH'S BRIEF at 5-6, Donald has paid all outstanding attorneys fee ordered by the trial court. Thus those portions of her Statement of the Case are irrelevant.

At some point in the litigation, however, Judith asked for \$12,000 more. The decree simply failed to mention the request. DECREE, *Appx. to Judith's Br.* at 65 *et seq.* In response, Judith filed two motions for reconsideration. See RESPONDENT'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF DIVORCE DECREE, *Appx. to Judith's Br.* at 69, 76 ¶ 63 and also RESPONDENT'S MOTION FOR INSTRUCTION, *Appx. to Judith's Br.* at 82. Both motions were denied when the court made clear that the only attorneys fees it was ordering was that which, as noted, had already been paid. ORDER, *Appx. to Judith's Br.* at 84.

The grounds for Judith's claim for additional attorneys fees appears to be that she blames her lack of money on Donald. She says it's all his fault because he didn't leave her with enough funds when he "moved out of the family home." JUDITH'S BRIEF at 13.

Donald's explanation is more complicated. He testified that the couple's finances were co-mingled during the entire marriage, that his paychecks were automatically deposited in a joint checking account, and that her name was on any accounts they had. *Trn.* at 14-15. Judith did not work outside the home for many years, had ample time and opportunity to pay the bills and take control of the family finances, and that it was her responsibility to do so as he was busy making money for the two of them. *Trn.* at 16-17. Judith's testimony corroborated these statements. *Trn.* at 106-108, 116.

Moreover, there was uncontroverted testimony that their final break-up occurred when

*Judith* kicked *Donald* out of the family home. *Trn.* at 9. There was no suggestion that he planned to leave, surreptitiously put aside money so he could move out, or purposely emptied accounts to make things difficult for *Judith*. Her asking him to leave was as a result of a spontaneous argument about finances. *Id.*

Thus, while *Donald* took responsibility for his part of the couple's inability to successfully manage their finances, the fault is shared. The final divorce decree spells this out:

With regard to the parties' financial difficulties, [*Judith*] basically blames [*Donald*]. [*Donald*] accepted significant responsibility for the parties' physical plight but also claims that [*Judith*] was "home all the time," had access to the checkbook but simply did not pay any bills.

DECREE, *Appx. to Judith's Br.* at 65.

A divorce court may award attorneys fees if it finds "need on the part of one party and ability to pay on the part of the other." *Indorf v. Indorf*, 132 N.H. 45, 47 (1989). The court below reviewed documents regarding both *Judith's* and *Donald's* income, expenses, and the availability of insurance; it heard testimony regarding how each lives, their hobbies and predilections, and what things (such as dental work and a wardrobe, *Trn.* at 45-46) that *Donald* needs to maintain his professional career. The court took into account the couple's entire financial picture.

While it appears that the court did not make any specific findings regarding *Judith's* request for an additional \$12,000 in attorneys fees, in its discretion it apparently determined that *Judith* either didn't have sufficient need, or *Donald* didn't have the ability to pay.

We apply an abuse of discretion standard when we review the trial court's award of attorney's fees. *See Glick v. Naess*, 143 N.H. 172, 175, 722 A.2d 453 (1998) (quotation and citation omitted). "To constitute abuse, reversible on appeal, the discretion must have been exercised for reasons *clearly untenable* or to an extent *clearly unreasonable* to the prejudice of the objecting party. If there is some support in the record for the trial court's determination, we will uphold it." *Id.* (quotation and citation omitted).

*Town of Nottingham v. Newman*, 147 N.H. 131 (2001) (quotations and citations in original, emphasis added); *see also, Snyder v. Clifton*, 139 N.H. 549, 552 (1995) (discretion standard in divorce context).

There is nothing in Judith's brief suggesting that the court's decision to confine attorneys fees to those already paid was "clearly untenable" or "clearly unreasonable." Accordingly, the court's rejection of an award of an additional \$12,000 must stand.

Finally, Judith found her attorney through the Bar Association's *Pro Bono* Referral System. In arranging for free representation, it is disingenuous for her to now claim attorneys fees. In addition, for the first time on appeal Judith asks that the money be paid to the Bar Association. The request was not preserved below, Judith has no standing to request payment to a non-party, *see In re New Hampshire Dept. of Transp.*, 143 N.H. 358 (1999) (union claiming fees was a party), and there is no record of the Bar Association having expended any resources beyond making the referral.

## CONCLUSION

Based on the foregoing, Donald Bayly requests that this Court affirm the judgment of the court below as to alimony, insurance, and attorneys fees.

Respectfully submitted,

Donald Bayly  
By his Attorney,

**Law Office of Joshua L. Gordon**

Dated: December 16, 2005

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**REQUEST FOR ORAL ARGUMENT AND CERTIFICATION**

Donald Bayly requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on December 16, 2005, copies of the foregoing will be forwarded to Judith A. Klinghoffer, Esq.

Dated: December 16, 2005

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**APPENDIX**

1. EXHIBIT A – DONALD BAYLY’S NET DISPOSABLE MONTHLY INCOME . . . . . 13