State of New Hampshire
Supreme Court

NO. 2005-0634

2006 TERM

APRIL SESSION

In the Matter of Jennifer Sarvela

&

Brian Sarvela

RULE 7 APPEAL OF FINAL DECISION OF
HILLSBOROUGH COUNTY (NORTH) SUPERIOR COURT

BRIEF OF RESPONDENT/APPELLEE, BRIAN SARVELA

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QUESTIONS PRESENTED

I. Did the court properly find that the breakdown of the marriage was caused by irreconcilable differences, when there was no drunkenness, when the use of prescription drugs did not cause the breakdown of the marriage, and did not pre-date the wedding nor post-date the separation, and when Brian Sarvela's dependency is a product of addiction and not habit?

Preserved: This issue was raised by the appellant.

II. Did the court err in finding that Brian Sarvela was voluntarily underemployed, when his use of prescription drugs was not voluntary but rather the unfortunate consequence of legitimate use of prescribed pain killers, he consistently held employment and earned a salary, and there is nothing in the record betraying an intent to not support his family?

Preserved: *Respondent's Motion to Reconsider Court Order of July 7, 2005* (July 14, 2005).

III. Did the court err in arbitrarily imputing Brian Sarvela's income on his most fortunate earning year and not on his current earning?

Preserved: *Respondent's Motion to Reconsider Court Order of July 7, 2005* (July 14, 2005).

IV. Did the court err in establishing an escrow account to secure the payment of child support when the escrow contains the proceeds of the marital home – Brian Sarvela's most valuable asset – but he has no hand in its investment, management or disbursement, and he doesn't even have the ability to effectively monitor it?

Preserved: *Motion for Clarification* (July 14, 2005); *Motion for Clarification* (July 18, 2005).

V. Did the court err in not awarding Brian Sarvela a greater share of the marital estate, including the marital home, stock, and valuable personal property?

Preserved: This issue was raised by the appellant; *Objection to Motion for Reconsideration of Final Decree* (July 20, 2005).

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Met and Married

Brian Sarvela and Jennifer Sarvela knew each other in high school, but met as adults in 1996. 1 *Trn.* at 8. Their romance was quick, and they moved in together almost immediately. 1 *Trn.* at 149. They lived together for a year-and-a-half before getting married in August 1998, 1 *Trn.* at 18, 149, 158, and at the time of the final hearing they had been married two months short of seven years. 1 *Trn.* at 104. There are two children from the marriage, Leea (born May 12, 2001) and Seija (born Aug. 4, 2002). As a result of this divorce action, the parties share legal custody and Jennifer has physical custody.

II. Jennifer's Employment History

During that time – even before children – Jennifer held six different jobs, worked a total of only about 18 months, and earned little money. EXH. 3 (tax returns); 1 *Trn.* at 159. She was fired from a job early in the couple's relationship, 1 *Trn.* at 149, and when she didn't want to comply with a company policy at another, 1 *Trn.* at 158, she left. Jennifer admitted that when she got bored of a job, she quit and became unemployed. 1 *Trn.* at 85. Even though Jennifer acknowledges she is capable of employment, she testified "I choose not to work right now." 1 *Trn.* at 125.

III. Brian's Employment History

Brian has also worked for a number of employers, but has had no more than a total of a few weeks unemployment between jobs, and has consistently earned a salary for his family. EXH. 3 (tax returns).

When Jennifer and Brian became a couple, Brian was self-employed as a court reporter,

and writing personalized wedding songs. He was making just $5,000 per year. 1 *Trn.* at 9; 2 *Trn.* at 4-5. In 1997 and 1998 he worked at the Music Mall, making about $13,000 per year. 2 *Trn.* at 5.

At the time of their wedding, Brian had his first job selling radio advertising, getting a job at Rock 101 in Manchester. 2 *Trn.* at 5-6. He stayed there for about 3½ years, and when he left in May 2000, he was making just under $60,000 per year. During that time the station was acquired in the general media industry consolidation three separate times. 1 *Trn.* at 159; 2 *Trn.* at 6-8.

With just one week off between jobs, Brian left Rock 101 to become director of sales for an independent start-up concert and sports promotion company, Cirus Entertainment, in Manchester. He had a base salary of $45,000 plus commissions, and a pay cap of $80,000 per year. The company couldn't get a business loan, however, and the job ended after just four months, and far less money than Brian had hoped. 1 *Trn.* at 38, 160-62; 2 *Trn.* at 6-8.

As Brian could predict the Cirus job would not last, in September 2001 he began working at WLNH, a radio station in Laconia, before the Cirus job ended. His position was sales manager, earning $42,000 plus potential commissions. 1 *Trn.* at 161-62.

After about six months at WLNH, in 2002 Brian got head-hunted by Telemedia (Oldies 99) in Concord, and took the job as general sales manager because the money was better and the position was a promotion. He earned $72,000 per year. The job lasted about two years, and Brian was working for Oldies 99 at the time Jennifer filed for divorce. His position disappeared because the station was bought by another media company. 1 *Trn.* at 163-65; 2 *Trn.* at 8, 12.

From there, punctuated by just 10 days of unemployment, in January 2004 Brian joined WKXL in Concord, as director of sales. It appears that perhaps a personality conflict, a money dispute, and Brian's continuing prescription drug issues contributed to him leaving the job. 1 *Trn.* at 165. The loss

left him scrambling, so he took a stop-gap job at Ameriquest, a mortgage company in Needham, MA, earning $440 per week. 1 *Trn.* at 166.

After about a month, however, in June 2004, Brian was offered a job split between two radio stations in Nashua and Rochester. He was paid about $1,000 per week, until the stations were sold in September 2003. 1 *Trn.* at 166-67.

Then followed Brian's only period of unemployment. He did a variety of odd jobs in November and December, fixing cars and working in an auto-body shop. He was unemployed for a total of about a month. 1 *Trn.* at 168.

In January 2005 Brian resumed his sales career, at World Trade Executives. At the time of trial he was earning about $440 per week, and was expecting that to soon double to about $2,500 per month. 1 *Trn.* at 168, 201. Also at the time of trial he had lined up a new job in Vermont to start right after the trial ended, for the same people that had owned Rock 101 earlier in his career. His expectation was to make about $2,500 per month. 1 *Trn.* at 169.

IV. Brian's Medical Problems and Prescription Drug Issues

Brian suffers from a degenerative disease of his back, which has required surgery to implant a titanium disk. 1 *Trn.* at 170. The condition causes severe pain, for which Brian has tried alternative therapies, including acupuncture, massage, chiropractic, burning incense, Reiki, 1 *Trn.* at 95, and even "a guy that . . . kind of hangs on your head and hits trigger points." 1 *Trn.* at 173. Although these may have helped, Brian was prescribed pain medication beginning in 1997. 1 *Trn.* at 22-23, 87, 94, 171.

Not at any one time, but Brian took as many as 11 different pain medications, 1 *Trn.* at 22-23, 35, 91-93, 172-73, sometimes having "a pill for a pill for a pill." 1 *Trn.* at 173. His doctors stopped and started different prescriptions at different times because of side effects and interactions. 1 *Trn.* at

173. Unfortunately some of the medications are highly addictive. *See e.g.*, Lance Dodes, M.D., *The Heart of Addiction* (2002); Peter Breggin, M.D., *Toxic Psychiatry* (1991); Frederic Kass, M.D., John Oldham, M.D., Herbert Pardes, M.D. (eds.), *The Columbia University College of Physicians and Surgeons Complete Home Guide to Mental Health* 135-36 (1992). Ultimately Brian's use blossomed into dependency, 2 *Trn.* at 21, and at some point after it had, Jennifer realized both the extent of the problem, 1 *Trn.* at 24, and its longevity. 1 *Trn.* at 25-28, 90.

The scope of Brian's problem was exacerbated by the prescribed dosages, which usually contained a "take as needed" allowance. Brian's addiction exploited the ambiguity, which both facilitated his denial that there was a problem, and undermined Jennifer's attempts to intervene. 1 *Trn.* at 88, 93-94, 176, 178; 2 *Trn.* at 18, 25. *See* Lance Dodes, M.D., *The Heart of Addiction* 102, 140 (2002) (denial of abuse of pharmaceuticals is part of pattern of abuse). His doctors told him he was failing to recognize his own addiction, 2 *Trn.* at 22, but eventually Brian realized prescription drugs were affecting his life. 2 *Trn.* at 21, 24.

Consequently, through both his own efforts and those of his family, he has worked to get off all pharmaceuticals. 2 *Trn.* at 45-46. At the urging of his family he began to get help as early as 1999. 1 *Trn.* at 25. He sought advice from Northeast Pain Consultants in Rochester for several months in early 2002. 1 *Trn.* at 29-31, 95. Brian found, however, that the replacement drug they gave him didn't address his pain, and he didn't like methadone because it "made me loopy." 2 *Trn.* at 19. He then sought help from a pair of doctors at Elliot Hospital, which was nearer work and home. 2 *Trn.* at 19, 20. Later that year Brian's extended family organized an intervention that also proved unsuccessful. 1 *Trn.* at 31-32.

In early 2003 Brian was taken to the emergency room by his co-workers, 1 *Trn.* at 96, for a

frightening incident which Brian believes was a drug interaction. 1 *Trn.* at 174-75. This caused his extended family lots of concern, and in April they organized a second intervention, at Portsmouth Pavilion – a five-day inpatient detox program. 1 *Trn.* at 174-77; 2 *Trn.* at 24. Because his back surgery was still six months away, 1 *Trn.* at 176-77, it "was a shot I had to take." 1 *Trn.* at 177. The program weaned his system from medications, and it was initially successful, but Brian's pain remained and a new doctor prescribed yet another addictive pharmaceutical. 1 *Trn.* at 33-34; 2 *Trn.* at 25, 45.

A year after his back surgery, in October 2004, Brian checked himself into Emerson Hospital for a week to "learn a little bit more about what I was going through." 1 *Trn.* at 180; 1 *Trn.* at 35-37. Although Brian found no effective aftercare for prescription drug abuse, 1 *Trn.* at 180, for about a year after discharge he attended some Narcotics Anonymous sessions and (although there is no evidence of significant drinking, 1 *Trn.* at 179; 2 *Trn.* at 28-29), Alcohol Anonymous meetings when NA wasn't available. 1 *Trn.* at 37-38; 2 *Trn.* at 23, 26. Since that time Brian maintains he has been pharmaceutical-free, 2 *Trn.* at 46, including during the trial of this matter. 1 *Trn.* at 181-82.

Despite Brian's belief (in keeping with his general denial of abuse) that his prescription drug problem was not interfering with work, it is plain his employers were aware that something was amiss. 1 *Trn.* at 100-101; 2 *Trn.* at 11-13, 17, 22, 44-45.

Nonetheless, except for time off he was allowed for his stint in Portsmouth Pavilion and follow-up, 1 *Trn.* at 100-101; 169-70, he did not miss any work despite his constant pain. 1 *Trn.* at 178. During the entire time Brian is accused of abusing prescription drugs, Jennifer concedes he went to work, earned a paycheck, and supported his family. 1 *Trn.* at 99; 1 *Trn.* at 178, 182.

Although the court found that Brian "was fired from a series of well-paying jobs as a result of his drug abuse," FINAL DECREE ¶ 4, WIFE'S REQUESTS, ¶¶ 10, 25; HUSBAND'S REQUESTS, ¶¶ 10, 25,

there is scant evidence to support this. 1 *Trn.* at 39, 98-99 (Jennifer's allegation). Certainly at least two of his employers were aware that something was wrong, but the only evidence the court heard that Brian lost employment due to drug use concerns a single job – at WKXL in Concord. EXH 10; 2 *Trn.* at 9-10.

Even if Brian were fired, he managed to find new jobs quickly. And there is no dispute that he has a record of consistent employment – and consistent earning – during the marriage. Brian testified, "I never went without a paycheck." 1 *Trn.* at 170; 1 *Trn.* at 182.

> Q: So there never has been a period of time when you were not contributing to the household financially?
>
> A: Not once.

1 *Trn.* at 170. And Jennifer conceded this:

> Q: And during this whole time frame was Brian also employed?
>
> A: Yes, he was.

1 *Trn.* at 87. Jennifer also testified:

> Q: Did Brian ever miss work because of these medications?
>
> A: I don't know, he was on the road a lot.
>
> Q: Isn't it true he went to work every single day?
>
> A: I believe so.
>
> Q: And he also brought a paycheck home?
>
> A: He did.
>
> Q: And supported you and the children very well?
>
> A: He supported the family, yes, he did.

Q: Yet you are saying he's a drug addict and he's ruining your life and he can't hold a job?

A: He has a problem with prescriptions, yes. He's been cited as a drug addict; and, yes, he ruined the family's life by making the choices he made.

Q: But he worked every day and he supported you quite well?

A: He worked every day.

1 *Trn.* at 99-100.

V. Jennifer's and Brian's Financial History

Jennifer brought some significant assets to the couple's marriage. Before their wedding, Jennifer's mother allowed Jennifer and Brian the use of a house in Merrimack for about a year rent-free, 1 *Trn.* at 14-16, 79; 2 *Trn.* at 32, plus gave Jennifer an additional $1,000 per month for expenses. 1 *Trn.* at 80-81.

Jennifer received $25,000 in stock from her grandmother prior to marriage. It was put into Brian and Jennifer's joint names after their wedding, 1 *Trn.* at 48, 78, and they cashed it out over time. The stock still constitutes a significant asset – about $25,000 at the time of trial – either because it appreciated during the marriage, the couple together bought additional stock, or both. 1 *Trn.* at 77-78, 183.

Jennifer's family gave Brian and Jennifer together some outright gifts as well. The couple received $18,000 as a wedding present from Jennifer's mother, 1 *Trn.* at 156-57, to buy land in New Boston. 2 *Trn.* at 32. The mother and grandmother together gave the couple a series of gifts totaling $40,000 to build a home on the New Boston land.

Brian also brought some assets to the marriage – some classic cars and motorcycles, and an antique guitar – which were sold during the marriage. 1 *Trn.* at 10-11, 153-55. But more important,

he brought home weekly paychecks.

The couple used these assets – capital contributed by Jennifer and a stream of income contributed by Brian – to acquire what now constitutes the marital estate.

While they lived rent-free in Merrimack for a year, the couple made significant renovations, including the living room, kitchen, and bedroom. 1 *Trn.* at 151. Jennifer's mother paid for some of the materials, and Brian and Jennifer together did much of the construction themselves. As Jennifer was not working at the time, Brian's paycheck contributed to the projects. 1 *Trn.* at 80, 150-52.

As noted, they bought land in New Boston, New Hampshire, and then built a house on it. Part of the money for the house came from Jennifer's family, but the mortgage was paid with Brian's regular income. 1 *Trn.* at 49, 76. Significant improvements, worth $20,000 to $25,000, were later made to the house, including a paved driveway, finished basement, landscaping, lighting, and a new master bedroom. 1 *Trn.* at 39, 101-102, 184. As Jennifer was not working at the time, 1 *Trn.* at 184, they were paid for from Brian's income, 1 *Trn.* at 183, and by two general refinancings of all the couple's assets. 1 *Trn.* at 39, 101-102. For the purposes of this case, the house was ultimately appraised at $270,000. 1 *Trn.* at 41-42.

In 1999 they also acquired a camp in Vermont. 1 *Trn.* at 182. It was paid for in part with Jennifer's lawsuit settlement and the couple's stock assets, 1 *Trn.* at 20, 26, 48-49, 76, in part from savings accrued from Brian's salary, and in part by the first of the refinancings of the New Boston property. 1 *Trn.* at 26, 49, 183. Improvements to the camp, including maintaining the driveway and building an addition, were paid for by the second refinancing. 1 *Trn.* at 29, 101-102. Pursuant to the trial court's order, Jennifer sold the Vermont camp during the pendency of this proceeding for about $133,000, of which $62,000 was Jennifer's. She used half that to repay a debt to her mother, and kept

the remaining $25,000. 1 *Trn.* at 52, 141, 182. Brian's half was placed in escrow.

Both the stock and the real estate appreciated in value during the marriage through no effort by either party. It is for this reason that the refinancings are important here. The couple effectively used the appreciating values to bootstrap the purchase of first the New Boston real estate, and later the Vermont camp, and to make significant improvements to both. Brian gave every paycheck he ever made to Jennifer during their marriage, 1 *Trn.* at 150, and they kept joint accounts. 1 *Trn.* at 84. Thus the appreciating values and the refinancings now make it difficult to un-co-mingle the assets of the marriage. 1 *Trn.* at 26, 27, 39, 101-102, 182-83.

VI. Trial and Appeal

After a two-day trial, the court divorced the parties on the grounds of irreconcilable differences, provided for custody of the children in accord with the parties' stipulation, denied alimony, split the marital assets, and ordered Brian to pay child support. This appeal followed.

SUMMARY OF ARGUMENT

Brian Sarvela first argues that the trial court properly granted a divorce on the grounds of irreconcilable differences rather than on the grounds of habitual drunkenness because he has no record of drinking, because a dependency on prescription drugs does not constitute drunkenness, his dependency is a product of addiction and not habit, and because there was no evidence that his use of prescription drugs was the cause of the breakdown in the marriage.

Mr. Sarvela then discusses the court's finding that he was voluntarily underemployed. He argues that addiction to prescription drugs is not voluntary, that he was not fired as a result of the addiction, and even if he were, addiction does not betray an intent to not support his family.

Mr. Sarvela then argues that, assuming he was underemployed, the amount of income imputed to him was arbitrarily based on his most fortunate earning year, not on his current income.

Mr. Sarvela discusses the court's placement into escrow of the proceeds of the sale of the couple's hunting camp. Because the trial court provided no guidance regarding the escrow, Mr. Sarvela is left without any control over the investment, management, or disbursement of the funds, nor is he able to monitor what is in effect his greatest asset.

Finally, Mr. Sarvela argues that the court erred in not granting him a greater share of the marital estate, including the marital home, the couple's stock, and valuable personal property.

ARGUMENT

I. Court Properly Divorced Parties on Grounds of Irreconcilable Differences

The court granted the parties' divorce on irreconcilable differences, although Jennifer requested fault grounds. The law provides:

> A divorce from the bonds of matrimony shall be decreed in favor of the innocent party . . . [w]hen either party is an habitual drunkard, and has been such for 2 years together.

RSA 458:7, VII.

The word "drunkard" obviously refers to drinking, as the court below held. The derivation of the word "drunk" relates to the verb "drink." The Oxford English Dictionary traces the etymology of "drunk" to the fourteenth century, even then in the context of intoxication by alcoholic liquids. 3 OXFORD ENGLISH DICTIONARY 690-692 (1971).

There is no known case construing the word "drunk" to imply anything other than intoxicating liquor. *See,* Annotation, *What amounts to habitual intemperance, drunkenness, and the like within statute relating to substantive grounds for divorce,* 29 A.L.R.2d 925; *see also,* 19 Words & Phrases *Habitual Drunkard* at 42 (1970).

When the legislature intends to refer to intoxication from a source other than liquor, it has demonstrated it knows how, such as in the drunk-driving statute. RSA 265:82, I(a) ("No person shall drive . . . [w]hile such person is under the influence of intoxicating liquor or any controlled drug or any combination of intoxicating liquor and controlled drugs.").

Other states have divorce-grounds statutes specifically mentioning drugs. Mississippi's provides: "Divorces from the bonds of matrimony may be decreed to the injured party for . . . [h]abitual and excessive use of opium, morphine or other like drug." Miss.Code Ann. § 93-5-1

(1994); *Lawson v. Lawson*, 821 So. 2d. 142, 144 n.1 (Miss. App. 2002).

There was no evidence offered that Brian was a habitual drinker, or much of a drinker at all. Hence the court's finding below must be sustained.

Even if this court construes the fault statute to include the use of prescription drugs, it is necessary to show that the faulting party used them for "2 years together." *Batchelder v. Batchelder*, 14 N.H. 380 (1843). While the court found that Mr. Sarvela had a "rampant problem with abuse of prescription drugs," there was no finding of two years together, and no evidence that the problem was present for any two years together. Rather the evidence suggests that for Brian, the problem came and went with his various medical issues and his family's attempt to reign in his use. *See Brown v. Brown*, 97 S.E.2d 811 (W.Va. 1957) (drunkenness on widely separated occasions insufficient to warrant divorce).

Moreover, the New Hampshire statute requires that drunkenness be "habitual." It is clear that Mr. Sarvela suffers from an involuntary dependency, not a mere habit.

The timing in this case does not support a finding of drunkenness. An essential element of divorce on fault grounds is that the drunkenness post-date the wedding, *Davenport v. Davenport*, 159 So. 2d 204 (Ala. 1963), and that it continue after separation. *Simonds v. Simonds*, 93 S.E.2d 107 (S.C. 1956). The only evidence on the matter, however, shows that Mr. Sarvela probably began using prescription drugs before the marriage, and quit abusing them about a year before trial. 1 *Trn.* at 181-82.

Even if Brian is otherwise liable for divorce on these grounds, there was not even a hint of testimony that his use of prescription drugs *caused* the breakdown of the marriage. There is no doubt that Jennifer was upset at the situation, but the closest her testimony got on the subject was that "he

ruined the family's life." 1 *Trn*. at 100. She never averred that it was the cause it the breakdown.

Accordingly, the court's finding that "alcohol abuse *leading* to the breakdown of the marriage is insufficient for the Court to award the divorce on the fault grounds alleged," FINAL DECREE ¶ 1 (emphasis in original), should be upheld.

Finally, if the court believed that Mr. Sarvela was intoxicated at the time of the hearing, it had a duty to inquire into his competency to testify. *Whitus v. State*, 149 S.E.2d 130 (Ga. 1966). If he was not then competent, it had a duty to disallow him from testifying until another time. *State v. Porter*, 392 S.E.2d 216, 223 (W.Va.,1990) ("a proposed witness who is so intoxicated when it is sought to put him on the witness stand that he would not know what he was testifying to will be excluded from testifying").

II. Brian Sarvela Has Never Been Voluntary Underemployed

New Hampshire law provides:

> "The court, in its discretion, may consider as gross income the difference between the amount a parent is earning and the amount a parent has earned in cases where the parent voluntarily becomes unemployed or underemployed."

RSA 458-C:2, IV(a). Here the court found:

> It is clear, from the evidence presented at trial, that despite his denials to the contrary, respondent was fired from a series of well-paying jobs as a result of his drug abuse. By his own testimony, he walked away from employment compensating him at the rate of $52,000 a year, because he "did not feel like working."

FINAL DECREE ¶ 4. Thus the court listed two explanations for its finding of voluntary underemployment: 1) that Brian was fired due to prescription drug use, and 2) that he "walked away from employment."

A. No Evidence Brian Was Fired From a "Series" of Jobs

The court found that Brian "was fired from a *series* of well-paying jobs as a result of his drug abuse." FINAL DECREE ¶ (emphasis added). There is no evidence in the record that Brian was fired from any job except WKXL for drug use. EXH 10; 2 *Trn.* at 9-10. Certainly Jennifer testified as to her belief that Brian lost other jobs for that reason, 1 *Trn.* at 39, 98-99, but she provided no details, no documents, and no witnesses.

B. Prescription Drug Addiction is Not a Basis for Voluntary Underemployment

Brian's prescription drug use began when he had medical problems that entailed pain medication. To the extent he got addicted, it was unfortunate, but he didn't mean to. Addiction is in the nature of either the addictive substances, or the biology of those susceptible to addiction. *See e.g.,* <http://www.prescriptiondrugaddiction.com/>. Lance Dodes, M.D., *The Heart of Addiction* (2002);

Peter Breggin, M.D., *Toxic Psychiatry* (1991); Frederic Kass, M.D., John Oldham, M.D., Herbert Pardes, M.D. (eds.), *The Columbia University College of Physicians and Surgeons Complete Home Guide to Mental Health* 135-36 (1992).

If his prescription drug use were voluntary, surely Brian would have quit long before he did: "it was a terrible way to live, you know." 1 *Trn.* at 173. And he tried to quit. Brian sought help from Northeast Pain Consultants in 2002, and then from Elliot Hospital. After he was taken to the emergency room, his family successfully urged him to enter the program at Portsmouth Pavilion in 2003. When that didn't work, he checked himself into Emerson Hospital in 2004, and then attended a variety of AA and NA sessions. Ultimately he was successful, but it took until October 2004. 2 *Trn.* at 46 (Q: "[H]ave you essentially been clean and drug free?" A: "Absolutely." Q: "And you continue to work towards that goal?" A: "Daily."). *See Pace v. Pace*, 24 P.3d 66 (Idaho App. 2001) (parent who left employment to have time to remedy prescription drug addiction not voluntarily underemployed).

If the drug use were recreational, perhaps the result would be different. *See Hackett v. Hackett*, 1999 WL 1126608 (Va. App. 1999) ("Although we recognize the efforts made by the husband to overcome his addiction . . . because there is no evidence that his addiction resulted from a medically prescribed course of treatment or some other non-voluntary cause, the trial court's finding that his unemployment was 'voluntary' was not error."). But here Brian became addicted after appropriate and legal use of prescription medication.

In its order the trial court cited *Noddin v. Noddin*, 123 N.H. 73 (1983), to supports its finding of underemployment. In *Noddin* the obligor was arrested for stealing trade secrets from his employer, and then fired for the conduct. This court wrote that the man "was engaged in criminal activity at his

own peril, and his reduced financial ability was due to his own fault." *Noddin*, 123 N.H. at 76; *see also Matter of Rossino*, __ N.H. __ (decided Feb. 24, 2006) (police officer fired for having sexual relations while on duty). There is no doubt in *Noddin* and *Rossino* that the conduct was voluntary. But one cannot fairly compare the commission of a crime to becoming unwittingly addicted to legitimate pain medication.

Regardless of the reasons for his prescription drug use, however, Brian did not intend to lose his job. *In re Marriage of Atencio*, 47 P.3d 718, 721 (Colo. App. 2002) (father fired for drug use was not voluntarily underemployed solely because he was fired because even if drug use were voluntary, father "did not intend any of the consequences of that voluntary conduct, such as his reduced ability to pay child support"); *In re Marriage of Johnson*, 950 P.2d 267 (Kan.App. 1997).

Accordingly, the court erred in basing its finding of voluntary underemployment on Brian's use of prescription drugs.

C. Brian Did Not Walk Away from Employment

The court held that "[b]y his own testimony, [Brian] walked away from employment compensating him at the rate of $52,000 a year, because he 'did not feel like working.'" The only item in the transcript that comes close to this is in volume I, on page 167. On direct examination Brian was answering questions about his job history. Brian testified "I had depleted my checkbook . . . so I went and just took a job as a mortgage guy." 1 *Trn.* at 166.

Q: Was that Ameriquest?

A: Yeah.

Q: How long were you with them?

A: A month until I was offered another job in Nashua.

Q: So what were you earning when you were at Ameriquest?

A: 440 bucks a week.

Q: Okay. And you left Ameriquest and went to what job?

A: I went to two stations, one station in Nashua and one in Rochester, New Hampshire, and it was NEX in Rochester and I'm not sure of what the call letters were, it was an a.m. station, I think it was nine ten in Nashua.

Q: Okay. How long did you work there?

A: I worked there from June until – well, can I just tell you what happened there?

Q: Yes.

A: I worked there from June and I worked for one radio station WNEX up in Rochester until that was sold. So that was on – they sold that September 19th of 2003. *At that time I was still working for the one in Nashua until I came back in October from the craziness up in Vermont and I lost the camp*.

Q: Okay. So what was your position with NEX?

A: Well, I was the sales manager in Nashua and I was just a sales rep up in Rochester.

Q: What were you earning?

A: I was earning $500 from each station, so combined a thousand dollars a week.

Q: Okay. And why did you leave or why did that job terminate?

A: Well, the first one, the one that the camp thing happened over is because I couldn't work for – you can't work two radio stations owned by the same people. *Then when I came back from Vermont and I lost everything I ever dreamed of and just didn't go back to work, I didn't even feel like it was worth it at that time.*

Q: How long were you unemployed?

A: Until January. I mean I would do odd jobs in November and December, you know.

Q: So you were unemployed after NEX from when until when?

A: Second week of October until probably the third week in – no, the second week in

November.

Q: So, for weeks?

A: Yeah.

1 *Trn.* at 166-68 (emphasis added).

The "craziness up in Vermont" to which the testimony refers, 1 *Trn* at 167, is how Brian came to lose his hunting camp. In October 2003 his grandfather died just before Brian's regularly scheduled vacation. Because Brian attended the funeral in Massachusetts on a Friday, he could not pick up his paycheck to pay his child support. He thought he made that clear to Jennifer, but there was an apparent misunderstanding. He was then away hunting for several weeks on vacation, and when he returned learned that the cabin had been sold because of the overdue child support. *See* 2 *Trn.* at 200.

With his addiction to prescription drugs, his marriage having fallen apart, the continual churning of jobs, living again with his parents as an adult, the inability to see his children, still living with his back pain, and – the final straw – the loss of his hunting cabin, Brian was anxious and depressed. Consequently, the fact that he "just didn't go back to work, I didn't even feel like it was worth it at that time," is understandable. Moreover, Jennifer believed the job was likely to be lost anyway due to prescription drug use, and the period of Brian's unemployment was only about three weeks.

These circumstances do not show a man intending to not support his children. They show a short period of depression, followed almost immediately by a resumption of his career. The finding of voluntary underemployment is thus erroneous.

But even if Brian walked away from one of the jobs, he had two at the time, both paying $500 per week. 1 *Trn.* at 167.

Finally, Brian has never not worked. Throughout the marriage, with slight periods between some jobs, he has always been employed, and has always brought home a paycheck. Despite his prescription drug issues, he has never failed to support his family. The court, however, by its finding of voluntarily underemployment, placed him in the category of people trying to avoid their responsibilities, *see e.g., In re Stall*, __ N.H. __ (decided Dec. 30, 2005) (former wife quit job and moved to Maine to live with lover), for which there simply is no evidence in this case.

III. Court Arbitrarily Chose Brian's Most Fortunate Earning Year to Impute Income

Even if the court properly found that Brian was underemployed, the amount of income it imputed to him was improper. In arriving at the amount of imputation, the trial court wrote:

> At his highest level, he was earning $77,000 per year with an additional $20,000 a year bonus when he worked at WLNH in Laconia. The Court now imputes the amount of $72,449 per year to him in calculating his child support obligation, the amount he made in 2003.

FINAL DECREE ¶ 4.

As noted, the court gave two reasons for voluntary underemployment – that he was fired for drug abuse, and he left a job paying $52,000 per year. Neither of these reasons can account for the amount imputed.

The only evidence introduced at trial that Brian actually lost a job due to drug abuse was at WKXL in Concord in 2004. Exh. 10; 2 *Trn.* at 9-10. It paid nowhere near the amount imputed. And the job Brian is alleged to have quit – the Nashua radio station – paid about $25,000, far less than the amount imputed.

The job that paid so much and appears to be the basis for the imputed amount was Oldies 99 (Telemedia) in Concord. Brian explained why he lost that job:

> Q: Why did you leave this company?
>
> A: Why did I leave?
>
> Q: Uh-huh.
>
> A: They didn't have any room for – the company was bought and they put all the companies into one building and there was two sales managers for each company and then there was a general sales manager, which would be myself, and then the GMs which is above me, so they put all of us into one building so there were seven or eight different managers and I was one of the highest paid managers in the new company they bought, and I was on my way.

Q: So you were not fired?

A: No, no.

Q: The job went away?

A: Yea, absolutely.

1 *Trn*. at 164. Jennifer offered no competing testimony on the matter. The amount of money he made at that job, therefore, is not a proper basis for imputation.

In determining the income of a child support obligor, trial courts are required to use present income, and cannot average income over several years. *Rattee v. Rattee*, 146 N.H. 44, 46 (2001); *Hillebrand v. Hillebrand*, 130 N.H. 520, 526 (1988). In order for the court to consider anything but current income, it must make a finding that there are some unusual circumstances, such as the obligor has not been forthright in providing income figures, the proffered income figures are misleading, *In re Crowe*, 148 N.H. 218 (2002), or there has been an unreported windfall. *In re Feddersen*, 149 N.H. 194 (2003). Mr. Sarvela is a paycheck employee, with nothing unusual about his income stream, and no allegations of misleading reporting. His child support calculations are thus restricted to "present income." *Crowe*, 148 N.H. at 222.

The amount of income the court picked was $72,449. This figure appears on Brian's 2003 tax return – the year of his highest income. The hearing was held in 2005, when Mr. Sarvela's income had returned to its previous levels. In reaching back and arbitrarily picking the most fortunate year of Brian's career, it therefore failed to base child support on present income.

IV. Mr. Sarvela Should be Able to Fully Participate in the Investment, Management, and Monitoring of an Escrow Fund Created by the Trial Court, Which Contains his Most Significant Asset

Trial courts clearly have the authority to provide for security for the payment of child support. RSA 458:21. Here the court ordered that Brian's share of the proceeds of the sale of the marital home "shall be held in escrow until such time as respondent is compensated at the level of his previous employment and is able to pay petitioner the amount of child support he owes under the Guidelines." FINAL DECREE ¶ 18.

Security for the payment of child support, however, is restricted to those cases where there has been egregious non-payment, *Dubois v. Dubois*, 121 N.H. 664 (1981), or misleading reporting of substantial amounts of income. *In re Feddersen*, 149 N.H. 194 (2003). In Mr. Sarvela's case, he has received steady paychecks for his entire career, and does not have a record of egregious non-payment. Thus there is no basis for the escrow the court required here.

Moreover, given the nature of the radio industry, and given the arbitrariness with which the court chose the year on which to base imputed income, it is unlikely the escrow will expire before its funds are exhausted.

Finally, when setting up arrangements to securitize the payment of child support, trial courts are required to carefully police the use of the funds, and provide for openness in reporting so that any misuse can be effectively monitored. *Leary v. Leary*, 137 N.H. 161 (1993).

In Mr. Sarvela's case, the escrow was created with his share of the equity in his home, thereby representing nearly his entire life savings. He has no control over how this asset is invested, managed, or disbursed. The court failed to place restrictions on the use of the fund, to give the parties any guidance regarding management of the escrow, or to provide for monthly or quarterly accounting.

Accordingly, this court should order the escrow be dissolved, or in the alternative, remand with directions that the court create the ability for Mr. Sarvela to fully participate in the investment, management, and monitoring of the fund.

V. Court Should Have Awarded Brian Sarvela a More Even Half of the Marital Estate

Jennifer wants it all. She wants the house in New Boston, claiming that her mother gave her the money for it. She wants the proceeds from the Vermont camp, which she claims got rolled into the mortgage on the New Boston property. She also wants all the couple's remaining stock, again claiming that because it was originally hers, it still is. 1 *Trn.* at 62, 128. And she wants back the $58,000 in gifts her family gave the couple. APPELLANT'S BRIEF at 6. She also claimed all the furniture and household items from both houses.

The court awarded Jennifer the house. It gave Brian half the value of the house minus $10,000 to account for the amount Jennifer invested in it. Brian hasn't seen the money, however, because the court ordered that it be placed in escrow to secure payment of child support. FINAL DECREE ¶ 18.

Jennifer claims that all these items should be returned to her because hers was a short-term marriage. (On the other hand, Jennifer also requested alimony claiming it was a long-term marriage.) Although Brian and Jennifer were married in August 1998 and filed for divorce in September 2003, their relationship was longer than five years. Brian and Jennifer re-met as adults in 1996 and moved in together almost immediately. They lived together for a year-and-a-half before getting married, and at the time of the final hearing they had been together for a total of almost nine years. Thus, although the court made a finding that their marriage was short-term, FINAL DECREE ¶ 9, it didn't take into account their total period of cohabitation. *In re Crowe*, 148 N.H. 218 (2002).

The law regarding short-term marriages assumes that the shortness will enable the court to restore the parties to their pre-marital financial positions. *Rhan v. Rhan*, 123 N.H. 222 (1983). But here, Brian and Jennifer co-mingled their assets from the very beginning of their relationship. They put their stock into both their names, maintained joint bank accounts into which were deposited all

paychecks, enjoyed significant gifts together as a couple, acquired two pieces of property, built one house and improved two others, bought additional stock, took advantage of the burgeoning value of stock and real estate that occurred through no efforts of their own, completed two refinancings of all their assets, and have two children. These financial machinations eclipse the *Rhan* assumption. In making its final award, the court understood there was no way to simply return Brian and Jennifer to their pre-marital positions. Moreover, even though Jennifer brought to the marriage the down payments, it was Brian's stream of income that allowed the couple to pay the monthly financing bills.

The court did not go far enough in making an equitable distribution of the marital assets. Jennifer's appraisal valued the house at $279,270. FINAL DECREE ¶ 18; EXH. 4. The decree awarded Brian half that, minus $10,000. That works out to $129,635, or about 46 percent of its value.

During the marriage the stock that was given to Jennifer by her family still constitutes a significant asset either because it appreciated during the marriage, the couple together bought additional stock, or both. 1 *Trn.* at 78, 183. At the time of the hearing, the stock was worth $25,000 according to Jennifer. 1 *Trn.* at 77. The court found that Brian "agreed to waive his claim" to the stock "in return for her agreement not to pursue his Rock 101 401(k) account." Final Decree ¶ 15. Brian maintains he made no waiver, and there is nothing in the record tending to sound like a waiver. Such a waiver would not have been in his interest, as the value of the 401(k) account, although apparently not in evidence, is far less than the value of the stock. The court's finding is based on no evidence at all, and is thus arbitrary. Accordingly this court should award Brian half the value of the stock, or the matter should be remanded for further fact-finding.

Finally, the court noted the dispute between the parties regarding personal property. The court avoided it, however, by awarding each the personal effect then in their respective possession. Final

Decree ¶ 13. While that might sound fair, Brian had virtually no personality in his possession, and Jennifer had nearly all the personal items that populated both the house in New Boston and the camp in Vermont. Brian was reduced to not even having pots and pans. Although the exact values of the items are in dispute, the total is nonetheless substantial. The court's finding on this matter was inequitable, and should be remanded for further fact-finding.

CONCLUSION

For the foregoing reasons, Brian Sarvela request this honorable Court, in accord with the foregoing, to sustain the lower court's finding that the breakdown of the marriage was caused by irreconcilable differences, reverse the finding that he was voluntarily underemployed, impute a more reasonable amount of income to him if he is voluntarily underemployed, either dissolve the escrow or order that he have a hand in its management, and award him a greater share of the marital estate.

Respectfully submitted,

Brian Sarvela
By his Attorney,

Law Office of Joshua L. Gordon

Dated: April 3, 2006

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Brian Sarvela requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on April 3, 2006, copies of the foregoing will be forwarded to Doreen F. Connor, Esq.

Dated: April 3, 2006

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APPENDIX