

State of New Hampshire
Supreme Court

NO. 2009-0365

2009 TERM

DECEMBER SESSION

In the Matter of Paul Summerville and Sandra L'Heureux

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

BRIEF OF PETITIONER/APPELLEE PAUL SUMMERVILLE

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Lifetime Financial Plan

Paul Summerville and Sandra L'Heureux were married in 1982 and separated in 2006. They have one child, now 15 years old. Before this proceeding, they were pragmatic people.

Mr. Summerville had a high-achieving military career. He is now a Captain flying for US Airways who regularly maintains his rigorous anti-terrorist qualifications. *1 Trn.*¹ at 49-50. Although at the beginning of the decade he was earning about \$225,000 a year, *1 Trn.* at 57, when US Airways went bankrupt in 2002, his pay was reduced to around \$130,000. *4 Trn.* at 928; *5 Trn.* at 1109.

Ms. L'Heureux has a college degree, *4 Trn.* at 901, a paralegal certificate, *4 Trn.* at 902, and received a medical transcriptionist certificate during this proceeding. *5 Trn.* at 1122. She worked in each of those fields, *4 Trn.* at 898, and then for most of the duration of the marriage, *3 Trn.* at 693, was a successful real estate developer.

Early in their marriage Mr. Summerville and Ms. L'Heureux agreed on a life-time financial plan, and as a couple they maintained a goal of developing \$3.5 million for retirement. *4 Trn.* at 905, 927. After discovering the differential in housing costs when Mr. Summerville was transferred from Boston to his home-town of Pittsburgh, Pennsylvania in 1985, *4 Trn.* at 899, 904, the couple decided to invest Ms. L'Heureux's talents and Mr. Summerville's salary in Pittsburgh real estate. *3 Trn.* at 633; *4 Trn.* at 905. The purpose of the Pittsburgh investments was to make money. *2 Trn.* at 251.

¹The pages of the transcripts of the five days of trial are sequentially numbered. For convenience the day of trial is nonetheless indicated in the transcript citations here, as *1 Trn.*, *2 Trn.*, etc.

Their plans included borrowing against their house and its adjoining undeveloped and unencumbered lot in Bedford, New Hampshire, valued together at \$932,000. FINANCIAL AFFIDAVIT OF SANDRA B. L'HEUREUX (June 23, 2008), Schedule of Assets, *Appx.*² at 61, 65; *see* PETITIONER'S OBJECTION TO RESPONDENT'S MOTION FOR EXPEDITED HEARING (Aug. 3, 2006), *Suppl.Appx.* at 1 (businesses commingled with debt on marital home). And conversely, as both Ms. L'Heureux and the couple's accountant explained, the proceeds from one of the Pittsburgh development projects was designated to pay off the mortgage on the New Hampshire residence. *3 Trn.* at 616; *4 Trn.* at 912-13.

Although Mr. Summerville lost his million-dollar retirement fund in the 2002 US Airways bankruptcy restructuring, *3 Trn.* at 681; *4 Trn.* at 928; *Recon.Trn.*³ at 41-42, and Ms. L'Heureux lost money in one of her Pittsburgh ventures, *4 Trn.* at 779, the Summerville/L'Heureux business partnership did well.

Aside from their Bedford real estate and other assets, they owned a dozen properties in Pittsburgh comprising single- and multiple-family structures, PARTIAL STIPULATION FOR FINAL DECREE OF DIVORCE ¶¶14 & 15 (June 18, 2008) (hereinafter STIPULATION), *Appx.* at 1; *1 Trn.* at 122, and a remaining portion of an eight-unit development project. They also owned interests in at least three separate Pennsylvania corporate and partnership business entities. STIPULATION ¶¶12(A)&(B), *Appx.* at 1, 6-7; *4 Trn.* at 1021 & *5 Trn.* at 1157-59 (testimony of Ms. L'Heureux); *1 Trn.* at 119-125 (testimony of Mr. Summerville); *3 Trn.* at 587 (testimony of accountant). Ms.

²The appendix, filed with Ms. L'Heureux's brief, is cited herein as "*Appx.*" The supplemental appendix, filed with Mr. Summerville's brief, is cited herein as "*Suppl.Appx.*"

³"*Recon.Trn.*" refers to the transcript of the February 19, 2009 hearing on various post-trial motions.

L'Heureux's financial affidavit estimates the value of these assets at \$1.7 million. FINANCIAL AFFIDAVIT OF SANDRA B. L'HEUREUX (June 23, 2008) Schedule of Assets, *Appx.* at 61, 68.

II. Ms. L'Heureux's Real Estate Business

This success did not come without effort – Ms. L'Heureux worked hard at it. She traveled frequently to Pittsburgh, *3 Trn.* at 772, flying on reduced-rate “companion passes” which are a benefit of Mr. Summerville job. *5 Trn.* at 1286; RESPONDENT'S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW (July 3, 2008) (hereinafter L'HEUREUX'S FINDINGS) ¶68, *Appx.* at 17, 27. She entered business and real estate deals and attended numerous land and financial closings on behalf of both herself and the various business entities. *1 Trn.* at 211; *4 Trn.* at 759, 765,768-69 (testimony of Mr. Summerville); *4 Trn.* at 918, 929, 1006 (testimony of Ms. L'Heureux). At times she used a power of attorney, which Mr. Summerville had granted her when he was ordered to the Gulf War in 1990, to sign on behalf of Mr. Summerville as well, *1 Trn.* at 180, 192-93, 198.

As a developer, Ms. L'Heureux successfully negotiated with city officials, navigated municipal planning and zoning, and acquired an urban development grant to finance a portion of one of her projects. *1 Trn.* at 127-133; *3 Trn.* at 582, *4 Trn.* at 941. She bought property at Pittsburgh tax sales, *4 Trn.* at 929, and was able to use connections Mr. Summerville's family had in Pittsburgh. *3 Trn.* at 696-97. She met a retired Pittsburgh Penguins professional hockey player, established a business relationship, constituted a corporate entity, and created a real estate development partnership with him. *4 Trn.* at 926, 930-31; *1 Trn.* at 125. Ms. L'Heureux's testimony showed a thorough understanding of mortgage financing. *See e.g., 4 Trn.* at 914, 936-

940; 5 *Trn.* at 1016. Her accountant testified she is a “project manager.” 3 *Trn.* at 582.

As an administrator, Ms. L’Heureux signed leases and collected rents. 1 *Trn.* at 123, 231-33. She kept business books, maintained ledgers, and paid local and commonwealth taxes in Pittsburgh and Pennsylvania. 3 *Trn.* at 591, 597, 650-51. She arranged construction loans, juggled interest rates, made disbursements, and kept bank accounts. 4 *Trn.* at 914, 936-940; 5 *Trn.* at 1016; 1 *Trn.* at 116-17, 133-150, 203-04, 220-21; PETITIONER’S FINDINGS OF FACT AND RULINGS OF LAW (July 3, 2008) (hereinafter SUMMERVILLE’S FINDINGS) ¶¶ 56-67, 75-76, *Suppl.Appx.* at 37, 38-39. She managed various consultants and subcontractors. 3 *Trn.* at 582, 589, 633. Her work was computerized. 4 *Trn.* at 755. Ms. L’Heureux testified she operated and managed all the personal and entity-owned property in Pittsburgh. 4 *Trn.* at 908, 911-12, 1017-18, 1138. She testified she “orchestrated” and “administered” the Pittsburgh real estate. 4 *Trn.* at 905-06.

The parties agree that Mr. Summerville had a negligible part in Ms. L’Heureux’s business affairs. 4 *Trn.* at 766. Ms. L’Heureux testified, “Paul did not have a role. I mean Paul had a job and that was his responsibility and the portfolio via real estate acquisitions was mine.” 4 *Trn.* at 906. He accompanied her to Pittsburgh only once. 4 *Trn.* at 770-71. At most Mr. Summerville kept himself apprised of Ms. L’Heureux’s business plans through her. 4 *Trn.* 909. During the discovery phase of this proceeding when Mr. Summerville was unable to get complete accountings of Ms. L’Heureux’s activities, he suggested he should be put in charge of the Pittsburgh businesses and properties. In a pleading Ms. L’Heureux responded:

“[T]he [p]arties’ historical management of various real properties and the purchase, development, construction, improvement, sale, and renting of the same, which administration has to date and through the [p]arties’ marriage rested almost

exclusively with Ms. L'Heureux. Mr. Summerville has historically disassociated himself in the described administration of real properties. Mr. Summerville has no substantive knowledge of the status of the projects and administration thereof. Mr. Summerville has not established connections, associations, relationships, contracts and agreements respecting such administration of the real properties, while Ms. L'Heureux has heretofore established the same with bank officials, development entities, city (of Pittsburgh) officials, and third parties with whom Ms. L'Heureux has worked in the administration and improvement of the same. Essentially all of these third parties are unknown to Mr. Summerville. Mr. Summerville is not qualified to administer the properties and projects in question nor oversee the development project of real estate presently ongoing through the entit[ies].

RESPONDENT'S OBJECTION TO NOTICE OF PETITIONER'S CORRECTED RESPONSE ¶¶ 3-5 (Jan. 2, 2007), *Suppl.Appx.* at 10 (proper names substituted for "petitioner" and "respondent"; paragraphing omitted). Accordingly, in temporary orders the court below found that Mr. Summerville was not competent to take over the Pittsburgh affairs and ordered that "Ms. L'Heureux shall continue to manage the parties corporate and business interests." ORDER ¶4 (Jan. 3, 2007), *Suppl.Appx.* at 13.

Ms. L'Heureux's real estate activities generated wealth. Although she did not regularly take a draw, *5 Trn.* at 1191, she acknowledged that significant funds were derived from her real estate businesses. *4 Trn.* at 923-24. The court found that whatever the legal classification or tax status of the money, *Recon.Trn.* at 17, "[t]he parties have earned income from Sandra's involvement in property management and development." SUMMERVILLE'S FINDINGS ¶¶ 41-42, *Suppl.Appx.* at 31, 35.

Ms. L'Heureux enjoys the real estate business. *1 Trn.* at 32-33 (reading from Ms. L'Heureux's journal). The court found that "from the evidence presented [Ms. L'Heureux] has been employed for at least the last decade in managing the parties['] real estate," ORDER ¶4 (Jan.

3, 2007), *Suppl.Appx.* at 13, and that she “has been working as a real estate developer and property manager from approximately 1991, or seventeen years.” SUMMERVILLE’S FINDINGS ¶¶ 96a, *Suppl.Appx.* at 31, 43. The court called her a “businesswoman” and a “small businessperson.” *Recon.Trn.* at 17-18. It found that because Ms. L’Heureux is “the one that’s managing these hundreds of thousands of dollars worth of property, making arrangements for them to be rented, etc., etc., I consider that a business skill.” *Recon.Trn.* at 21-22.

III. Appointment of Commissioner

After the parties separated, Ms. L’Heureux continued to operate the Pittsburgh properties. Mr. Summerville alleged mismanagement – properties incurring costs and lack of clarity regarding where tenants’ rent monies were going – which Ms. L’Heureux denied. The court repeatedly ordered an accounting of the businesses to assess these issues, but no accounting was ever produced. SUMMERVILLE’S FINDINGS ¶ 5, *Suppl.Appx.* at 31 (“Reconciliation statements submitted by Sandra are for snippets of time and not a complete accounting as ordered by Court order.”); ORDER ¶ 4 (Aug. 4, 2008), *L’Heureux Brf.* at 35, 40 (“There is no question that Ms. L’Heureux failed to follow the Court’s order relative to an accounting. It is as if Ms. L’Heureux deliberately, willfully and intentionally was determined to flaunt Mr. Summerville’s legitimate requests for an accounting of the money and to flaunt the Court’s order.”).

Before the parties reached a stipulation on disposition of the properties, but for reasons not apparent from the record, they agreed that both the Pittsburgh and Bedford properties should be sold. ORDER ¶¶ 4a, 4b, 4d (Nov. 6, 2007), *Suppl.Appx.* at 19. It is believed from casual references in the record that a hearing may have been held on the matter, ORDER (May 1, 2007),

Suppl.Appx. at 18, but it has not been transcribed. It is apparent, however, that the parties could not agree on who should be their real estate agent neither in Pennsylvania nor New Hampshire. ORDER ¶¶ 4c, 4d (Nov. 6, 2007), *Suppl.Appx.* at 19 (parties “can’t reach an agreement on an independent or new neutral real estate agent”). Ms. L’Heureux acknowledged in a pleading that an impasse over real estate agents was the reason a commissioner was appointed.

RESPONDENT’S OBJECTION TO COMMISSIONER’S MOTION TO APPROVE NEW HAMPSHIRE LISTING AGREEMENT AND SALE PRICE ¶¶ 2, 9 (May 19, 2008), *Suppl.Appx.* at 25.

In any event, the court appointed a commissioner to sell the properties. ORDER ¶¶ 4b, 4d (Nov. 6, 2007), *Suppl.Appx.* at 19. The commissioner appeared, APPEARANCE (Jan. 11, 2008), *Suppl.Appx.* at 24, hired a lawyer in Pennsylvania and real estate agents both there and in New Hampshire, and generally conducted sales activities. RETURN OF THE COMMISSIONER AND REQUEST FOR COURT ORDER ON FEES (June 17, 2008), *Suppl.Appx.* at 28 (exhibits omitted). For reasons not apparent from the record the properties were not sold by the commissioner, but rather were later distributed according to the parties’ stipulation. The commissioner’s costs had already been incurred however; the court approved them and ordered they be equally split. *Id.*

IV. Stipulation & Liquidation

Eventually the parties entered a stipulation. It settled the grounds of divorce, and distributed retirement plans, financial assets, debt, and ownership of motor vehicles, and dealt with various other issues. The parties also agreed they would each pay their own “attorney fees and costs sustained in this litigation.” STIPULATION ¶ 20, *Appx.* at 1, 12.

Most significant here, the stipulation divided the real property. Ms. L’Heureux got *all* the

business interests and *all* the real estate. This included the marital home and adjacent undeveloped lot in Bedford, STIPULATION ¶ 14, and all the investment property in Pittsburgh. STIPULATION ¶ 15(B). The only real estate Mr. Summerville retained was his cabin in rural Pennsylvania two hours from Pittsburgh. STIPULATION ¶ 15(A).

The nature of the assets each got is important. Except for his cabin and active checking account, all the assets Mr. Summerville realized from the stipulation are pensions which have only future value. This is in contrast to what Ms. L’Heureux got. Except for her half of Mr. Summerville’s US Airways retirement plan, all the assets Ms. L’Heureux’s realized have current value.

The stipulation was approved by the court twice – once within a few days after it was signed by the parties, STIPULATION (signature page), *Appx.* at 15; NOTICE OF DECISION (June 18, 2008), *Appx.* at 16 (“permanent partial stipulation; approved), and again in the final decree. ORDER ¶ 2 (Aug. 4, 2008), *L’Heureux Brf.* at 35, 38.

During the course of the litigation, it became clear that Ms. L’Heureux had always intended to liquidate the investment assets. The court found: “Sandra stated she would be selling the properties in Pittsburgh, Pennsylvania.” SUMMERVILLE’S FINDINGS ¶ 31, *Suppl.Appx.* at 31, 34. It wrote in the final decree: “It was represented that Ms. L’Heureux will be liquidating the Pittsburgh property.” ORDER ¶ 8 (Aug. 4, 2008), *L’Heureux Brf.* at 35, 41-42; *see also, 1 Trn.* at 33 (reading from Ms. L’Heureux’s diary); *4 Trn.* at 912-13, 918.

V. Final Decree & Rehabilitative Alimony

The five-day trial in this matter largely concerned two issues. The first was parenting schedules, not relevant here. The second was whether this party or that dissipated marital assets such that alimony should be increased or decreased to take into account the amounts that were allegedly misappropriated. The record is awash with evidence which appears to be material, but no cogent analysis was presented by either party, and in the end the trial court determined that it could not reach any definitive conclusions:

An interesting aspect of this case is that both sides prepared, in excruciating detail, minutia of individual snippets of financial facts and information. The answer to all the issues may, indeed, be contained within the voluminous exhibits neatly categorized and filed by both parties. The problem the Court has is that it is very difficult to grasp a big picture so as to come up with a unified whole. This case cried out for a forensic accountant to digest and simplify the financial actions and/or chicanery of the parties. The Court most certainly does not pretend to be a financial expert. The Court does not pretend to understand all the reasonable ins and outs of economic resources of the parties which were centered in Pittsburgh. The Court cannot conclude from the evidence presented whether or not Ms. L'Heureux managed or mismanaged the various accounts and businesses in Pittsburgh. It does know that Ms. L'Heureux repeatedly failed to provide simplified accountings. Just throwing documents either at Mr. Summerville or at the Court doesn't cut muster. The financial situation was a mess at the beginning of the five-day trial, and, quite frankly, it was a mess at the end of the five-day trial. The only saving grace was that the parties had reached a property settlement. The whole exercise relative to the financial matters went to the issue of alimony. The Court found trying to go back over the financial matters that had already been settled to prove or disprove alimony very counterproductive.

ORDER (Aug. 4, 2008), *L'Heureux Brf.* at 35, 36; *see also, id.* ¶ 5 (“The court could not find and makes no ruling whether or not Ms. L'Heureux properly or improperly utilized monies from the parties' various businesses.”).

The court explained the purpose of its award of alimony: “The Court is issuing this order based upon the fact that it may take a period of time before the properties in Pittsburgh are

liquidated and Ms. L'Heureux can then utilize said monies to generate a cash flow.” ORDER (Aug. 4, 2008), *L'Heureux Brf.* at 35, 41-42.

Ms. L'Heureux wanted supportive alimony at the rate of \$2,500 per month for a dozen years until she reaches retirement age. PROPOSED DECREE ¶ 5, *Appx.* at 34, 36. Mr. Summerville suggested no alimony at all because of the magnitude of current-value property assets Ms. L'Heureux retained in connection with her businesses, her education and career experience, her current job as a medical transcriptionist, and her ability to generate income by real estate development and by employment given that she is 53 years old and can presumably work for at least 12 more years.

Because of the property division, in which Ms. L'Heureux received all the real property (except the cabin), and because of her obvious talent in the real estate business, the court regarded her situation in need of traditional rehabilitative alimony only. *Recon.Trn.* at 20. After a five-day trial, it awarded her \$1,250 per month for 24 months. ORDER (Aug. 4, 2008), *L'Heureux Brf.* at 35, 41.

Both parties moved for reconsideration. In her motion Ms. L'Heureux made the same fact-based arguments she presents here. RESPONDENT'S MOTION FOR RECONSIDERATION ¶¶ I.1 - I.16, (Aug. 29, 2008), *Appx.* at 51, 51-55. The court allocated three hours for a hearing, *Recon.Trn.* at 4, about half of which concerned alimony. At the hearing Ms. L'Heureux's attorney presented an offer of proof reiterating the same facts.

The reconsideration proceedings resulted in one significant change to the alimony order – its effective date. In its original decree, the court had written: “Said alimony order shall be effective upon the divorce becoming final,” ORDER ¶5 (Aug. 4, 2008), *L'Heureux Brf.* at 35, 41,

which, if an appeal is taken, presumably means at the end of the appeal period. SUP.CT.R. 24. In her reconsideration pleadings, Ms. L'Heureux notified the court that she anticipated an appeal, and requested that the temporary orders (with the higher alimony amount) “remain in full force and effect” pending her appeal. RESPONDENT’S OBJECTION TO PETITIONER’S MOTION TO RECONSIDER AND CLARIFY (Sept. 5, 2008), *Suppl.Appx.* at 49. She renewed the request at the reconsideration hearing, *Recon.Trn.* at 69, and Mr. Summerville objected. *Recon.Trn.* at 70. The court understood that reasons for such a request are “that somebody may be stringing out an appeal” or “taking advantage of the delays in the court system ... both of which work to the unfairness of one party or the other.” *Recon.Trn.* at 70, 72. Thus the court made the permanent alimony award effective on the date of the hearing: “The order on alimony shall begin as of February 19, 2009, whether or not the matter is appealed to the Supreme Court.” ORDER ON MOTIONS TO RECONSIDER (Feb. 25, 2009), *Suppl.Appx.* at 52.

Ms. L'Heureux appealed.

SUMMARY OF ARGUMENT

Paul Mr. Summerville recites the facts the court considered in setting alimony including Sandra L'Heureux's business success, and the discretionary standard of review. He then notes both parties' diminished standard of living as a result of divorce, and argues it does not imply greater alimony. He suggests Ms. L'Heureux's income is not so low as her careful labeling implies, and notes the court did not force her to sell any assets beyond what she had already planned. He also belies Ms. L'Heureux's claim of retaliatory retroactive alimony.

Mr. Summerville argues that commissioner fees were properly divided because they were mutually incurred, and that Ms. L'Heureux's must pay the cost of her own career-change training because it is unrelated to the marriage.

ARGUMENT

I. Court Exercised its Discretion in Awarding Rehabilitative Alimony

A. Alimony Award is Sensible in Light of the Facts

Whether a party should receive alimony is within the discretion of the trial court. *Marsh v. Marsh*, 123 N.H. 448, 451 (1983).

It has long been recognized that the primary purpose of alimony is rehabilitative. This principle is based upon the realization that modern spouses are equally able to function in the job market and to provide for their own financial needs. Alimony should, therefore, generally be designed to encourage the recipient to establish an independent source of income.

In re Nassar, 156 N.H. 769 (2008) (citations omitted). Alimony is not intended to “provide a life-time profit-sharing plan.” *Calderwood v. Calderwood*, 114 N.H. 651, 653 (1974) (quotation omitted). Traditional rehabilitative alimony is appropriate where the recipient is in good health, has skills and education, is capable of earning, and takes substantial property from the marriage. *In re Nassar*, 156 N.H. at 769; *In re Crowe*, 148 N.H. 218 (2002).

Here the trial court was unable to unscramble the various businesses and properties, and could not determine whether either party dissipated marital assets. But to make an alimony award it did not have to, and this Court is not being asked to either.

What is apparent is that the assets Ms. L’Heureux takes from the marriage are substantial, that they were accumulated through the capital contributed by Mr. Summerville and the efforts expended by Ms. L’Heureux, that the properties periodically throw off sums of money which adds to Ms. L’Heureux’s overall net worth, that they are at least somewhat liquid, and that she intended to sell them. The trial court took all this into account, along with Mr. Summerville’s other obligations including child support and that under the stipulation he received no current

cash value assets. The court determined that Ms. L'Heureux would need some time to extricate her business interests from Mr. Summerville's personal finances, estimated that whatever difficulty she might have in selling or refinancing could stretch as long as two years, and that given her experience and education as well as her current employment, Ms. L'Heureux could thereafter be self-supporting with a reasonable standard of living.

It thus provided alimony to supplement her income for that period. The court wrote that its alimony award is "based upon the fact that it may take a period of time before the properties in Pittsburgh are liquidated and Ms. L'Heureux can then utilize said monies to generate a cash flow." ORDER (Aug. 4, 2008), *L'Heureux Brf.* at 35, 41-42.

Balancing these matters is within the discretion of the trial court, which heard five days of testimony, and then entertained all the factual arguments made here in both lengthy reconsideration pleadings and a three-hour reconsideration hearing. In light of the facts, the alimony award is sensible, and this Court should affirm.

B. Style of Living Does Not Imply Greater Alimony Amount

Ms. L'Heureux's brief repeatedly focuses on whether she will be able to maintain her current lifestyle and argues that because she allegedly will not, the alimony amount should be greater. *L'Heureux Brf.* at 20, 23, 24, 31. By doing so she distorts the structure of the alimony statute, and conflates its separate sections.

New Hampshire's alimony law comprises a two-step determination. RSA 458:19.⁴ The first is whether alimony should be awarded at all, and is controlled by section I of the statute. The second is a determination of its amount, and is controlled by section IV.

⁴The statute is set forth in full at the beginning of Ms. L'Heureux's brief.

In order to award alimony at all, section I of the statute requires the court make three findings, which are joined by the conjunctive “and.”

“[T]he court shall make orders for the payment of alimony ... if ... the court finds that:

(a) The party in need lacks sufficient income, property, or both, including property apportioned in accordance with [the property settlement], to provide for such party’s reasonable needs, taking into account the style of living to which the parties have become accustomed during the marriage; *and*

(b) The party from whom alimony is sought is able to meet reasonable needs while meeting those of the party seeking alimony, taking into account the style of living to which the parties have become accustomed during the marriage; *and*

(c) The party in need is unable to be self-supporting through appropriate employment at a standard of living that meets reasonable needs....

RSA 458:19, I(a), (b), & (c) (emphasis added).

If these three conjunctive conditions are met, the court proceeds to the second step, a determination of how much. The statute sets forth groups of considerations – those the court “shall consider,” and those the court “may also consider.” (Those the court “shall not consider” are not relevant here.)

(b) In determining the *amount* of alimony, the court *shall consider* the length of the marriage; the age, health, social or economic status, occupation, amount and sources of income, the property awarded under [the property settlement], vocational skills, employability, estate, liabilities, and needs of each of the parties; the opportunity of each for future acquisition of capital assets and income; the fault of either party ... and the federal tax consequences of the order.

(d) The court *may also consider* the contribution of each of the parties in the acquisition, preservation, or appreciation in value of their respective estates and the noneconomic contribution of each of the parties to the family unit.

RSA 458:19, IV(b) & (d) (emphasis added).

It is important to note that the phrase “the style of living to which the parties have become

accustomed during the marriage” is present on both sides of the equation in section I – controlling whether alimony is awarded at all – but is absent from section IV – controlling the amount of alimony. Thus the parties’ style of living to which they became accustomed is *not* a statutory consideration in determining the *amount* of alimony.

To the extent the court found that Ms. L’Heureux lacks means to maintain the style of living to which she became accustomed, it acted in accord with the finding by awarding some alimony. It does not, however, imply a greater amount, as Ms. L’Heureux suggests. In determining the amount of alimony, the court took into account the mandatory considerations in RSA 458:19, IV(b), as well as the optional considerations in RSA 458:19, IV(d), and arrived at an amount, which is in its discretion.

Even if the style of living were a consideration in the amount of alimony, Mr. Summerville did not “escape[] a marriage unscathed” as Ms. L’Heureux suggests. *L’Heureux’s Brf.* at 19. He lost over \$600,000 in wealth, lost his home, and lived in a one-bedroom apartment. *4 Trn.* at 965. His style of living has constricted roughly the same as Ms. L’Heureux’s, and the court took these matters into consideration as well. Accordingly, there is no error, and this Court should affirm.

C. Distorted Income Figures

Despite Ms. L’Heureux’s talent for amassing wealth, in her brief she repeatedly reports she earned next to nothing for her entire married life, and is careful to label the money she makes as “social security earnings” and “social security income.” *L’Heureux Brf.* at 1, 13. The source of information she quotes for the amount of her income is her “Social Security Statement (December 7, 2005) - Period 1982-2004; IRS Form W-2 (2007).” EXHIBIT H (Comparative

Earnings - Petitioner and Respondent), *Appx.* at 75-76 (“data sources”).

These forms, of course, do not show capital gains income, in-kind income, or any one of who-knows-how-many other kinds of income. They only show paycheck income. Because Ms. L’Heureux earned her money outside of a paycheck, the Social Security and IRS forms she cites distort her financial situation and earning abilities. Mr. Summerville repeatedly requested and the court repeatedly ordered Ms. L’Heureux produce an accounting of her business activities. For reasons not disclosed, but giving rise to anger and suspicion, Ms. L’Heureux never supplied an accounting. She thus deprived the court an opportunity to see how much money she actually made.

But the court was not blinded by the ruse. It found that whatever the legal classification or tax status of Ms. L’Heureux earnings, “[t]he parties have earned income from Sandra’s involvement in property management and development.” SUMMERVILLE’S FINDINGS ¶¶ 41-42, *Suppl.Appx.* at 35.

This Court has before approved alimony similar in amount and duration to that here, not only in circumstances where the recipient was healthy and able to earn a living, *In re Harvey*, 153 N.H. 425 (2006), but also in circumstances where the recipient did not have nearly the resources, talents, and education with which Ms. L’Heureux is blessed. *In re Gronvaldt*, 150 N.H. 551 (2004). Ms. L’Heureux attempts to liken her situation to *In re Fowler*, 145 N.H. 516 (2000), but it bears little relation. In *Fowler* the wife had “a very modest job history,” and “at the [husband’s] behest, the [wife] refrained from entering the workplace or furthering her education for nearly all of their twenty-four year marriage and committed her energy to the maintenance of their home.” Mr. Summerville, in contrast, encouraged Ms. L’Heureux’s education, career, and advancement, and Ms. L’Heureux clearly thrived in that world.

D. Court did not Force Liquidation of Assets

Ms. L'Heureux claims that the court ordered her to liquidate her assets and invest the proceeds. *L'Heureux Brf.* at 1. There are several problems with this claim.

First, there is nothing in the court order requiring these actions. Second, the court found that Ms. L'Heureux intended to liquidate the Pittsburgh assets anyway in order to generate a cash flow.

Third, even if that is what the court did, it has the authority. In *Walker v. Walker*, 133 N.H. 413 (1990), this Court held that an alimony order is permissible even though it might require a party to liquidate assets to generate income. Ms. L'Heureux cites *Russman v. Russman*, 124 N.H. 593 (1984), for the proposition that “as a matter of law, the liquidation of assets as a substitute for alimony is improper.” *L'Heureux Brf.* at 19. But that’s not what *Russman* is about. In *Russman*, this Court allowed a trial court to take into account the distribution of property assets in making its alimony determination. It held, however, that

a presumption, on these facts, that the asset, upon liquidation, would represent a present use value of \$90,000 to the plaintiff is unjustified and too uncertain to give validity to a corresponding support award.

Thus the unremarkable rule of *Russman* is that a court cannot assign a liquidation value to an asset when there is insufficient data to support a particular value.

Here the court did not assign any value to any asset. Unlike *Russman*, it did not base its alimony award on Ms. L'Heureux having available a certain amount of money from the liquidation of assets. Rather it recognized that, from the stipulated property distribution, Ms. L'Heureux has assets which produce income and which she intended to liquidate anyway. The *value* of the assets here was largely irrelevant because the court was relieved from making a

property division due to the stipulation. And as Ms. L’Heureux points out in her brief, the court was careful to not establish liquidation values: “The [c]ourt recognized ... that the actual value of the real property awarded to [Ms. L’Heureux] was necessarily (I) dependent upon market conditions actually bringing in sale proceeds, and (ii) various real estate commissions, closing costs, and the like.” *L’Heureux Brf.* at 9. Moreover, all claims of value were produced by Ms. L’Heureux herself, and not estimated by the court. AFFIDAVIT OF SANDRA B. L’HEUREUX (June 23, 2008), Schedule of Assets, *Appx.* at 61, 68. Finally, Ms. L’Heureux claimed the net asset value of the properties she received under the stipulation was \$670,000, *id.*; *5 Trn.* at 1251 – an amount large enough so that any error in her estimate is not material to alimony.

E. Retroactive Retaliation

Ms. L’Heureux makes passing references in her brief that the alimony was retroactive and was made retroactive due to retaliation. *L’Heureux Brf.* at 8 & 31. If this is a separate appellate issue, it was not preserved – it was not raised below, and was not mentioned in the questions for review in either Ms. L’Heureux’s notice of appeal or her brief. And the passing references in her brief do not qualify as appellate argument. *Radziewicz v. Town of Hudson*, __ N.H. __, 982 A.2d 415 (decided Oct. 20, 2009).

Moreover, alimony was not made retroactive. The court ordered that the final decree go into effect on the date of the reconsideration hearing, and that it would not be stayed pending appeal. There is no retroactivity issue. Even if there were, “the date from which alimony is payable is peculiarly within the discretion of the trial court.” *Walker v. Walker*, 133 N.H. 413, 418 (1990) (quotation omitted). Moreover, while generally “courts make alimony payable from

the date of the decree or order granting it, ... in a proper case, courts may make alimony awards retroactive computed at any time subsequent to the commencement of the suit for divorce.” *Id.* (quotations and citations omitted). Finally, the record discloses that earlier in the litigation Ms. L’Heureux requested a temporary alimony order benefitting her be made retroactive, making her complaint somewhat disingenuous. PROPOSED TEMPORARY DECREE ¶ 5 (Sept. 25, 2006) (“Petitioner shall pay to Respondent temporary alimony in the sum of \$3,826.00 per month ... retroactive to the date of June 16, 2006.”).

Ms. L’Heureux also claims that the retroactive alimony was “retaliatory by the trial court.” *L’Heureux Brf.* at 31. She does not say, however, what the court was retaliating for, or why, nor how retroactive alimony was retaliatory or how it prejudiced her. For these reasons, the allegation should be ignored.

II. Commissioner Fees Properly Divided

As noted, the court appointed a commissioner to sell the parties' real estate. The court on reconsideration later ordered the parties to equally share the cost. ORDER ON MOTIONS TO RECONSIDER ¶8 (Feb. 25, 2009), *Suppl.Appx.* at 52.

The court has discretion regarding who pays for the cost of commissioners in divorce. *Murano v. Murano*, 122 N.H. 223 (1982).

The issue is waived, however, because it is merely the subject of a passing reference in Ms. L'Heureux's brief. *L'Heureux Brf.* at 29, 31; *Radziewicz v. Town of Hudson*, __ N.H. at __ (passing references not constitute appellate argument). Even if not waived, it is not adequately presented. Beyond the conclusory statement that Ms. L'Heureux is "unable to contribute to such cost," she provides no reason that Mr. Summerville should bear it alone. Moreover, it is believed that the court held a hearing on the matter, which Ms. L'Heureux neglected to transcribe. SUP.CT.R. 13; *Murray v. Developmental Services of Sullivan County, Inc.*, 149 N.H. 264, 268 (2003) ("moving party is responsible for presenting a record sufficient to allow this court to decide the issue presented on appeal").

The issue was substantively waived as well. After the commissioner's work was underway, the parties entered a stipulation which settled a variety of issues. Among them was: "The Parties shall be responsible for their own attorney fees and *costs* sustained in this litigation." STIPULATION ¶ 20, *Appx.* at 1, 12 (emphasis added). The cost of the commissioner is among the "costs sustained in this litigation," and under the terms of the agreement it must be split.

In *Murano v. Murano*, 122 N.H. 223, 230 (1982), this Court held that a divorce court may

order a commissioner to sell properties if either party refused, although “it would be unjust to charge an innocent party for expenses resulting from the conduct of another party.”

In her brief Ms. L’Heureux alleges (in a parenthetical) that the commissioner was “necessitated by the conduct of [Mr. Summerville].” *L’Heureux Brf.* at 3. It is not clear what she means because there is no explanation, but the allegation is contradicted by both the court’s findings and Ms. L’Heureux’s own statements. The court found that the reason for the appointment of a commissioner is that the parties “can’t reach an agreement on an independent or new neutral real estate agent.” ORDER ¶¶ 4c (Nov. 6, 2007), *Suppl.Appx.* at 19. Ms. L’Heureux acknowledged the commissioner was necessary due to the impasse. RESPONDENT’S OBJECTION TO COMMISSIONER’S MOTION TO APPROVE NEW HAMPSHIRE LISTING AGREEMENT AND SALE PRICE ¶¶ 2, 9 (May 19, 2008), *Suppl.Appx.* at 25 (“The Court’s original appointment of the Commissioner . . . was, presumably to circumvent the impasse of the Parties in selecting appropriate individuals to list their real properties in New Hampshire and Pennsylvania for sale.”).

Thus there is no “innocent party” for the purposes of *Murano*, and it is fair that both parties should share the cost of the commissioner. This Court should thus affirm.

III. Ms. L'Heureux's Should Pay Her Own Tuition Loan

Sometime after the petition for divorce was filed in this case, Ms. L'Heureux borrowed \$12,245 to get a certificate as a medical transcriptionist. She then requested reimbursement from the marital estate. In its decree the court "issue[d] no order requiring Mr. Summerville to reimburse Ms. L'Heureux for any tuition." ORDER ¶ 13 (Aug. 4, 2008), *Ms. L'Heureux's Brf.* at 35, 43. After request for reconsideration, the court explicitly denied the request. ORDER ON MOTIONS TO RECONSIDER ¶5 (Feb. 25, 2009), *Suppl.Appx.* at 52.

The court has discretion regarding which spouse pays for student loan debt. *Bourdon v. Bourdon*, 119 N.H. 518 (1979).

The issue is waived, however, because it is merely the subject of a passing reference in Ms. L'Heureux's brief. *L'Heureux Brf.* at 29, 31; *Radziewicz v. Town of Hudson*, __ N.H. at __ (passing references not constitute appellate argument). Even if not waived, it is not adequately presented. Beyond the conclusory statement that not ordering reimbursement "is nothing less than unconscionable," *L'Heureux Brf.* at 31, Ms. L'Heureux provides no reason that Mr. Summerville should participate in paying for her post-filing education. Moreover, she does not specify whether she wants Mr. Summerville to pay outright, or to split the cost.

The court's finding that she alone should bear the cost, moreover, is reasonable. Ms. L'Heureux incurred the loan during the pendency of this divorce action, not during the marriage, and Mr. Summerville can derive no benefit from it. *C.f.*, *Bourdon*, 119 N.H. at 519 (student loan incurred well within marriage and other party spent part of proceeds). As the court noted, Ms. L'Heureux already has an education, including a bachelor's degree and a paralegal certificate. She has business skills and a demonstrated knack for making money in real estate. Ms.

L'Heureux's career change, if that is what she intends, is by her choice, as is its timing and cost. Mr. Summerville had nothing to do with it and should not be charged for it. Accordingly, this Court should affirm.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court below.

Respectfully submitted,

Paul Summerville
By his Attorney,

Law Office of Joshua L. Gordon

Dated: December 15, 2009

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Paul Summerville requests that if oral argument is heard, Attorney Joshua L. Gordon be allowed the time allotted.

I hereby certify that on December 15, 2009, copies of the foregoing will be forwarded to Ronald J. Caron, Esq.; John D. Cameron, Esq., GAL; Stephanie Norrell (co-respondent); Daniel C. Proctor, Esq. (commissioner).

Dated: December 15, 2009

Joshua L. Gordon, Esq.