

NH Supreme Court 3JX Panel Orders - June 2004

THE FOLLOWING ARE Orders issued by the Court in June, 2004 of cases that were heard by the three-judge panels in the expedited appeals process known as "3JX" (3-judge panel expedited).

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2003-0255

Appeal of John Thyng

The court on June 8, 2004, issued the following order:

The employee, John Thyng, appeals a decision of the New Hampshire Personnel Appeals Board (board) upholding his written warnings and his dismissal from employment. He contends that his due process rights were violated and that the decision of the board was otherwise unreasonable and unlawful. We affirm.

We will affirm the board's decision unless we find an error of law or by a clear preponderance of the evidence that it is unjust or unreasonable. *See* RSA 541:13 (1997).

The employee challenges letters of warning that he received on December 21, 2000, and December 21, 2001. The evidence supports the board's findings that in 2000, the employee left an unlocked vehicle unattended with the engine running, and that in 2001, the employee was late for work and did not telephone his supervisors to inform them that he would be late. Accordingly, we affirm the board's denial of the appeals of those two letters of warning. We also agree with the board's ruling that it would not overturn the employee's October 2000 disciplinary suspension in light of the employee's failure to appeal that suspension to the board.

The employee also challenges his termination. On December 31, 2001, the employee was issued an unsatisfactory performance evaluation and a notice of dismissal. The termination was based upon New Hampshire Administrative Rule, Per 1001.08 (b)(2), which authorizes dismissal by issuance of a fifth written warning for different offenses within a period of five years. We agree with the State that the employee has not demonstrated any substantial violation of the applicable rules. *See Colburn v. Personnel Commission*, 118 N.H. 60, 63 (1978) (discharge procured in the face of substantial violation of rules is invalid); *cf. McIntire v. Woodall*, 140 N.H. 228, 230 (1995) (showing of actual prejudice necessary to prevail on due process claim). We find no substantial violation of New Hampshire Administrative Rule, Per 1001.08(c) -- the dismissal notice specifically listed the disciplinary actions upon which the termination was based. As the board indicated, the employer was under no obligation to revisit the conduct underlying each of the disciplinary actions. We are also not persuaded by the employee's argument that Mr. DeNutte was personally required to meet with the employee.

We agree with the board that the employer's knowledge and awareness of the employee's history, including awareness of warnings more than five years old, does not equate to inclusion of that history as a *basis* for termination. While the parties stipulated to the admission of a number of documents upon which the appointing authority "relied," it is clear that the board and the parties did not understand that stipulation as setting forth the basis for the employee's termination. The employee's counsel noted that he was not stipulating to the accuracy of the exhibits in question, but indicated that there was "no sense in going through a big authentication process." We do not read the stipulation as being inconsistent with the board's findings, which are supported by the evidence, that the employer's cognizance of the employee's history does not mean that the employer based the termination upon improper facts or failed to comply with Rule 1001.08. *Cf. Appeal of Boulay*, 142 N.H. 626, 628 (1998) (employer violated Rule 1001.08 by failing to provide important details of investigation into specific misconduct that formed basis for termination).

We have reviewed the employee's remaining arguments and find them to be without merit. Accordingly, we affirm.

Affirmed.

BRODERICK, C.J., and NADEAU and DALIANIS, JJ., concurred.

Eileen Fox, Clerk

2003-0338

Blagbrough Family Realty Trust v. Town of Wilton

The court on June 8, 2004, issued the following order:

The plaintiff, the Blagbrough Family Realty Trust, appeals the dismissal of its appeal of the decision by the zoning board of adjustment (ZBA) of the defendant, the Town of Wilton. The plaintiff challenges the superior court's decision to dismiss its appeal of the ZBA's decision under the "time of decision" rule. We affirm in part and remand.

The "time of decision" rule applies when a zoning authority properly and not in bad faith or with intent to delay amends a zoning ordinance while an appeal of a zoning board decision is pending. *McGovern v. City of Manchester*, 130 N.H. 628, 631 (1988). This rule requires a reviewing court to apply the zoning law that exists when it renders its decision. *Id.*; see also 3 A.H. Rathkopf & a., *Rathkopf's The Law of Zoning and Planning* § 37.3, at 37-3 (2003). The amended zoning ordinance therefore controls the rights of the parties unless a vested right to develop accrued under the prior ordinance. 3 Rathkopf, *supra* § 37.3, at 37-3, 37-5.

The amended ordinance makes clear that the setback requirements for "structures" do not pertain to driveways or culverts approved by the planning board as part of a subdivision plan. The amended ordinance, thus, renders moot the plaintiff's argument that the ZBA erroneously upheld the planning board's approval of a subdivision plan that depicted a driveway and culvert within the setbacks for "structures."

The plaintiff argues that the "time of decision" rule does not apply because it acquired vested rights under the original ordinance pursuant to RSA 676:12, V (1996) (amended 2003) and RSA 674:39 (1996). Both of these statutes concern when a landowner's right to develop his or her land has vested under a prior ordinance. They do not pertain to abutters' rights. Contrary to the plaintiff's assertions, neighboring property owners have no vested right to a particular zoning ordinance. 4 A.H. Rathkopf & a., *Rathkopf's The Law of Zoning and Planning* § 70.10, at 70-7 to 70-8 (2002).

The plaintiff next asserts that the "time of decision" rule does not apply because the town acted in bad faith by amending the zoning ordinance to "legislate away" this litigation. See *McGovern*, 130 N.H. at 631. The trial court found no evidence of bad faith. As the plaintiff does not argue that this finding is unsupported by the evidence, we affirm it. See *Morgenstern v. Town of Rye*, 147 N.H. 558, 565 (2002). We decline the plaintiff's invitation to shift the burden of proof to the town "to demonstrate that it had other legitimate reasons for the change."

The plaintiff contends that the town was precluded from amending its zoning ordinance to exempt driveways and culverts from the definition of "structure" because doing so is contrary to State law. See *N.H. Admin. Rules Env-Wt 101.80*; see also RSA 482-A:2, IX (Supp. 2003). Although the plaintiff raised this issue before the trial court, the trial court did not address it. We decline to reach it in the first instance, leaving it for the trial court to address upon remand. See *N. Country Envtl. Servs. v. Town of Bethlehem*, 150 N.H. ___, ___, 843 A.2d 949, 962 (2004).

Affirmed in part and remanded.

BRODERICK, C.J., and DUGGAN and GALWAY, JJ., concurred.

Eileen Fox, Clerk

2003-0400

In the Matter of Joseph S. Eisenberg and Roberta L. Eisenberg

The court on June 8, 2004, issued the following order:

The petitioner, Joseph S. Eisenberg, appeals his divorce decree, contesting the trial court's unequal division of the parties' marital property. Following briefing and oral argument, we remanded this case to the trial court to explain its rulings on certain property division issues. Having reviewed the trial court's order following remand, we affirm.

"We sustain the findings and rulings of the trial court unless they are lacking in evidential support or tainted by error of law." *In the Matter of Letendre & Letendre*, 149 N.H. 31, 34 (2002). The trial court has broad discretion in determining matters of property distribution in a final divorce decree; absent an unsustainable exercise of discretion, we will not overturn its rulings or set aside its factual findings. *See id.*

On appeal, the petitioner argues both that the trial court failed to make adequate findings and rulings to support its unequal division of marital assets and that the division constituted an unsustainable exercise of discretion. In reaching its decision, the trial court issued an eleven-page divorce decree and addressed 86 findings of fact and rulings of law submitted by the parties. Following remand, the trial court further explained its adjustments to the valuation of the marital estate. Among its findings were that the petitioner was 52 years old, was voluntarily unemployed, owned an income-producing condominium, and had a greater opportunity than the respondent to further earn and save.

The trial court also found that the respondent had not worked since 1992 and was receiving social security disability income as well as workers' compensation. While these previous administrative determinations may not have been binding on the court, they provided some evidence, along with her testimony, of the respondent's inability to engage in gainful employment.

Given the statutory factors cited by the trial court and supported by the record, we find no error in its distribution of marital assets. *See RSA 458:16-a (Supp. 2003)* (equal division of marital assets presumed equitable unless trial court concludes that such division would be inappropriate or inequitable after considering one or more of several enumerated factors).

Affirmed.

BRODERICK, C.J., and DUGGAN and GALWAY, JJ., concurred.

Eileen Fox, Clerk

2003-0455

State of New Hampshire v. Lee E. Carpenter

The court on June 1, 2004, issued the following order:

Following a jury trial, the defendant, Lee Carpenter, was convicted of aggravated felonious sexual assault. *See* RSA 632-A:2, III (1996). On appeal, he contends that the trial court's decision to limit the evidence presented was not sustainable. Although the defendant cited New Hampshire Rule of Evidence 404(b) in his brief, at oral argument, he conceded that his claim of error is limited to Rule 403. We affirm.

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.” *N.H. R. Ev.* 403. Absent an unsustainable exercise of discretion, we will not reverse a trial court's determination of the admissibility of evidence. *See State v. DiNapoli*, 149 N.H. 514, 518 (2003).

The defendant argues that the trial court erred in limiting the evidence of the household rules which he established and enforced and in barring evidence of the victim's mother's occasional fear of the victim and the victim's threats against her grandmother. He contends that the prohibited evidence would have established that the victim had “the run of the house” whenever he was out of the country on business and therefore was motivated to fabricate her accusations to “keep him out of the house permanently.”

The trial court permitted the defendant to establish that the victim did not like his rules and that there were fewer household rules when he was away. The court found that further inquiry about specific rules would lead to a trial within a trial and that even if it were marginally relevant, its probative value would be outweighed by the risk of prejudice. The record reflects that the defendant also elicited testimony from the victim about the fights that they had about the rules, including physical confrontations. We find no error in the parameters established by the trial court. Given its limited relevance to the theory of defense, we also conclude that the trial court's decision to bar testimony about the relationship between the victim and her mother and grandmother was sustainable. *See N.H. R. Ev.* 403.

We have confined our review to only those issues which the defendant has fully briefed. *See State v. Chick*, 141 N.H. 503, 504 (1996) (passing reference to constitutional claim renders argument waived). Based on the record before us, we find no error in the trial court's ruling.

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Eileen Fox, Clerk

2003-0508

State of New Hampshire v. Michael J. Smith

The court on June 22, 2004, issued the following order:

Following a bench trial, the defendant, Michael Smith, was convicted of driving while under the influence of intoxicating liquor or drugs. *See* RSA 265:82 (Supp. 2003). On appeal, he contends that the trial court erred in denying his motion to suppress. We affirm.

When reviewing a trial court's ruling on a motion to suppress, we accept the trial court's findings unless they are unsupported by the record or clearly erroneous. *See State v. Johnston*, 150 N.H. 448, 451 (2004). We review the trial court's legal conclusions *de novo*. *See id.*

The defendant argues that because the arresting officers lacked police power at the time of the stop, the trial court erred in analyzing the stop under ordinary stop and arrest principles. The defendant cites no State or Federal Constitutional provision in support of his argument; his only argument is that the stop violated statutory requirements. We note that the cases he cites involve arrests made by police officers outside their jurisdiction. In this case, the defendant was stopped by local police officers traveling outside their jurisdiction; he was arrested, however, by a State Trooper. *See* RSA 594:10, I (c) (2001); *State v. Schneider*, 124 N.H. 242 (1983) (arrest by State Trooper who arrived on scene after individual stopped by two police officers permissible under RSA 594:10 when, based on reports of police officers and his own observations, trooper has probable cause to believe individual was driving while intoxicated).

The defendant cites only a violation of RSA 105:4 in support of his claim that the trial court erred in denying his motion to suppress. *See State v. Dellorfano*, 128 N.H. 628, 632 (1986) (to trigger State constitutional analysis defendant must raise constitutional issue below and specifically invoke State constitutional provision in brief); *In re Baby Girl P.*, 147 N.H. 772, 780 (2002) (federal constitutional claims deemed waived when neither briefed nor argued below or done so only in passing). We will assume without deciding that a violation of RSA 105:4 occurred in this case. We have previously recognized that the legislature may wish to provide constitutional-type safeguards in certain statutory enactments. *See State v. Flynn*, 123 N.H. 457, 463-65 (1983). While we have held that suppression of evidence obtained in violation of a State statute may be an appropriate remedy in certain cases where the legislature wanted to provide constitutional-type safeguards, we have first conducted an analysis of the statute to determine whether the legislature intended to authorize such a remedy, *see id.* at 463-65. The defendant cites no provision of RSA chapter 105 to indicate that the legislature intended to authorize such a remedy in this case; nor are we able to discern one. He makes no other argument as to why suppression should be held to be an appropriate remedy for violation of RSA chapter 105. Accordingly, we find no error in the trial court's denial of his motion to suppress.

Given our analysis, we need not determine whether the trial court found that the defendant's stop was valid under the community caretaking exception or whether such a finding would have been correct.

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.
Eileen Fox, Clerk

2003-0540

In the Matter of Francis B. Rives and Susan Rives

The court on June 1, 2004, issued the following order:

The petitioner, Francis B. Rives, appeals his divorce decree. He contends that the trial court erred in finding that it had jurisdiction to order the transfer of his interest in Yarrow, LLC, a Nevada corporation. We affirm.

The trial court found that “the respondent would qualify as a family member under the articles of agreement of Yarrow, LLC.” Based on this finding, the court concluded that Yarrow’s articles of agreement would permit the petitioner to transfer all or a portion of his interest in Yarrow to the respondent without invoking certain provisions of the articles of agreement addressing Yarrow’s members’ rights of first refusal or vote prior to transfer of Yarrow units. The court then awarded the respondent 41% of the petitioner’s interest in Yarrow, LLC, including the income received monthly therefrom. On appeal, the petitioner argues that the trial court erred in “exercis[ing] personal jurisdiction over Yarrow, LLC without the corporation being joined as a party and without sufficient minimum contacts.”

The trial court found that Yarrow was established during the parties’ marriage and that the petitioner owned 300 units of Yarrow, LLC. The trial court did not order the dissolution of Yarrow but rather only the transfer by the petitioner of a portion of his interest therein to the respondent. Because the trial court found the 300 units to be a marital asset, an issue not contested on appeal, the court could order a division of the units. *See* RSA 458:16-a (Supp. 2003). The court did not exercise jurisdiction over Yarrow, LLC, but rather over the petitioner and the 300 Yarrow units he owned. Thus, while the trial court’s order may not bind Yarrow, a non-party to this action, it is binding upon the petitioner.

We note that the trial court found that the value of the petitioner’s interest in Yarrow, LLC was \$509,945.00 and awarded the respondent 41% of the petitioner’s interest. Nothing in this order would prevent the parties from mutually agreeing that the petitioner may otherwise satisfy this award.

Affirmed.

BRODERICK, NADEAU and DALIANIS, JJ., concurred.

Eileen Fox, Clerk

2003-0549

In the Matter of Nancy Henry and Kevin Henry

The court on June 4, 2004, issued the following order:

The respondent, Kevin Henry, appeals his divorce decree. He contends that the trial court erred in: (1) including fault as a reason for the unequal division of the marital estate after finding that the petitioner had failed to demonstrate that extreme cruelty caused the breakdown of the marriage; (2) awarding the petitioner, Nancy Henry, her pension; and (3) awarding the petitioner 60% of the equity in the marital home. We vacate and remand.

The trial court has broad discretion in dividing marital property; absent an unsustainable exercise of discretion, we will not overturn its rulings or set aside its factual findings. *See In the Matter of Letendre & Letendre*, 149 N.H. 31, 34 (2002). While an equal division of property is presumed equitable, the trial court may decide otherwise after considering one or more of the factors set forth in RSA 458:16-a (Supp. 2003). The trial court must provide written reasons for the division. *See* RSA 458:16-a, III.

We have previously held that fault may not be considered in making a division of property in a no-fault divorce decree. *See Boucher v. Boucher*, 131 N.H. 377, 379-80 (1988). In this case, the trial court noted that its recommended division of property might result in more than half being awarded to the petitioner. Among the reasons cited by the court in support of its division was the respondent's conduct during the marriage; the court found that his conduct was the primary cause of the parties' irreconcilable differences. Because we cannot tell from the record whether the trial court was impermissibly influenced by this finding when apportioning the marital property, we remand for further consideration consistent with this order.

Vacated and remanded.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Eileen Fox, Clerk

2003-0599

Joseph T. Salisbury, Jr. & a. v. Gary C. Ledoux & a.

The court on June 1, 2004, issued the following order:

The defendants, Gary C. Ledoux and Charlene Ledoux, appeal an order of the trial court awarding the plaintiffs, Joseph T. Salisbury and Tammy Salisbury, \$5000 plus interest and costs. They contend that the trial court erred in issuing a final order prior to receiving a report that it had ordered the plaintiffs to produce. We affirm.

The plaintiffs bought a house from the defendants; they filed suit after discovering that its well was dry. After a hearing, the trial court found that the defendants were aware of the water shortage but had indicated there was no problem with water quantity on the "Seller Property Information Report." Based upon its findings, the court entered judgment for the plaintiffs. *See Snierson v. Scruton*, 145 N.H. 73, 78 (2000) (elements of negligent misrepresentation are negligent misrepresentation of material fact by defendant and justifiable reliance by plaintiff).

On appeal, the defendants contend that the trial court erred in issuing a final order before receiving the home inspection report it had requested from the plaintiffs. The record reflects that at the close of the hearing, the court asked the plaintiffs to provide a copy of the inspection report to the court and the court would "see to it that Counsel gets a copy." On appeal, the plaintiffs assert that they filed the report on the same day as the hearing. Because defendants' counsel did not receive a copy until after the trial court issued its order, they argue that the court did not have the report at the time it issued its order. We need not determine the time of the filing of the report, however, as we conclude that any error in failing to provide it to the defendants was harmless.

The trial court found that the defendants were both aware of the shortage and failed to disclose it. Because the trial court's order was based on a finding of negligent misrepresentation, the inspection report was irrelevant to its determination. We therefore affirm the ruling of the trial court.

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Eileen Fox, Clerk

2003-0650

In the Matter of Leland D. Judd, Jr. and Charlene D. Romine Judd

The court on June 30, 2004, issued the following order:

The respondent, Charlene D. Romine Judd, appeals an order of the trial court terminating the child support obligation of the petitioner, Leland D. Judd. We affirm.

We will set aside a child support modification order “only if it clearly appears on the evidence that the court’s exercise of discretion was unsustainable.” *In the Matter of Feddersen & Cannon*, 149 N.H. 194, 196 (2003) (quotations omitted).

In this case, the trial court terminated the petitioner’s child support obligation; the respondent then appealed. We vacated the trial court’s order and remanded the case to allow the court to calculate the amount of child support presumptively payable under the guidelines and to make specific findings that application of the guidelines would be unjust or inappropriate. *See* RSA 458-C:4, II (1992); RSA 458-C:5 (Supp. 2003). Upon remand, the trial court found that the children were very close to the age of majority and living with the respondent in California, that the petitioner “despite his severely limited resources” was attempting to have the children visit with him, and that the respondent was in contempt of the court’s earlier order. Citing RSA 458-C:5, I(b)(significantly low income of obligor), RSA 458-C:5, I(d) (extraordinary costs associated with obligor’s exercise of his physical custodial rights), and RSA 458-C:5, I(i) (other special circumstances found by court to avoid confiscatory support order), the court found exceptional circumstances existed and vacated the petitioner’s support obligation retroactive to September 2001, the date when he had filed his motion for contempt.

The respondent argues that the support obligation of a parent to his children should not be reduced for punitive reasons. We agree. In this case, the record contains evidence that the petitioner was receiving workers’ compensation at the time of the hearing and would not be able to return to work for some time, that his daughter had lived with him for two months during the preceding year and that he had taken a loan to pay for her airline ticket. Because the record before us supports the trial court’s findings, we conclude that its exercise of discretion was sustainable. *See In the Matter of Feddersen & Cannon*, 149 N.H. at 196 (trial court in best position to determine parties’ respective needs and their respective ability to meet them); *Giles v. Giles*, 136 N.H. 540, 546 (1992) (permitting reduction of child support as of filing of petition to modify).

Affirmed.

NADEAU, DUGGAN and GALWAY, JJ., concurred.
Eileen Fox, Clerk

2003-0811

In the Matter of Boris J. Lvin and Irina Y. Yudanova

The court on June 30, 2004, issued the following order:

The petitioner, Boris J. Lvin, appeals his divorce decree. He contends that the trial court erred by ordering him to pay the respondent, Irina Y. Yudanova, \$15,000 and by denying his motion to default her for failing to file a financial affidavit. We reverse and remand.

The trial court has broad discretion in determining matters of property distribution in a final divorce decree; absent an unsustainable exercise of discretion, we will not overturn its ruling or set aside its factual findings. *See In the Matter of Letendre & Letendre*, 149 N.H. 31, 34 (2002). Superior Court Rule 197 requires that financial affidavits must be filed “at every hearing involving financial matters or property.” The requirement of full disclosure under Rule 197 is mandatory; a financial affidavit must be filed in divorce proceedings. *See Shafmaster v. Shafmaster*, 138 N.H. 460, 467 (1994) (decided under prior Superior Court Rule 157).

The parties were married in January 2002; the petitioner filed for divorce in May 2002. Despite several requests, the respondent failed to file a financial affidavit or respond to interrogatories propounded by the petitioner. Citing *Burse v. Bursey*, 145 N.H. 283 (2000), the respondent’s counsel contends that the trial court could have waived this requirement due to impossibility, because the respondent had returned to Russia without leaving a forwarding address or phone number. We note that in *Burse*, the plaintiff filed an affidavit along with her proposed final decree, explaining the impossibility of obtaining a financial affidavit from the defendant. We decline to allow the party who fails to comply with a rule to benefit from such noncompliance.

In this case, the respondent was allegedly unable to execute a financial affidavit but was able to execute a permanent stipulation which entitled her to \$15,000. Because the trial court did not have all relevant information prior to incorporating a permanent stipulation executed only by the nondisclosing party into the final divorce decree, we conclude that it erred in denying the petitioner’s motion for default and in incorporating the contested stipulation. *See In the Matter of Jones and Jones*, 146 N.H. 119, 122-23 (2001) (default appropriate remedy in case of repeated noncompliance with court orders and extended discovery schedule). We therefore reverse and remand for further proceedings consistent with this order. *See RSA 458:16-a, II (Supp. 2003)* (factors to consider when determining equitable division of marital property).

Reversed and remanded.

NADEAU, DUGGAN and GALWAY, JJ., concurred.

Eileen Fox, Clerk