State of New Hampshire
Supreme Court

NO. 2020-0336

2020 TERM

DECEMBER SESSION

In the Matter of
Jessica Buckley and Regan Buckley

RULE 7 APPEAL OF FINAL DECISION OF THE
SALEM FAMILY COURT

BRIEF OF RESPONDENT/APPELLEE, REGAN BUCKLEY

December 23, 2020

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QUESTIONS PRESENTED

I. Did the family court properly interpret the parties' divorce stipulation to mean that Jessica was to receive one-half the value of Regan's stocks and options?

II. Did the family court properly determine that Regan's single transfer of shares did not constitute a course of conduct giving interpretive meaning to the parties' stipulation?

III. Did the family court properly characterize Regan's actions as reasonable and considerate?

STATEMENT OF FACTS

Regan Buckley is an executive at American Tower Corporation (ATC), a publicly-traded company. As part of his compensation package, he accumulated four types of ATC stock, which are professionally managed: exchange traded funds (ETF),[1] restricted stock units (RSU)[2], vested stock options, and unvested stock options. *Hrg*.[3] at 3, 16; REGAN'S ETRADE STATEMENT (May 31, 2019) at 5, 6 & 7, Exh. 4, *Appx-NOA*[4] at 42; <https://www. americantower.com>.

Regan and Jessica[5] amicably divorced in October 2019. They agreed on all terms, including grounds of irreconcilable differences, DECREE OF DIVORCE (Oct. 2, 2019), *Appx-Brf* at 5, parenting and visitation schedules, PARENTING PLAN (Sept. 20, 2019), *Appx-Brf* at 12, and financial and property issues. PERMANENT STIPULATION (Sept. 13, 2019), *Appx-Brf* at 6, *Addendum* at 25. The settlement is comprehensive as to all their assets, and includes a mutual warrantee:

> Each party acknowledges that this Stipulation is fair and equitable, that it is being entered into voluntarily, and that it is not the result of any duress or undue influence. The parties acknowledge that he or she has been furnished with or is aware of all information pertaining to the financial affairs of the other party which was requested.

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[1]ETFs can be colloquially understood as simply stocks. *See, e.g.,* <https://www. investopedia.com/terms/e/etf.asp>.

[2]RSUs are unvested stocks, with vesting restrictions imposed by the employer. *See, e.g.,* <https://www.investopedia.com/terms/r/restricted-stock-unit.asp>.

[3]There was one hearing in this matter, on May 29, 2020, the transcript of which is cited herein as "*Hrg.*"

[4]Jessica filed an appendix to her notice of appeal, cited herein as *Appx-NOA*. She also filed an appendix to her brief, cited herein as *Appx-Brf*. Together they contain all relevant documents.

[5]Because of shared surnames, for clarity the parties are identified by their forenames.

STIPULATION ¶21.I.

The RSUs and unvested options were awarded solely to Reagan. The stipulation split only the *vested* stock and *vested* stock options, *Hrg*. at 3-4, in two parallel paragraphs:

> Jessica and Regan have agreed to split 50/50 the *stock options* that Regan owned as of May 30, 2019 in the amount of $1,279,342.00.[6] Jessica is awarded one-half of the Etrade Options in the amount of $639,671.00.[7] Regan will arrange for the Options to be transferred to Jessica's individual Etrade account. Jessica shall solely be responsible for any and all costs related to the sale of these assets including but not limited to any tax implications.…
>
> Jessica and Regan have agreed to split 50/50 the *vested stock* that Regan owned as of May 30, 2019 in the amount of $1,298,539.00.[8] Jessica is awarded one-half of the Etrade Vested Stock in the amount of $649,269.00.[9] Regan will arrange for the Vested Stock to be transferred to Jessica's individual Etrade account. Jessica shall solely be responsible for any and all costs related to the sale of these assets including but not limited to any tax implications.…

STIPULATION ¶11 (emphasis added).

The stipulation thus handled vested options and vested stock identically:

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[6]A scrivener's error transposed the number in this and the following paragraph. This number should have been $1,298,539.00. *Hrg*. at 5-6; REGAN'S ETRADE STATEMENT (May 31, 2019) at 3-4, Exh. 4, *Appx-NOA* at 42.

[7]$639,671 is half of $1,279,342.

[8]A scrivener's error transposed the number in this and the preceding paragraph. This number should have been $1,279,342.00. *Hrg*. at 5-6; REGAN'S ETRADE STATEMENT (May 31, 2019) at 3-4, Exh. 4, *Appx-NOA* at 42.

[9]$649,269 is half of $1,298,539.

- The parties agreed to evenly divide both the vested stock and vested stock options;
- The value, in dollars, of each asset, was specified;
- The parties understood the asset values were as of May 30, 2019;
- The value, in dollars, awarded to Jessica, was specified;
- Regan would arrange transfers into Jessica's account;
- Jessica is liable for costs and taxes related to any sale of the assets.

Regan understood that overall, he had about $2.5 million worth of stocks and options, and that he was required to transfer to Jessica a total value of $1,288,940 ($639,671 + $649,269 = $1,288,940). STIPULATION ¶11; *Hrg*. at 16. Before signing the settlement, Regan believed, and told Jessica, that he would be able to transfer stock options from his eTrade account to hers. RESPONSE TO OBJECTION ¶17 (May 1, 2020), *Appx-NOA* at 16.

In November 2019, shortly after the divorce was finalized, Regan transferred to Jessica 3,065 shares of vested stock. JESSICA'S ETRADE STATEMENT (Nov. 30, 2019) at 5, Exh. 5, *Appx-NOA* at 48; REGAN'S ETRADE STATEMENT (Nov. 30, 2019) at 8, Exh. 9, *Appx-NOA* at 61; RESPONSE TO OBJECTION ¶9.

At the same time, he also attempted to transfer stock options. He learned from his employer, however, of three restrictions to stock transfers in the manner the parties envisaged. *Hrg*. at 16, 19.

First, Regan learned that ATC employees cannot transfer options to non-employees. To transfer options to Jessica, Regan would have to first exercise them. *Hrg*. at 13, 16-17; ORDER (May 29, 2020), *Addendum* at 23; OBJECTION TO CONTEMPT (Apr. 28, 2020) at 2, *Appx-NOA* at 5.

Second, Regan learned that exercising options, in order to make a transfer or for any other reason, is a taxable event. Regan knew his income is taxed at a far higher rate than Jessica's, and realized that if he were to exercise $1.2 million worth of options, which would be taxed to him as ordinary income,

he would incur a significant tax liability. *Hrg*. at 13. Regan also understood that under the stipulation, Jessica would pay that tax. *Hrg*. at 21; ORDER (May 29, 2020), *Addendum* at 23; OBJECTION TO CONTEMPT at 4.

Third, because Regan is an ATC executive subject to insider trading rules, he was not allowed to trade ATC securities at certain times, including the period from December 15, 2019 to March 1, 2020. *Hrg*. at 13; OBJECTION TO CONTEMPT at 4.

Thus, the parties had agreed to a particular dollar-amount settlement to Jessica, and anticipated paying that dollar-amount in transferred stock options, but when it became apparent that transferring the options themselves was not possible, they needed an alternative.

Consequently, Regan attempted to contact Jessica several times – in person, by phone, by emails and texts – to discuss the matter. OBJECTION TO CONTEMPT at 4. On the last day of 2019, Regan emailed Jessica a comprehensive description of the dilemma, and proposed a solution. EMAIL FROM REGAN TO JESSICA (Dec. 31, 2019), Exh. 7, *Appx-NOA* at 55, *Addendum* at 31.

Regan first paraphrased what he had learned about restrictions on his ability to transfer options to her, *id.,* and explained delays due to insider trading rules. *Id.* He then listed the value of stock assets he had already transferred, and promised to transfer the remainder to her as soon as he was permitted. *Id.* Regan then queried:

> The question I have is how do you want to receive the remaining transfer once my account opens up for the move? Do you want me to exercise the options and hold back the tax necessary based on what an accountant would show as backup or do you want me to try an [sic] move over RSUs or as much as I can in RSUs to avoid the tax reduction.

EMAIL FROM REGAN TO JESSICA, Exh. 7, *Appx-NOA* at 55, *Addendum* at 31.

Regan proposed that they avoid the restrictions and taxes by transferring to Jessica the same amount of money specified in their stipulation, but from a different source. *Hrg*. at 13. He pointed out that if Jessica accepted RSUs in lieu of options, he would be allowed to make the transfers. He also explained that by receiving RSUs, she would pay capital gains tax rates, which are much lower than Regan's income tax rate, and those would be due only when she sold individual stock, the timing of which would be within her control. EMAIL FROM REGAN TO JESSICA.

Finally, in his December 31 email, Regan expressed his concern for Jessica in this process:

> I realize this is not something you may understand so if you want an advisor to review and we can go over on a call than [sic] I would be more than willing to explain.

EMAIL FROM REGAN TO JESSICA, Exh. 7, *Appx-NOA* at 55, *Addendum* at 31.

Jessica never responded to Regan's email. OBJECTION TO CONTEMPT at 2, 4.

Consequently, in April 2020, Regan transferred to Jessica another 2,400 RSUs, for a total of 5,465 shares, which she accepted without objection. According to Jessica, the value of her stock in April was $238 per share, SHARE VALUES (Apr. 30, 2020), Exh. 6, *Appx-NOA* at 54, producing a total market value of $1,300,670 – exceeding the amount required in the twin paragraphs of the decree. *Hrg*. at 9-10, 13-15, 17-21; JESSICA'S ETRADE STATEMENT (Nov. 30, 2019) at 3, Exh. 5, *Appx-NOA* at 48; OBJECTION TO CONTEMPT at 2, 4.

STATEMENT OF THE CASE

In September 2019, the parties signed a "permanent stipulation" on financial issues, which was entered as a decree when their divorce was finalized. PERMANENT STIPULATION (Sept. 13, 2019), *Appx-Brf* at 6, *Addendum* at 25; DECREE OF DIVORCE (Oct. 2, 2019), *Appx-Brf* at 5. Thereafter, Regan transferred assets to Jessica in an attempt to comply with the terms of the stipulation.

This litigation was commenced in March 2020, on the day after insider trading rules reauthorized transfers. Jessica accused Regan of not having paid what he owed, to which Regan objected and Jessica replied. PETITION FOR CONTEMPT (Mar. 2, 2020), *Appx-NOA* at 3; OBJECTION TO CONTEMPT (Apr. 28, 2020) at 4, *Appx-NOA* at 5; RESPONSE TO OBJECTION ¶17 (May 1, 2020), *Appx-NOA* at 16.

In May 2020, the Salem Family Division (*Michael L. Alfano*, J.), held a telephonic hearing during which Regan testified, and lawyers for both parties made offers of proof and presented argument. During the hearing Jessica narrowed her contention to only the vested options. *Hrg*. at 10.

Jessica claimed that at the time she negotiated the settlement, she intended to receive a certain number of options, not the dollar-amount specified in the stipulation. *Hrg*. at 3-10, 19-20. She offered no explanation for the absence, in the stipulation, of a named number of stocks or options, and claimed that the only reason the actual dollar-amounts appear in the stipulation is "to distinguish between which ones there are because there were unvested options, as well." *Hrg.* at 8.

Regan recalled that during negotiations, Jessica had made clear she wanted an amount certain, without incurring market risk, and that is why dollar-amounts are specified in the stipulation. *Hrg*. at 12. He pointed out that the parties did not want to engage in a valuation of the options, and that if they

intended to transfer a certain number of stocks or options, that number would have been recited in the stipulation. Though Regan had anticipated paying the dollar-amount owed to Jessica via transferred options, when he discovered restrictions, and discerned unforseen taxation that would be incurred by Jessica, he tried to discuss alternatives with her. Having received no response, he took the reasonable step of transferring other assets to her, in accord with timing allowed by insider trading rules, taking care to meet (and exceed) the total stipulated amount, in a fashion that avoided Jessica's risk and minimized her taxes. *Hrg*. at 12-17.

The family court recognized that "[s]tock options are notoriously difficult to transfer," and that transferring them would mean "a significant tax hit." The court denied Jessica's motion for contempt, holding that Regan "has given [Jessica] other assets to make up for the value of the stock options … in compliance with the agreement." ORDER (May 29, 2020), *Addendum* at 23.

Jessica filed a motion to reconsider, to which Regan objected, and which the court denied. MOTION TO RECONSIDER (June 12, 2020) (margin order, June 24, 2020), *Appx-NOA* at 26; OBJECTION TO RECONSIDERATION (June 16, 2020), *Appx-NOA* at 31. Jessica appealed.

SUMMARY OF ARGUMENT

Regan first sets forth the considerations regarding dividing stock options in divorce. He notes that at the time of the parties' stipulation, Jessica bargained for certain values, eschewing an assumption of market risk, but now would like to benefit from rising share prices of Regan's employer.

Regan points out that a single transfer of shares did not create a course of conduct sufficient to alter the plain meaning of the parties' agreement.

Finally, Regan shows that he transferred to Jessica total assets with value exceeding his obligations, which was reasonable and considerate under the circumstances.

ARGUMENT

I. Splitting Stock Options in Divorce

A stock option is "the right to buy a specific number of a company's common shares at a specific price for a specific period of time." Shannon P. Pratt, VALUING A BUSINESS, THE ANALYSIS AND APPRAISAL OF CLOSELY HELD COMPANIES at 586-87 (5th ed. 2008); *see also Divorce and Separation Treatment of Stock Options for Purposes of Dividing Marital Property* ¶1[a], 46 ALR 4th 640; *In re Dolan*, 147 N.H. 218, 220 (2001) (defining stock options). Options can be vested or unvested, and they can be "a reward for past services, an incentive for future services, or a combination of both." 46 ALR 4th at 668; Shannon P. Pratt, *supra,* at 603. Fluctuation in the value of options is "a function of market conditions, not the [employee's] future work performance." *In re Valence*, 147 N.H. 663, 674 (2002) (*Dalianis*, J., dissenting).

Stock options are part of a marital estate, *Tishkevich v. Tishkevich*, 131 N.H. 404 (1989), depending upon when they accrued, *Valence*, 147 N.H. at 663, and they commonly arise in divorce cases. Charles Kindregan, *Unexercised Stock Options and Marital Dissolution*, 34 SUFFOLK U.L. REV. 227, 228 (2001); *see, e.g., In re Martel*, 157 N.H. 53 (2008); *In re Baker*, 154 N.H. 186 (2006); *In re Feddersen*, 149 N.H. 194 (2003); *Dolan*, 147 N.H. at 218.

Valuation of stock options is complicated and uncertain, with at least two competing models, which depend upon varying assumptions. Shannon P. Pratt, *supra,* at 589-603; Kindregan, *supra,* at 227. While not placing a value on options is not fatal to having value, *Liberty v. Bourque Shoe Co.*, 106 N.H. 162 (1965), valuation in litigation is cumbersome. *Valence*, 147 N.H. at 668 (listing factors to be considered and experts to be consulted). For that reason, courts are encouraged to substitute other assets for the value of options, and parties have an incentive to settle on similar terms. *Id.* at 668, 675.

Generally, when an employee exercises options and then sells them, the gain is considered ordinary income to the employee, with significant resultant tax liabilities. Pratt, *supra*, at 603. Avoiding disadvantageous timing of a sale is therefore a common issue. *Valence*, 147 N.H. at 669; Kindregan, *supra* at 237-38. Executives subject to insider trading rules are further restricted from selling at certain times. *Id.* at 239.

II. Regan Acted in Compliance with the Stipulation

In her brief, Jessica posits three related claims that she should have received stock options, rather than the dollar-amounts specified in her agreement with Regan, and therefore requests that he be held in contempt of court. All three claims are factually inaccurate.

Rather, Regan acted reasonably under the circumstances, transferred to Jessica an amount in excess of the dollar-amounts she bargained for, and complied with the stipulation.

A. The Parties Bargained for a Value, Not a Number of Options

The stipulation provides:

> Jessica and Regan have agreed to split 50/50 the stock options that Regan owned as of May 30, 2019 in the amount of $1,279,342.00. Jessica is awarded one-half of the Etrade Options in the amount of $639,671.00.

STIPULATION ¶11.

The passage it not ambiguous. It twice refers to specific dollar-amounts: the dollar-amount Regan owned, and the dollar-amount of Jessica's half. Nowhere does it say a specific number of stock options. The provision is clear on its face that Jessica "is awarded … $639,671.00."[10]

The provision is also clear that those figures are derived from what the options were worth on a particular day, May 30, 2019, thus avoiding later revaluation, a process fraught with expense and uncertainty.

Jessica now claims the dollar-amounts were mentioned only for identification purposes. She offers no explanation for the stipulation's silence on the actual number of stocks and options she purportedly expected to receive.

Had the parties intended a transfer of a certain number of stocks or

[10]Notwithstanding the scrivener's errors.

options, they would have agreed on a number. To construe the stipulation in the manner Jessica suggests would require replacing specified dollar-amounts with specified numbers of shares. Such reformation is not necessitated here, however, because the agreement by the parties does not betray an "obvious failure to articulate their true and discoverable intent." *Matter of Lemieux*, 157 N.H. 370, 373 (2008).

It is apparent from the record that ATC's share prices went up during the period between May 2019 when the stipulation was signed, and April 2020 when insider trading rules allowed Regan to make the second transfer. It is also apparent that had they gone down, it is unlikely that Jessica would now be demanding shares. At this date, Jessica wants to enjoy the escalated share prices, without having taken the risk they would fall.

The stipulation makes Jessica liable for the tax implications of transferring options. In her brief, she argues that the court's interpretation makes that provision superfluous. JESSICA'S BRF. at 11-12. Such a provision is never superfluous, however, because *somebody* is liable for taxes, and it is natural that the parties would settle the matter. *In re Telgener*, 148 N.H. 190, 192 (2002) ("[T]ax consequences should be considered by attorneys and masters in their negotiations or rulings.").

In her brief, Jessica suggests that negotiation of the stipulation was somehow unfair because her lawyer did not sign it. JESSICA'S BRF. at 4-5. It is apparent, however, that there was extensive negotiation. During the hearing, both parties' lawyers reminisced about the settlement negotiations, suggesting they were both involved. *Hrg.* at 19 (Jessica's lawyer); *Hrg.* at 14-15 (Regan's lawyer). The stipulation itself includes a statement that it was "fair and equitable," "entered into voluntarily," and with mutual knowledge of "all information pertaining to the financial affairs of the other party." STIPULATION ¶21.I. Negotiation was also comprehensive: the entire divorce was amicably

settled, the remainder of the permanent stipulation shows Regan and Jessica worked out all financial issues, *id.,* and the parenting plan shows they resolved the minutia of shared parenting responsibilities. PARENTING PLAN (Sept. 20, 2019), *Appx-Brf* at 12.

Finally, Jessica accepted the RSUs when proffered in April 2020, suggesting she should be estopped from later protest. *See Great Lakes Aircraft Co. v. City of Claremont*, 135 N.H. 270, 291 (1992).

Accordingly, the family court properly found that Regan complied with the stipulation.

B. Regan's Single Transfer of Shares Did Not Change the Meaning of the Parties' Stipulation

Jessica points to the two paragraphs of the stipulation, one governing vested stock and the other stock options, and argues that Regan's having transferred half the vested stock shares demonstrates the parties' intent to split the options rather than their value.

Regan chose to transfer one-half the actual shares because the share price in November 2019, when the divorce was finalized, was not much higher than in May 2019, when the stipulation was signed. While transfer of the shares resulted in a higher value than was owed to Jessica under the stipulation, it was close enough that Regan was not overly concerned about the surplus. Had the share price decreased between May and November, Regan would have been obligated to transfer additional shares to equal or exceed the value specified in the stipulation.

Thus, the number of shares was a matter of happenstance, not indicative of how the parties' stipulation is to be construed.

Moreover, a course of conduct on which construction of a contract may be grounded involves long periods and repetitive interaction between the parties. *Birch Broad., Inc. v. Capitol Broad. Corp.*, 161 N.H. 192, 198 (2010)

(course of conduct was five years of post-contract cooperation in seeking regulatory approval for project); *Auclair v. Bancroft*, 121 N.H. 393, 395 (1981) ("defendant's overt act of making payments on the lease … is ample evidence that he intended to assume the obligations of the lease"); *Spectrum Enterprises, Inc. v. Helm Corp.*, 114 N.H. 773 (1974) (several years of paid use of a basement); *Bogosian v. Fine*, 99 N.H. 340 (1955) (many years of parties dividing shared retail space). Here, there was no course of conduct – only a single transaction.

The family court was within its discretion to find that the two transfers together satisfied Regan's obligation to Jessica.

C. Regan's Transfers Exceeded the Amount of the Parties' Bargain

In her brief, Jessica's arithmetic purports to show that Regan underpaid her. Her argument, however, appears to be premised on calculation of the value of shares on a particular date, and therefore on the supposed importance of the market price of the shares on a date different from when they were transferred.

As noted, however, the stipulation specifies a dollar-amount of value, not an enumerated number of shares. The total dollar-amount Jessica received is thus the relevant consideration, not the number of shares or their market price at some time other than the transfer date.

The evidence shows that Jessica received from Regan stock valued, at the time Regan was permitted by insider trading rules to complete the transfers, at $1,300,670, more than the $1,288,904 total[11] specified in the decree. The family court thus properly ruled that Regan complied with the stipulation.

[11] $639,671 + $649,269 = $1,288,940.

D. Regan Acted Reasonably and Considerately

Transfer of Regan's vested stock posed no problem. When attempting to transfer options, however, Regan encountered unanticipated restrictions, along with significant tax implications, of which the parties were unaware at the time they signed the stipulation. *Matter of Lemieux*, 157 N.H. 370, 374 (2008) (equity excuses mutual mistake of law or fact).

Because transferring options in the manner envisaged by the parties was an impossibility, *see George v. Al Hoyt & Sons, Inc.*, 162 N.H. 123, 130 (2011), Regan posed the dilemma to Jessica, but she expressed no preference on alternative ways to structure the transfers. He then did the reasonable thing: he transferred RSUs of more total value. This satisfied Regan's obligation to transfer a set dollar-amount to Jessica. Jessica got more value than she bargained for, though from a different source than she anticipated. That she accepted the RSUs in lieu of options further indicates the reasonableness of Regan's actions.

Regan described this to the family court, which found his "testimony credible that he has given [Jessica] other assets to make up for the value of the stock options." ORDER (May 29, 2020), *Addendum* at 23.

> The trial court's discretion necessarily extends to matters such as assigning weight to evidence and assessing the credibility and demeanor of witnesses. Conflicts in the testimony, questions about the credibility of witnesses, and the weight assigned to testimony are matters for the trial court to resolve. The trial court's factual findings are binding upon this court if they are supported by the evidence and are not legally erroneous.

Matter of Summers, 172 N.H. 474, 479 (2019).

Accordingly, the family court properly held that Regan complied with the parties' stipulation – and thus does not owe Jessica any more money – and this court should affirm.

CONCLUSION

Jessica bargained for specific amounts of money, not wanting to risk a downturn in ATC share prices. With prices having risen, she now wants the benefit of market fluctuation. In total, Regan transferred to Jessica more than she bargained for, and acted in compliance with their agreement. This court should therefore affirm.

ORAL ARGUMENT

Because the issue raised in this appeal is the interpretation of a single divorce stipulation, which is unlikely to be repeated, and because the matter turns on particular facts, there is no need for oral argument. Regan welcomes oral argument, however, in accord with the court's preference.

Respectfully submitted,

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Dated: December 23, 2020

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief. I further certify that this brief contains no more than 4,056 words, exclusive of those portions which are exempted.

I further certify that on December 23, 2020, copies of the foregoing will be forwarded to Kevin P. Rauseo, Esq.

Dated: December 23, 2020

Joshua L. Gordon, Esq.

ADDENDUM