State of New Hampshire
Supreme Court

NO. 2007-0271

2007 TERM

SEPTEMBER SESSION

IN THE MATTER OF

JENNIFER G. LAFOND

AND

DAVID A. LAFOND

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

BRIEF OF RESPONDENT DAVID LAFOND

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QUESTIONS PRESENTED

I. Was David Lafond provided insufficient notice that relocation would be an issue for adjudication at his divorce trial when the litigation had progressed on the mutual assumption that New Hampshire's relocation statute would apply to the parties, and Jennifer Lafond did not mention deviation from the statute until just moments before trial?
Preserved*: Motion for Reconsideration on Relocation Provision* (Jan. 29, 2007), *Appx.* at 98.

II. Did the court unsustainably exercise its discretion in deviating from New Hampshire's relocation statute when the only testimony Jennifer offered on the matter was that "it would be nice" to avoid a hearing in the event of relocation, and there was therefore no evidence to support the court's deviation?
Preserved*: Motion for Reconsideration on Relocation Provision* (Jan. 29, 2007), *Appx.* at 98.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Jennifer G. Lafond and David A. Lafond were married in 2002. They have two young children, 3 and 4 years old at the time of the decree. They are a middle-class family, both Jennifer and David work, and during their marriage accumulated real estate, motor vehicles, modest investments, and personal property. In 2005, after attempts at reconciliation, Jennifer petitioned for a no-fault divorce, and the parties were able to stipulate to most issues.

As litigated divorce cases go Jennifer's and David's was generally unremarkable – until the day of trial. Several minutes before trial began, Jennifer provided a copy of her proposed parenting plan to David's counsel. It contained a surprise request for a provision which would allow her to relocate with the children within 20 miles of the marital home without notification to David or permission from the court.

A chronology of the litigation is necessary to put that surprise in context.

A. Petition for Divorce, Early Litigation, and Temporary Stipulation

In her March 2005 Petition for Divorce, Jennifer alleged irreconcilable differences, asked for joint legal and primary physical custody of the children, child support, alimony, maintenance of health and life insurance, and for division of the couple's assets and liabilities. Relocation was not mentioned. Jennifer's PETITION FOR DIVORCE AND REQUEST FOR TEMPORARY ORDERS (Mar. 18, 2005), *Appx*. at 1

A few months later, the parties reached a temporary stipulation. They agreed on some items, but left for court determination use of the marital homestead, primary residential placement, parenting schedule, child support, and miscellaneous child-related expenses. Relocation was not mentioned. Parties' PARTIAL [TEMPORARY] STIPULATION (June 3, 2005).

B. First Structuring Conference and Temporary Decree

On June 3, 2005, the court held a Trial Management Conference in accord with Superior Court Rule 194. In advance of it, both parties submitted proposed temporary orders. Neither proposal, which are largely duplicative, mention relocation. PETITIONER'S PROPOSED TEMPORARY ORDER (June 3, 2005), *Appx*. at 5;David's PROPOSED TEMPORARY ORDER (June 3, 2005), *Appx*. at 14.

At the outset of the hearing, the court announced: "We're here today for a temporary hearing and structuring conference." *6/3/05 Trn.* at 4. The court noted the partial temporary stipulation, and then queried, "[I]t appears that the issues in dispute are the physical custodial label and schedule, child support miscellaneous expenses, the bed and mattress, debt, the marital homestead and the cats. Is that correct?" Attorneys for both parties agreed. *Id.* Regarding the marital home, the issue was who will live there. Jennifer herself grew up in the house, and her mother sold it to the couple. Consequently Jennifer asked for exclusive use. *6/3/05 Trn.* at 16-17. David didn't care which parent got the home, so long as children's environment was stable. *6/3/05 Trn.* at 28-29. The court also explored the scope of the GAL's investigation. *See 6/3/05 Trn.* at 33. Jennifer relocating away from the house was never mentioned.

The court promptly issued a conference report memorializing the hearing. STIPULATED DOMESTIC RELATIONS STRUCTURING CONFERENCE REPORT AND SCHEDULING ORDER (June 6, 2005), *Appx*. at 21.[1] The report noted the issues for temporary court determination were property distribution, allocation of debts, child support, physical custody, and visitation. The

[1]In this brief court documents are cited as dated by the marital master rather than as counter-signed by the judicial officer because the master's dates are more relevant to the chronology.

"Other" line was left blank, and the report does not mention relocation as an issue.

Along with the conference report, the court also appointed a GAL. In its appointment order, the court noted the issues for investigation were physical custody, visitation and custodial time, parenting skills and home environments of both parties, assessment of child/parent bonds, parenting mediation, and time and place of visitation exchanges. The court had no reason to ask the GAL to investigate the impact of possible relocation on the children, and there was no such request. ORDER ON APPOINTMENT OF GUARDIAN AD LITEM (June 6, 2005), *Appx*. at 23.

Also following the hearing, the court issued a temporary decree determining the issues it understood needed its attention. Jennifer got temporary use of the marital home. TEMPORARY DECREE (June 7, 2005), *Appx*. at 27. Relocation was not mentioned.

The parties apparently had difficulty with their co-parenting arrangements, and as litigation continued, it appears that the parenting schedule and transportation were shaping up to be the dominant issues needing court intervention. Pleadings were filed and orders were issued on these matters. Relocation was not mentioned in any of them.

C. Second Structuring Conference, and Apparent Agreement to Apply Relocation Statute

In November 2005 the court held another Rule 194 pre-trial conference gearing up for the permanent decree. On the day of the hearing Jennifer submitted a proposed parenting plan in which, for the first time, she mentioned relocation. Her proposal suggested that relocation be governed by New Hampshire's relocation statute, RSA 461-A:12, which she summarized and cited. Although her proposal does not quote the statute, it does not deviate from it any particular. Her proposal makes no attempt to distinguish between long- and short-distance relocations, no

attempt to narrow the statute's requirement of a hearing prior to relocation, and no attempt to modify the burdens of proof contained in the statute. Jennifer's PARENTING PLAN (Nov. 2, 2005) at ¶F, *Appx.* at 32. At the same time, Jennifer also filed a proposed final decree, which, just like her proposed parenting plan, called for straight application of the statute. Jennifer's proposed FINAL DECREE ON PETITION FOR DIVORCE OR LEGAL SEPARATION (Nov. 2, 2005) at ¶F, *Appx.* at 39.

On the same date, David also filed a proposed parenting plan. David's proposed PARENTING PLAN (Nov. 2, 2005) at ¶F, *Appx.* at 53. Although in his the statute is quoted, there is no material difference between the two relocation plans the parties proposed that day.

During the pre-trial hearing, it became apparent that the parties were living just one mile from each other, and that both intended to stay in the Manchester area. *11/2/05 Trn.* at 6. After one-by-one enumerating the remaining disputed issues, *11/2/05 Trn.* at 28-30, the court asked, "Anything else that is in dispute between the parties at this point?" To that Jennifer's lawyer's only response was that Jennifer had a business interest. Relocation was not mentioned at all during the hearing.

Following the hearing, the court issued its second conference report. MARITAL PRETRIAL CONFERENCE REPORT AND SCHEDULING ORDER (Nov. 7, 2005), *Appx.* at 62. In it, as before, the master checked off the issues to be decided by the court: property distribution, allocation of debts, child support, and medical insurance. In the "Other" line, the court wrote, "business interest." Relocation was not mentioned. The court also issued a narrative post-conference order addressing the GAL's duties and other matters, but not relocation. Court's ORDER ON REVIEW WITH GUARDIAN AD LITEM, MOTION FOR RECONSIDERATION RELATIVE TO CHILD SUPPORT AND

DAYCARE AND PRETRIAL CONFERENCE (Nov. 7, 2005), *Appx.* at 64.

There followed some additional pleadings concerning GAL fees, discovery, and other matters. None of them mentioned relocation.

In May 2006, after attending mediation, the parties entered a final stipulation on financial issues, division of assets (including the marital home which Jennifer kept for the stability of the children), and allocation of debt. PARTIAL PERMANENT STIPULATION (May 31, 2006), *Appx.* at 67. The remaining issues for the court's determination were primary residential responsibility, parenting schedule, child support, and miscellaneous child-related expenses including daycare. Relocation is not mentioned in the document.

D. Trial Day Surprise Relocation Proposal

Trial was held on November 6, 2006. A batch of documents were filed on that day by both parties: child support worksheets, financial affidavits, requests for findings and rulings, proposed decrees. Among them were both parties' proposed parenting plans. David's recites the position they had theretofore apparently shared – that relocation would be governed by RSA 461-A:12, either parent can move closer if school enrollment is not effected, the relocating parent will keep the other informed, either can request a hearing, and presumably the scheme of shifting burdens of proof specified in the statute. David's proposed PARENTING PLAN (Nov. 6, 2006) at ¶F, *Appx.* at 74.

Jennifer's proposed parenting plan, however, was a surprise, setting forth a completely new relocation procedure:

> Either parent shall have a right to relocate their residence within a twenty (20) mile radius of their home where they lived at the time of the divorce without having to secure permission of the other party or approval by the Court. If a parent desires to relocate their present residence more than twenty miles from their current residence they shall have an obligation to secure the other Party's consent, in writing, or permission from the Court. In the event that a party desires to relocate more than twenty (20) miles from their current residence then the Parties rights shall be governed by RSA 461-A:1 [sic]. In general, either parent may move the children's residence if it results in the parents living closer and if it will not affect the children's school enrollment. Prior to relocating more than twenty miles from their present residence, the parent shall provide reasonable notice to the other parent. For purposes of this section, 60 days notice shall be presumed to be reasonable unless other factors are found to be present. At the request of either parent, the court shall hold a hearing on the relocation issues.

Jennifer's proposed PARENTING PLAN (Nov. 6, 2006) at ¶F, *Appx.* at 87.

The proposal is different from the statute[2] in several respects. First, it distinguishes

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[2]New Hampshire's relocation statute provides:

I. This section shall apply if the existing parenting plan, order on parental rights and responsibilities, or other enforceable agreement between the parties does not expressly govern the relocation issue. This section shall not apply if the relocation results in the residence being closer to the other parent or to any location within the child's current school district.

II. This section shall apply to the relocation of any residence in which the child resides at least 150 days a year.

III. Prior to relocating, the parent shall provide reasonable notice to the other parent. For purposes of this section, 60 days notice shall be presumed to be reasonable unless other factors are found to be present.

IV. At the request of either parent, the court shall hold a hearing on the relocation issue.

V. The parent seeking permission to relocate bears the initial burden of demonstrating, by a preponderance of the evidence, that:
   A. The relocation is for a legitimate purpose; and
   B. The proposed location is reasonable in light of that purpose.

VI. If the burden of proof established in paragraph V is met, the burden shifts to the other parent to prove, by a preponderance of the evidence, that the proposed relocation is not in the best interest of the child.

VII. If the court has issued a temporary order authorizing temporary relocation, the court shall not give undue weight to that temporary relocation as a factor in reaching its final decision.

VIII. The court, in reaching its final decision, shall not consider whether the parent seeking to

(continued...)

between moves that are more than 20 miles from those that are nearer, applying the statute to the former but a new procedure to the latter. Second, while the statute requires notice for all moves, the proposal allows no notice for moves less than 20 miles. Third, while the statute requires court involvement for all moves, the proposal allows a parent to move less than 20 miles without seeking or obtaining permission. Fourth, while the statute sets up a scheme of proofs and assigns the burdens, the proposal allows shorter moves without proof of anything to anyone.

E. Trial and Trial Testimony

At 9:07 A.M. trial began. *Trl.Trn*. at 3. Before any testimony was taken, the court noted the parties' stipulations, and Jennifer's attorney explained that the remaining issues are "the parenting plan, child support." *Trl.Trn*. at 5. It became apparent during the course of the one-day trial (only Jennifer, David and the GAL testified) that the issues which both divided the couple and were in need of judicial resolution were parenting logistics – the schedule of extracurricular activities, "holidays and vacation time." *Trl.Trn*. at 90 (Jennifer's testimony). The GAL acknowledged that "the parties need a very clearly defined schedule on parenting time, holidays and vacation time." *Trl.Trn* at 211; 212, 216-17. The bulk of trial testimony is concerned with these matters.

Jennifer testified that she grew up in the marital home, *Trl.Trn*. at 15, that she intended to continue residing there, *Trl.Trn*. at 32, 35, and that in negotiating the stipulations she represented to David that she "wanted to stay in the marital home and had no intention of moving." *Trl.Trn*. at 102.

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[2](...continued)
relocate has declared that he or she will not relocate if relocation of the child is denied. RSA 461-A:12.

Thus it was with some surprise when part-way through her testimony, Jennifer's attorney asked a single question about "[t]he location of the children, are you asking for anything?" Jennifer replied, "I'm asking for a 20-mile radius from where both David and I currently live. In our marriage we had talked about moving outside of the city, and I don't have any immediate plans to move but it would be nice to not have to come back to court to get permission to move." *Trl.Trn*. at 36. Jennifer offered no further evidence on the matter.

Jennifer acknowledged in her testimony that the parties agreed she would be awarded the marital home, and that the parties' stipulation contains "no wording about relocation or [her] desire to want to relocate from the marital home." She further acknowledged that during the stipulation negotiations she represented to David that she "wanted to stay in the marital home and had no intention of moving." *Trl.Trn*. at 102.

During David's testimony, he was asked, "what are your feelings on the relocation issue that's been brought up today?" He said, "I'm very shocked. When we went to mediation and agreed to the partial stipulation, I was under the impression theat Jenn had no intentions on moving at all, and it was actually part of the reason how we got to the partial stipulation, that the kids needed their family home and that they were going to be staying there." *Trl.Trn* at 122. He testified further that at the time the parties made their agreement, "my understanding would have been that had she wanted – she said she didn't want to leave, but had she wanted to leave my understanding would be that the law or the statute that's in effect now would be in place." *Id.*

The GAL's testimony contains no information about relocation.

F. Decree and Post-Trial Pleadings

Following trial the court issued its parenting plan, adopting without change the language contained in Jennifer's proposal. PARENTING PLAN (Dec. 5, 2006) at ¶F, *Appx*. at 87 (Jennifer's proposed plan with markings by court). The court's narrative decree provides no explanation of the relocation portion of its decision, DIVORCE DECREE (Dec. 5, 2006), *Appx*. at 95, and no relevant findings or rulings were made.

David filed a motion to reconsider on the issue. In it he noted the differences between the decreed and the statutory parenting plans, complained about the ability of Jennifer to move his children without a hearing, noted that a move of 20 miles would impact his parenting time and his ability to attend his children's activities and events which might be even further away, pointed out that a 20 mile radius of the marital home includes places in Massachusetts, and voiced his dismay at being "completely blindsided" by Jennifer's trial-day proposal without prior notice. David's MOTION FOR RECONSIDERATION ON RELOCATION PROVISION (Jan. 29, 2007), *Appx*. at 98. Jennifer objected to the motion but also suggested that the radius be reduced to 15 miles. PETITIONER'S OBJECTION TO RESPONDENT'S MOTION FOR RECONSIDERATION ON RELOCATION PROVISION AND PETITIONER'S ANSWER TO RESPONDENT'S MOTION FOR RECONSIDERATION OF RELOCATION PROVISION (Feb. 1, 2007), *Appx*. at 103. The court affirmed its decree on the matter without changes.

Finally, the parties entered an amended agreed-upon parenting plan incorporating the court's order, but noting David's disagreement with the relocation provision. Parties *AMENDED* PARENTING PLAN (Mar. 12, 2007) at ¶F, *Appx*. at 107.

This appeal followed.

SUMMARY OF ARGUMENT

David Lafond provides a detailed chronology of the documentary and in-court record with a focus on when and where in the record relocation was raised, and pointing out that it first became an issue only moments before trial began.

He then reviews the law regarding notice of issues to be adjudicated, and argues that he received notice too late to adequately prepare for trial on the matter. Because of this he asks that the portion of the decree relative to relocation be vacated.

Mr. Lafond also points out that beyond Jennifer's testimony that "it would be nice" to avoid a hearing in the event of relocation, there is no evidence supporting the court's deviation from New Hampshire's relocation statute. Accordingly he argues that the court exercised its discretion unsustainably, and that the relocation portion of the decree should be vacated.

ARGUMENT

I. David Did Not Get Sufficient Notice of the Relocation Issue

New Hampshire law entitles litigants to notice of the issues that a court will address at a hearing. "The purpose of a notice requirement is to inform the recipient of the character of a proposed action so that he can prepare adequately for the hearing." *Appeal of Clement*, 124 N.H. 503, 506 (1984) (quotations and citations omitted). For this reason this Court has admonished that "[n]otices furnished by our courts to counsel and parties should make clear what is to be heard or considered." *V. S. H. Realty, Inc. v. City of Rochester,* 118 N.H. 778, 781 (1978).

A general notice of hearing is not sufficient; it must be specific as to the exact issues the court will hear. "In the divorce context, notice to the parties must give the defendant actual notice of the hearing and the issues to be addressed." *Douglas v. Douglas*, 143 N.H. 419, 423 (1999). This Court has stated that notice must "give the [respondent] actual notice *of the issue* and the hearing." *Duclos v. Duclos*, 134 N.H. 42, 45 (1991) (emphasis in original), *quoting Morphy v. Morphy*, 112 N.H. 507, 510 (1972). In *Morphy*, for instance, this court held that notice of a "contempt hearing" was insufficient to allow a ruling on support.

An opportunity to cross-examine on a non-noticed issue does not cure lack of notice. *Reardon v. Lemoyne*, 122 N.H. 1042, 1051 (1982) (although court heard evidence which "occasionally strayed from the subject matter of the [noticed] motion into the merits of the dispute," door was not opened to a hearing on the merits). These rules are well-established. *See e.g., Kimball v. Fisk*, 39 N.H. 110 (1859); *Spengler v. Porter*, 144 N.H. 163, (*Brock*, C.J., dissenting; citing federal law).

When a court reaches an issue without adequate notice, its order regarding the non-

noticed issue must be vacated. *See e.g.*, *Morphy*, 112 N.H. at 511; *V. S. H. Realty*, 118 N.H. at 782.

In Jennifer and David Lafond's case, relocation was not mentioned in any pleading, nor in the two pre-trial hearings. It is not mentioned anywhere in the record until just moments before trial. David knew that the parties' *parenting plan* would be reached during the trial. But because the parties had before stipulated that the relocation statute, RSA 461-A:12, would govern their conduct, he had no notice that a differing relocation plan was a pending matter for adjudication.

Had David had notice that relocation would be an issue, he might have produced evidence tending to show that a 20-mile relocation is not *de minimis*. He might have produced a map showing the number of communities within a 20-mile radius and the amount of time it takes to drive from them to the marital house. He might have produced witnesses able to testify regarding the efforts David made to ensure he lived as close to his children as possible. He might have produced evidence tending to undermine Jennifer's claim that during their marriage the parties discussed moving from Manchester. Whatever the nature of the evidence he might have produced, he would have been prepared to contest the issue.

Jennifer's proposed parenting plan with the surprise relocation language was given to him literally within minutes of the commencement of trial. In the chronology of litigation to that point, there was no motion requesting a relocation plan different than the default plan set forth in the statute. It is thus not remarkable that, either by purposeful design or mere neglect, he was "completely blindsided" by the proposal. David's MOTION FOR RECONSIDERATION ON RELOCATION PROVISION (Jan. 29, 2007), *Appx.* at 98. Even if a party's proposed parenting plan

can be construed as a motion,[3] it didn't provide sufficient notice so that David could "prepare adequately for the hearing." *Appeal of Clement*, 124 N.H. at 506.

Accordingly, this Court must vacate the trial court's decree regarding relocation.

Because the relocation statute provides that it is the state's default relocation plan when a stipulation or decree "does not expressly govern the relocation issue," RSA 461-A:12, I, the terms of the statute should be deemed to control.

[3]Jennifer testified that she was "asking for a 20-mile radius from where both David and I currently live." But there is no formal request in the record. Requests to the court must be by motion. *See* SUPER.CT.R. 4-6, 57; DIST.CT.R. 1.8A ("Any request for action by the Court shall be by motion."); *Melendez v. United States*, 518 U.S. 120, 126, (1996) ("[T]he term 'motion' generally means '[a]n application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant.'"). A parenting plan is not, however, a motion. Rather it is among the "Required Documents" that must be filed in all Domestic Relations cases. SUPER.CT.R. 196-203; SUPER.CT.R. 202-A (I) ("Parenting plans shall be filed in all divorce and legal separation actions where there are minor children, and in all parenting actions."). It is thus doubtful that Jennifer ever made a "motion" regarding the relocation issue. If not, her testimony was in error, and the court essentially acted *sua sponte*.

II. No Evidence to Support Court's Deviation From Relocation Statute

This Court affirms factual determinations of divorce courts if the evidence in the record supports the finding. *In re Hampers*, 154 N.H. 275, 279 (2006). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* N.H.R.EVID. 401.

The only item that can be termed "evidence" that the court heard on Jennifer's relocation proposal was her response to a single question, when she said: "I'm asking for a 20-mile radius from where both David and I currently live. In our marriage we had talked about moving outside of the city, and I don't have any immediate plans to move but it would be nice to not have to come back to court to get permission to move." *Trl.Trn.* at 36.

Thus the only "evidence" offered by Jennifer was that "it would be nice" to avoid a hearing. "It would be nice, however," does not have "any tendency to make the existence of any fact … more probable." It appears, therefore, that Jennifer offered no evidence on the relocation matter.

Given that the parties stipulations assumed the relocation statute would govern, that David was blindsided regarding the morning-of-trial proposal, the lack of any formal request for the proposal, and the dearth of evidence supporting it, it is apparent that the trial court's discretion was unsustainably exercised in awarding Jennifer a deviation from the relocation statute.

This court should thus vacate that portion of the decree concerning relocation, and deem that the terms of the statute, RSA 461-A:12, control the matter between Jennifer and David.

CONCLUSION

In accord with the foregoing, David Lafond respectfully requests that this Honorable Court vacate the lower court's decree regarding relocation, and order that the parties be governed by the terms of the relocation statute, RSA 461-A:12.

Respectfully submitted,

David Lafond
By his Attorney,

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Dated: September 24, 2007

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for David Lafond requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the relocation statute is new (effective only since October 2005) and has not before been construed by this Court.

I hereby certify that on September 24, 2007, copies of the foregoing will be forwarded to Kathleen A. Hickey, Esq., counsel for Jennifer Lafond; and Kathleen Earnshaw, Esq., GAL.

Dated: September 24, 2007

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