State of New Hampshire
Supreme Court

NO. 2014-0615

2015 TERM

FEBRUARY SESSION

In the Matter of

Robert P. Stack, Jr. and Kerry Stack

RULE 7 APPEAL OF FINAL DECISION OF THE
DERRY FAMILY DIVISION

OPENING BRIEF OF ROBERT P. STACK, Jr.

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QUESTIONS PRESENTED

I. Kerry receives as an employment benefit a program called "Choice Pay," a cafeteria style plan which may be applied to a range of benefits. Did the court err in not considering "Choice Pay" as income for child support purposes?

Preserved: PETITIONER'S SUPPLEMENTAL MEMORANDUM ¶¶ 3-15 (June 13, 2014), *Appx*. at 109.

II. By requiring Robert to reimburse Kerry for costs associated with his healthcare coverage, did the court neglect to consider this portion of "Choice Pay" as income?

Preserved: PETITIONER'S MOTION TO RECONSIDER AND CLARIFY ¶¶ 28-29 (Aug. 1, 2014).

III. Did the court err in addressing ownership and value of motor vehicles when these matters were stipulated by the parties?

Preserved: RESPONSE/OBJECTION TO RESPONDENT'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION ¶¶ 8-9 (Jan. 17, 2014), *Appx*. at 23; PROPOSED TEMPORARY ORDER ¶ 8 (Oct. 29, 2013); PROPOSED FINAL ORDER ¶ 9 (May 5, 2014), *Appx*. at 48; PROPOSED FINAL ORDER ¶ 9 (June 5, 2014), *Appx*. at 80.

IV. Did the court err in not awarding Robert child support when he makes almost one-third of Kerry's salary, or about $6,000 less per month, but he has an equal need to house and feed the children?

Preserved: PETITIONER'S SUPPLEMENTAL MEMORANDUM ¶¶ 18-30 (June 13, 2014), *Appx*. at 117; PETITIONER'S MOTION TO RECONSIDER AND CLARIFY ¶¶ 10-21 (Aug. 1, 2014), *Appx*. at 137.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Marriage, Children, Separation, Stipulation to Some Issues, Divorce

Kerry Stack and Robert P. Stack, Jr.[1] were married in 2000. They have four children ranging from two to eleven years old. DIVORCE DECREE (July 21, 2014) at 1, *Appx*. at 124; *Trial Trn*. at 9. Kerry is an "information security specialist" at a Massachusetts-based hospital system, and earns about $125,000 per year. Robert is a "production specialist" at a company that makes high-tech nano-spraying equipment in northern Massachusetts, and earns about $50,000 per year. KERRY'S FINANCIAL AFFIDAVIT (June 5, 2014), *Sealed Appx*. at 232; ROBERT'S FINANCIAL AFFIDAVIT (June 5, 2014), *Sealed Appx*. at 236; TAX RETURNS FOR ROBERT STACK AND KERRY STACK (Resp. Exh. B) (Dec. 31, 2012) (in record but not included in appendix); TAX RETURNS FOR ROBERT STACK (Resp. Exh. A) (Dec. 31, 2013) (in record but not included in appendix); *Trial Trn*. at 118, 121-22. Kerry earns "more than twice what Robert earns." TEMPORARY ORDER (Jan. 2, 2014) at 1, *Appx*. at 14. Both live in Derry, New Hampshire. *Trial Trn*. at 12.

Kerry and Robert separated in 2012 after an incident of domestic violence. TEMPORARY ORDER (Jan. 2, 2014) at 1, *Appx*. at 14; *Trial Trn.* (June 5, 2014) at 87.[2] While Kerry initially wanted custody of the children, during litigation she and Robert stipulated to a parenting plan, which the court approved, wherein they enjoy equal parenting time. RESPONDENT'S ANSWER AND CROSS-PETITION FOR DIVORCE (Mar. 29, 2013) at 4, *Appx*. at 6; STIPULATED PARTIAL

[1]Because of their shared cognomen, Kerry Stack and Robert Stack are referred to herein by their forenames. No disrespect is intended.

[2]Kerry admitted she threw the first punch, although Robert was arrested and ultimately convicted of a violation-level mutual consent assault. *See* RSA 631:2-a, II. TEMPORARY ORDER (Jan. 2, 2014) at 1, *Appx*. at 14; *Trial Trn.* (June 5, 2014) at 86-87; *Crim.Trial Trn.* (Sept. 24, 2013) at 13 (not included in appendix) (Q: "You pushed him first?" A: "Yes."). There was also a domestic violence proceeding, later dismissed, and in the divorce case the parties agreed to a mutual restraining order. AGREEMENT ¶¶ 1-2 (Jan. 21, 2014), *Appx.* at 26.

PARENTING PLAN (June 5, 2014), *Appx*. at 99; *Trial Trn*. at 146; DIVORCE DECREE (July 21, 2014) at 1, 3, *Appx*. at 124. The GAL reported that both are good and involved parents with positive values. *Trial Trn.* (June 5, 2014) at 12, 39, 45, 54; GAL REPORT (Apr. 28, 2014), *Sealed Appx*. at 239.

Kerry and Robert agreed to no alimony. PRETRIAL STATEMENT (May 5, 2014), *Appx*. at 32 (Kerry's proposals) PROPOSED FINAL ORDER (May 5, 2014), *Appx*. at 36 (Robert's proposals). They agreed how to split some financial assets, but others were resolved by the court. PARTIALLY STIPULATED FINAL DECREE (June 5, 2014), *Appx*. at 73; DIVORCE DECREE ¶¶ 11-15 (July 21, 2014), *Appx*. at 124.

Ultimately the Derry Family Division (*Margaret-Ann Moran*, J.) granted a divorce on irreconcilable differences. DIVORCE DECREE (July 21, 2014), *Appx*. at 124.

II. Kerry's "Choice-Pay" Benefit Package

As part of her compensation package, Kerry enjoys a benefit her company calls "Choice-Pay," whose value is calculated as a dollar minimum, plus a percentage of the employee's pay. STAFF BENEFITS, PARTNERS HEALTHCARE SYSTEM, INC. (2014) at 2 (attached as Exhibit A to RESPONDENT'S SUPPLEMENTAL MEMORANDUM (June 11, 2014)), *Appx*. at 155. The employee can take that amount "as taxable pay or use [it] to purchase a wide variety of other benefits," such as dental or vision care, retirement savings, etc. STAFF BENEFITS at 1; *Trial Trn.* at 155. The company requires employees have medical insurance, STAFF BENEFITS at 7, 10, for which a spouse and children are eligible. STAFF BENEFITS at 3. After that mandate, however, the company literature promises:

> If you have Choice Pay left over, … you may take these remaining Choice Pay dollars as additional taxable pay each payday," [o]r you may apply your remaining Choice Pay toward the cost of other benefits.

STAFF BENEFITS at 2. The company pamphlet promotes the "tax advantage" of taking Choice Pay as benefits rather than income because income is taxable whereas benefits are not. STAFF BENEFITS at 5.

In 2014, Kerry's "Choice Pay dollars" added up to $1,872.51 per month. RESPONDENT'S SUPPLEMENTAL MEMORANDUM ¶7 (June 11, 2014), *Appx*. at 109; 2014 PERSONAL BENEFITS SUMMARY, (attached as Exhibit B to RESPONDENT'S SUPPLEMENTAL MEMORANDUM (June 11, 2014)). That year, Kerry applied her entire Choice Pay to benefits, and took none as taxable income. RESPONDENT'S SUPPLEMENTAL MEMORANDUM ¶10 (June 11, 2014), *Appx*. at 109. Robert argued that because Choice Pay is discretionary to take as regular income, all Kerry's Choice Pay dollars beyond mandated health insurance is liquid and thus must be treated as income for purposes of child support. PETITIONER'S SUPPLEMENTAL MEMORANDUM ¶¶ 3-15

(June 13, 2014), *Appx*. at 109. The court neglected, however, to count Kerry's Choice Pay benefit as "income" for the support calculation.

After their split, Robert continued to be covered under the family healthcare plan Kerry purchased through Choice Pay. The court ordered that if insuring Robert incurs a Choice Pay expenditure by Kerry, Robert is to reimburse her that amount, which it found was $123 per week. PETITIONER'S MOTION TO RECONSIDER AND CLARIFY ¶¶ 28-29 (Aug. 1, 2014), *Appx*. at 137; DIVORCE DECREE (July 21, 2014) at 4, *Appx*. at 124; ORDER ON MOTIONS FOR RECONSIDERATION AND CLARIFICATION (Aug. 21, 2014), *Appx*. at 151. Robert argued that the reimbursement amount, because it displaces what would otherwise be Kerry's earned income, should be regarded as Kerry's income for calculating child support. PETITIONER'S MOTION TO RECONSIDER AND CLARIFY ¶¶ 28-29 (Aug. 1, 2014).

III. Honda Pilot, Chevy Impala, Jeep Wrangler

Kerry and Robert own three cars, only one of which – the Honda Pilot – is large enough to transport all four children. PROPOSED TEMPORARY ORDER ¶ 8 (Oct. 29, 2013). During the marriage, although they exchanged it as necessary, the parties agreed that because Robert was generally the parent who did most of the transporting, he usually drove the Honda. RESPONSE/OBJECTION TO RESPONDENT'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION ¶ 7 (Jan. 17, 2014), *Appx*. at 23; *Trial Trn.* at 145.

Kerry initially wanted the Honda Pilot, arguing that when he left on the day of separation – without any children – Robert drove the Chevy Impala. RESPONDENT'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION ¶¶ 3-7 (Jan. 13, 2014), *Appx*. at 19; RESPONDENT'S AMENDED MOTION FOR RECONSIDERATION AND-OR CLARIFICATION ¶¶ 5-6 (Jan. 21, 2014), *Appx*. at 29. Later she determined it was best that Robert get the Honda Pilot, and that she take the other two cars. PROPOSED TEMPORARY DECREE ¶8 (Oct. 29, 2013); PROPOSED FINAL DECREE ¶9 (May 5, 2014), *Appx*. at 39; PROPOSED FINAL DECREE ¶9 (June 4, 2014), *Appx*. at 64.

Robert initially proposed passing the Honda Pilot back and forth to the custodial parent along with the children, but later suggested it should be his and that Kerry should get the other cars, noting that after separation his income is not sufficient for him to buy a car big enough to carry the children, but that Kerry's is. RESPONSE/OBJECTION TO RESPONDENT'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION ¶¶ 8-9 (Jan. 17, 2014), *Appx*. at 23; PROPOSED TEMPORARY ORDER ¶ 8 (Oct. 29, 2013); PROPOSED FINAL ORDER ¶ 9 (May 5, 2014), *Appx*. at 48; PROPOSED FINAL ORDER ¶ 9 (June 5, 2014), *Appx*. at 80.

In their partial property settlement, Kerry and Robert reached an agreement on the vehicles:

> Kerry is awarded the 2007 Chevy Impala + Jeep Wrangler *free and clear* of any interest of Robert. Robert is awarded the 2008 Honda Pilot *free and clear* of any interest of Kerry.

PARTIALLY STIPULATED FINAL DECREE ¶ 9 (June 5, 2014), *Appx*. at 73 (emphasis added).

The court found the 2009 Honda Pilot is worth $14,000; the 2007 Chevy Impala $5,000; and the 1996 Jeep Wrangler $2,000. DIVORCE DECREE ¶ 9 (July 21, 2014), *Appx*. at 124. It noted that the total value of the Chevy Impala and Jeep Wrangler, combined, is about half the value of the Honda Pilot.

The court awarded the cars as the parties agreed, but then – without regard to the "free and clear" language of the stipulation – ordered Robert to pay Kerry $7,000, which is to be accomplished by a shift of other assets. *Id.*

IV. No Child Support Despite Unequal Incomes

Finally, Kerry argued that because she agreed to pay some of the children's expenses, she should be relived of any child support obligation. *Trial Trn*. at 24, 58-59, 146-47; RESPONDENT'S OBJECTION TO PETITIONER'S MOTION TO RECONSIDER AND CLARIFY ¶¶ 6-11 (Aug. 13, 2014). Robert lives in an apartment small for a family of five. During the marriage, he was the parent who regularly took the children on outings and worked second shift to accommodate the children's needs. GAL REPORT (Apr. 28, 2014), *Sealed Appx*. at 239. Robert argued he should receive child support from Kerry because his need to house and feed the children is identical but his income is less than half of hers – 60 percent less – and because Kerry's child support obligation under the guidelines is greater than the costs she undertook. PETITIONER'S SUPPLEMENTAL MEMORANDUM ¶¶ 18-30 (June 13, 2014), *Appx*. at 117; PETITIONER'S MOTION TO RECONSIDER AND CLARIFY ¶¶ 10-21 (Aug. 1, 2014), *Appx*. at 137.

The court wrote:

> Although [Kerry] earns approximately $6,000 more per month than [Robert], and arguably could be required to pay $1,223 a month in child support to [Robert]. This obligation is off-set by her agreement to provide health insurance for the children, be responsible for 100% of the children's uninsured medical expenses, be 100% responsible for the cost of all agreed-upon extracurricular activities, be 100% responsible for the children's school supplies, as the school dictates, and provide all of the children's clothes and shoes that are agreed to by the parties. The children's tuition, lessons, sports and dance competitions and fees alone total $624 per month. Clothing is an additional $100 per month and daycare $1,100 per month. The cost [Kerry] has agreed to be responsible for compensates for the discrepancy in income.

DIVORCE DECREE (July 21, 2014) at 3-4, *Appx*. at 124 (cents omitted) Consequently the court ruled "neither party shall pay child support to the other." *Id.* at 3.

SUMMARY OF ARGUMENT

Robert first describes Kerry's "Choice Pay" employment benefit, noting that it is part of her compensation package and that she has the option of taking it as regular pay. He then argues it is therefore not "in-kind" income, but regular income that should be figured into the court's child support calculation.

Robert then points out that the court required him to reimburse Kerry for the cost she incurs for keeping him covered on her health insurance plan, and that the amount of the reimbursement represents income which should also be figured into the court's child support calculation.

Robert describes the stipulation he entered with Kerry, which distributed their three automobiles between them. He argues that because the stipulation included the language "free and clear of any interest" of the other, the fact that the cars had differing values was recognized by the parties in their bargain, and that it was error for the court to equalize the values by shifting other assets.

Finally, while Robert recognizes Kerry pays expenses on behalf of the children given her much greater income, he is required to house and feed them half of the time, and argues that there are no "special circumstances" to justify denying him any child support whatsoever.

ARGUMENT

I. Kerry's Choice Pay Benefit Should be Included as Income for Calculating Child Support

Kerry's Choice Pay is income for purposes of child support because it meets the two conditions this Court has said are necessary for an employment benefit to be included in the support calculation: Kerry has a right to it, and it is payable to her in money.

For purposes of calculating child support, the court is required to consider the obligor's "gross income," which is defined as

> all income from *any source*, whether earned or unearned, *including, but not limited* to, *wages, salary*, commissions, tips, annuities, social security benefits, trust income, lottery or gambling winnings, interest, dividends, investment income, net rental income, self-employment income, alimony, business profits, pensions, bonuses, and payments from other government programs.

RSA 458-C:2, IV (emphasis added).[3]

Here Kerry's Choice Pay benefit is contemplated by the items listed in the statute. It is

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[3]The statute provides in full:

> "Gross income'' means all income from any source, whether earned or unearned, including, but not limited to, wages, salary, commissions, tips, annuities, social security benefits, trust income, lottery or gambling winnings, interest, dividends, investment income, net rental income, self-employment income, alimony, business profits, pensions, bonuses, and payments from other government programs (except public assistance programs, including aid to families with dependent children, aid to the permanently and totally disabled, supplemental security income, food stamps, and general assistance received from a county or town), including, but not limited to, workers' compensation, veterans' benefits, unemployment benefits, and disability benefits; provided, however, that no income earned at an hourly rate for hours worked, on an occasional or seasonal basis, in excess of 40 hours in any week shall be considered as income for the purpose of determining gross income; and provided further that such hourly rate income is earned for actual overtime labor performed by an employee who earns wages at an hourly rate in a trade or industry which traditionally or commonly pays overtime wages, thus excluding professionals, business owners, business partners, self-employed individuals and others who may exercise sufficient control over their income so as to recharacterize payment to themselves to include overtime wages in addition to a salary.

RSA 458-C:2, IV.

"income" from "any source" and is part of Kerry's "wages" and "salary."

Even if not implicated by those specific words, by using the phrase "including, but not limited to," the statute is construed to mean similar sources. *In re Clark*, 154 N.H. 420, 423 (2006) ("When the legislature uses the phrase 'including, but not limited to' in a statute, the application of that statute is limited to the types of items therein particularized."); *In re Hennessey-Martin*, 151 N.H. 207, 211 (2004) ("The principle of *ejusdem generis* provides that, where specific words in a statute follow general ones, the general words are construed to embrace only objects similar in nature to those enumerated by the specific words."). The Choice Pay dollars to which Kerry is entitled, because they are takable as cash, are functionally identical to "wages, salary, commissions, tips," etc., and thus are intended by the statute as "gross income."[4]

In contrast, this Court has defined *in-kind* benefits – which are not regarded as income.

In *In re Clark*, 154 N.H. 420 (2006), the obligor lived in his employer's home for nominal rent and used his employer's vehicle. In determining whether these in-kind benefits were income for child support calculation, this Court held:

> [T]he items particularized in RSA 458-C:2, IV share two characteristics. First, they are payable in money, and second, they are things that, as a general matter, the recipient has a legal right to obtain and which the provider has a legal obligation to give.

Clark, 154 N.H. at 423, *citing In re Fulton*, 154 N.H. 264, 267 (2006). Because in *Clark* the benefits were "in-kind" – that is, "not paid in money" – their treatment was in the discretion of the trial court. *Id.* at 424.

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[4]This Court has found a wide variety of types of income includable in the child support calculation. *See, e.g., Matter of Maves*, 166 N.H. 564 (2014) (capital gains from sale of condominiums); *In re LaRocque*, 164 N.H. 148 (2012) (life insurance proceeds); *In re State ex rel. Taylor*, 153 N.H. 700 (2006) (personal injury settlement); *In re Hennessey-Martin*, 151 N.H. at 207 (adoption subsidy); *In re Feddersen*, 149 N.H. 194 (2003) (settlement from patent infringement lawsuit); *In re Crowe*, 148 N.H. 218 (2002) (alimony); *In re Dolan*, 147 N.H. 218 (2001) (exercised stock options).

Here, Kerry's Choice Pay benefit meets both of *Clark*'s conditions.

First, Choice Pay is part of Kerry's employer's regular company compensation package. She has a "legal right to obtain it," and her employer has a "legal obligation to give" it. Second, Choice Pay is "payable as money" because if Kerry were to not spend her "Choice Pay dollars" on benefits, it would be paid to her as regular income.

Accordingly, Choice Pay is not an "in-kind" benefit.

Rather, it is similar to the cash benefit in *In re Sullivan*, 159 N.H. 251 (2009), where this Court applied the *Clark* test. In *Sullivan,* the obligor had borrowed money from his employer, who later forgave a portion of the loan. This Court held that "[u]nlike in-kind benefits, employees may use a forgiven loan as 'an equivalent' of money. *Sullivan*, 159 N.H. at 255. The amount forgiven was thus income for purposes of calculating child support.

Many courts, under a variety of statutory schemes, have held that the value employees enjoy from such "cafeteria" or "flexible-benefit" plans are income for calculating child and spousal support. *See, e.g.*, *Wood v. Wood*, 1996 WL 563762 (Ark. Court. App. Oct. 2, 1996) (company's contribution to employee pension plan was includable as income for purposes of calculating child support); *Marriage of Cardona & Castro*, 321 P.3d 518 (Colo. App. 2010) *aff'd on other grounds*, 316 P.3d 626 (court properly counted as income for child support "the amount he pays into his employer's cafeteria plan"); *Pierce Gardner v. Gardner*, 2006 WL 1681231 (Conn. Super. Court. June 6, 2006) (parties must furnish information regarding cafeteria plan as documentation of income for child support); *K.G.K. v. M.M.K.*, 2009 WL 285137 (Del. Fam. Court. Jan. 7, 2009) (flexible spending plans treated as available income for child support); *Welch v. Welch*, 22 So. 3d 153 (Fla. Dist. Court. App. 2009) (benefit paid to retirement plan was income for purposes of calculating alimony); *Jacobsen v. Jacobsen*, 1999 WL 33437816 (Mich.

Court. App. Aug. 17, 1999) (flexible benefit plan includable as income for purposes of calculating spousal support); *Heckman v. Heckman*, 422 S.W.3d 336 (Mo. Court. App. 2013) (pre-tax "flex plan benefits" appropriately considered income for calculating child support); *Miller v. Miller*, 184 S.W.3d 174 (Mo. Court. App. 2006) (court could hear evidence to determine if "flex plan" benefits on pay stub includable as income for child support); *Fulton v. Adams*, 924 S.W.2d 548 (Mo. Court. App. 1996) (husband's pre-tax "flex plan" benefits could be included as income on child support guidelines worksheet); *Cushman v. Cushman*, 2014 WL 3720239 (Neb. Court. App. July 29 2014) (court properly considered contribution to cafeteria plan to determine income for calculating child support); *Marriage of Brownell*, 97 Wash. App. 1027 (1999) (wife's income included payment to cafeteria plan); *Stevens v. Stevens*, 318 P.3d 802 (Wyo. 2014) (court properly counted as income for child support amount father contributed to "flex benefit plan"). *Cf. Egan v. Egan*, 244 P.3d 1045 (Wyo. 2010) (child support statute did not recognize flex plan contributions as allowable deduction from income).

Here the family court's denial of child support was based on a calculation that did not include the Choice Pay benefit. Had it been included, the calculation would have been different, resulting in a higher guidelines support figure.

As this is an issue of statutory interpretation, this Court reviews it *de novo, Clark*, 154 N.H. at 422, and should find that the family court erred by neglecting to count Kerry's Choice Pay benefit in its child support calculation.

Remand for recalculation may be necessary. This Court has suggested, but not decided, that the cost of health insurance is not counted as income. *In re Fulton*, 154 N.H. 264, 267 (2006) ("For example, [the statute] it does not include real or personal property, nor benefits such as health insurance or employer contributions to a retirement plan."); *In re Regan*, 164 N.H. 1, 5-6

(2012) (construing medical support obligation). Depending upon her situation, some portion of Kerry's Choice Pay dollars may be mandated to go toward Robert's health insurance.

II. The Health Insurance Reimbursement Robert Pays Kerry Should be Included as Income for Calculating Child Support

Choice Pay represents a fixed amount of money, which Kerry can spend in a variety of ways. She can take it as a benefit (not income), or as pay (income).

By keeping Robert on the family health insurance plan which Kerry purchases through Choice Pay, it decreases the amount Kerry can take as pay. The amount of the decrease is the extra cost of keeping Robert on the plan. The court ordered Robert to reimburse Kerry that amount, thus refunding her for the potential decrease in her income, and restoring her income to the level it would have been had the purchase-refund scheme never occurred. This makes Kerry's income higher by that amount.

The court did not recognize this math. Thus Kerry's income is $123 per week higher than the number the court used to calculate child support. Had the reimbursement been included, the calculation would have been different, resulting in a higher guidelines support figure. Review is *de novo, Clark*, 154 N.H. at 422, and this Court should remand for recalculation. *See In re Arabian*, 151 N.H. 109, 112 (2004).

III. The Court Should Not have Equalized the Values of Cars When the Matter Was Stipulated

In their stipulation regarding who should get which car, Kerry and Robert agreed:

> Kerry is awarded the 2007 Chevy Impala + Jeep Wrangler *free and clear* of any interest of Robert. Robert is awarded the 2008 Honda Pilot *free and clear* of any interest of Kerry.

PARTIALLY STIPULATED FINAL DECREE ¶ 9 (June 5, 2014), *Appx*. at 73 (emphasis added).

Unlike alimony, child support, and pre- and post-nuptial agreements,[5] property awards are essentially permanent; the court does not retain jurisdiction; and the state has no special interest in them.

Where the intentions of the stipulating parties are clear, divorce stipulations are enforced, *Leighton v. Leighton*, 122 N.H. 721, 722 (1982); *Stebbins v. Stebbins*, 121 N.H. 1060, 1064 (1981), especially where the divorcing parties, as here, have attorneys. *Leighton*, 122 N.H. at 722. As long as the value of property has been disclosed, divorce stipulations regarding property must be respected. *Shafmaster v. Shafmaster*, 138 N.H. 460 (1994) (stipulation set aside where value concealed by party). Divorce stipulations regarding ownership of vehicles are construed according to their intent. *Sommers v. Sommers*, 143 N.H. 686, 692 (1999). "The interpretation of … contract language, is ultimately an issue of law for this court to decide." *See, Marikar v. Peerless Ins. Co.*, 151 N.H. 395, 397 (2004).

The court found, and no one disputes, that the Honda Pilot is worth about double the

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[5]Stipulations regarding alimony are not binding on the court "because an alimony award is always modifiable." *Laflamme v. Laflamme*, 144 N.H. 524, 527 (1999); *Norberg v. Norberg*, 135 N.H. 620, 622 (1992); *Morphy v. Morphy*, 112 N.H. 507, 509 (1972). Likewise, stipulations regarding "child custody and visitation orders are not contractual in nature" because "the court has continuing jurisdiction to modify arrangements in the best interests of the child." *Chandler v. Bishop*, 142 N.H. 404, 411 (1997). Similarly, although pre- and post-nuptial agreements have a "presumption of validity," because "[u]nlike parties to a commercial contract … spouses are traditionally regarded as fiduciaries of one another, and, therefore, often do not enter into agreements from arm's length," "the State has a special interest" in them and "courts scrutinize them more closely than ordinary commercial contracts." *In re Estate of Wilber*, 165 N.H. 246, 251 (2013).

value of the Chevy Impala and the Jeep Wrangler combined.

Given the respective ages and sizes of the three cars, that they were purchased and regularly driven by both parties, and the fact that both initially wanted the bigger newer Honda Pilot – their differing values is obvious, and thus disclosed.

By reversing her position – from first demanding the Honda Pilot to eventually allowing Robert to have it "free and clear" – Kerry demonstrated her interest in ensuring Robert had safe and adequate transportation for all the children, and also her understanding that Robert was less able to afford another big-enough car.

As made clear by their stipulation – "free and clear of any interest of Kerry" – the parties did not bargain for the *value* of the cars, but bargained for the cars themselves. By using the phrase, they recognized the unequal values of the cars, that they were being distributed between the parties despite the differing values, that Robert would financially benefit to the extent of their unequal values, and that Kerry would benefit in knowing the children could be safely transported when in Robert's custody.

Nonetheless, although the court awarded the cars as the parties agreed, it used other assets to equalize their value, thereby undoing an explicit term of the divorce stipulation. The court erred in over-scrutinizing the contract and treating it as though it were an inherently modifiable support agreement rather than a bargained-for permanent property stipulation.

This Court should therefore enforce the stipulation, and remand for re-distribution of the vehicular property without equalization of value.

IV. There are No Special Circumstances to Justify Non-Payment of Child Support

The purpose of the child support guidelines is "to ensure uniformity in determining the amount of child support," and "to ensure that both the custodial and non-custodial parents share in the support responsibility for their children, according to the relative percentage of each parent's income." *In re Carr*, 156 N.H. 498, 501 (2007).

The guidelines are presumed to calculate the correct amount of child support. "The presumption may be overcome and the trial court may deviate from the guidelines when it is shown by a preponderance of the evidence that the application of the guidelines would be unjust or inappropriate because of "'special circumstances.'" *In re Baker*, 154 N.H. 186, 187 (2006).

"Special circumstances" are defined by statute. RSA 458-C:5. When parents have "[e]qual or approximately equal parenting residential responsibilities," RSA 458-C:5(h)(2), the court may consider "[w]hether … the parties have agreed to the specific apportionment of variable expenses for the children, including but not limited to education, school supplies, day care, after school, vacation and summer care, extracurricular activities, clothing, health insurance costs and uninsured health costs, and other child-related expenses," RSA 458-C:5(h)(2)(A), and "[w]hether … the income of the lower earning parent enables that parent to meet the costs of child rearing in a similar or approximately equal style to that of the other parent." RSA 458-C:5(h)(2)(B).

While Kerry agreed to pay some of the children's expenses, her child support obligation under the guidelines is greater than the costs she undertook. During the marriage, Robert was the parent who adjusted his career, and accompanied the children on outings and extracurricular activities. Robert's need to house and feed the children is identical to Kerry's, but his income is much less so that he cannot provide a "similar or approximately equal style" as Kerry.

There is nothing special about Robert and Kerry's circumstances. An imbalance of incomes is not unusual among divorcing spouses, nor is the ability of one parent to make more frequent or more expensive purchases for the children. Robert must maintain housing suitable for four children, and feed them half their meals.

Kerry makes $6,000 more per month than Robert, and under the guidelines should be subsidizing his child-rearing costs at a rate of $1,223 or more per month. The additional expenses Kerry has assumed, while admittedly beneficial to the children, do nothing to aid Robert with their room and board, and total less than the guidelines amount.

It both unjust and inappropriate to deny Robert any child support. Accordingly, this Court should remand for recalculation of child support with additional attention to Robert's inability to provide commensurate meals and lodgings.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand for reallocation of property and recalculation of child support.

Respectfully submitted,

Robert Stack
By his Attorney,

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Dated: February 24, 2015

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Robert Stack requests that his counsel, Attorney Joshua L. Gordon, be allowed 15 minutes for oral argument because the issues presented here regarding flexible employment benefits and enforcement of divorce stipulations are novel in this jurisdiction.

I hereby certify that the decision being appealed is addended to this brief. I further certify that on February 24, 2015, copies of the foregoing will be forwarded to Robyn A. Guarino, Esq., and to Anna L. Elbroch, Esq., GAL.

Dated: February 24, 2015

Joshua L. Gordon, Esq.

ADDENDUM