2012 WL 9320809 (N.H.) (Appellate Brief)
Supreme Court of New Hampshire.

In the Matter of Gabrielle MULLER and William Muller.

No. 2011-0736.
April Term, 2012.
April 23, 2012.

Appeal from Final Decree Issued By the 10th Circuit - Derry Family Division
Doreen Connor will represent the Appellant at Oral Argument

Brief of Appellant William Muller

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2.Whether the Circuit Court Judge unsustainably exercised his discretion when he awarded Petitioner 50% of the marital home equity, when she did not contribute toward the home's purchase and the parties separated after two years of marriage? (Motion to reconsider; Notice of appeal, issue 2).

3.Whether the Circuit Court Judge unsustainably exercised his discretion when he characterized the $86,332 payment made by the Respondent parents toward the marital home “as a gift to the Respondent” but refused to award that gift to Respondent when Respondent is legally liable on the $186,332 promissory note? (Motion to reconsider; Notice of appeal, issue 3).

4. Whether the Circuit Court Judge's finding that Respondent was voluntary underemployed is against the weight of the evidence and inconsistent with the Judge's earlier finding that Respondent was not voluntarily underemployed? (Motion to reconsider; Notice of appeal, issue 4).

STATEMENT OF CASE AND UNDERLYING FACTS

The parties were married on October 28, 2006 and have one child, Brooke, date of birth XX/XX/07. (Addendum, hereinafter "Add.", p. 32). The parties separated on December 24, 2008, approximately two years after they were married. *Id.*

The primary issues on appeal arise out of William Muller's purchase of a home at 30 Preston Way in Auburn, New Hampshire one month after the parties' ***2** marriage. (Trial Exhibit N, Appendix (hereinafter "App.", p.1). Mr. Muller purchased the Auburn property for $386,332.23. (Transcript, hereinafter "T", p.487, line 11). The $386,332.23 purchase was financed in part by a mortgage with Bank of America in the amount of $200,000. (T-486). The remaining $186,332.23 payment came from funds advanced to Mr. Muller by his parents. (T-488-489). Mr. Muller testified that his father loaned the couple $186,332.23 to purchase the home. (T-492).

Mr. Muller executed a November 22, 2006 Promissory Note with his parents concerning the loan, which was acknowledged on August 18, 2009. (T-493)(App,, p. 5). Mr. Muller testified that he would have been unable to purchase the residence in Auburn without his parents' loan. (T-497). Joan and Stan Muller's loan appears as cash to paid by William Muller on the closing settlement statement. (App.,p. 3). Mr, Muller testified that his father expected to be repaid the $186,332.23 which he contributed toward the purchase of the marital home. (T-496). Mr. Muller also identified the Mortgage Deed filed with the Rockingham County Registry of Deeds on October 14, 2009 against the property with respect to his parents' loan in the amount of $186,332.23. (T-497, App. 6-7). Mr. Muller confirmed that the Mortgage was filed with the Rockingham County Registry of Deeds before he was served with his wife's Petition for Divorce. (T-597). Mr. Muller was served with divorce papers on October 24, 2009. (Motion to Reconsider, App. p. 31).

***3** Gabrielle Muller testified that shortly before the couple's marriage, she owned a condominium which she sold at a loss. (T-335). Ms. Muller acknowledged she contributed nothing towards the purchase of the marital residence one month into the couple's marriage. (T-337-338). Ms. Muller acknowledged that her husband's father contributed $186,332.23 towards the purchase of the property. (T-339). Ms. Muller described the payment as a gift. (T-339).

The Circuit Court denied Petitioner's request for alimony in part because of the "relatively short term of the parties' marriage." (Add. p.38). After acknowledging the parties "short term" marriage, however, the Court failed to return the parties to the economic positions they held two years prior to the marriage and instead granted Petitioner's request that she receive 50% of the funds Mr. Muller's parents contributed toward the purchase of the marital home. (Add. p. 41).

The Court ordered the parties to sell the marital home. If further found that once the first mortgage was paid, the parties should realize approximately $180,000.00 in equity, i.e., those sums loaned to the couple by Mr. Muller's parents when the property was purchased. The Court order refused to recognize the senior Muller's right to the $186,332.23 secured by a Promissory Note and recorded Mortgage Deed.

Instead, the Court order mandates that the funds Joan and Stan Muller contributed toward the young couple's home be split among the divorcing couple, ***4** creating a $90,000 windfall to Petitioner following the parties' two year marriage. The senior Mr. and Mrs. Muller were not parties to this proceeding.

After the Court refused to recognize the enforceability of the **elder** Mullers' Promissory Note and Mortgage Deed, the Court characterized the $186,332.23 payment as "a gift to the Respondent." (Add. p. 43). Although Mr. Muller maintains that the payment is a valid debt as opposed to a gift, if this Court affirms the Circuit Court's factual findings, the Court unsustainably exercised its discretion when dividing that gift on a 50/50 basis to Ms. Muller in a two year marriage absent any testimony from Joan and Stan Muller regarding their donative intent to bestow $90,000 to the former wife of their son.

Finally, the Circuit Court found that Mr. Muller was voluntarily unemployed. (Add., p. 44). The Court's factual finding that Mr. Muller was voluntarily unemployed contradicts the Court's earlier finding that Mr. Muller was not voluntarily underemployed. After Mr. Muller was laid off from Matheson Tri-Gas, a business formerly owned by his parents, he filed a Motion to Modify Support. The Petitioner objected and claimed Mr. Muller was voluntarily unemployed. (App., p. 58). The Court denied the Petitioner's claim on a temporary basis pending its review of Mr. Muller's personnel file. (App. p. 58-59). After reviewing Mr. Muller's personal record the Court concluded that no further action was warranted, i.e. Mr. Muller was not voluntarily unemployed. (App., p. 62). The Court's contrary ruling at the time of trial is inconsistent and against the weight of the evidence.

***5** If this Court were to affirm the Circuit Court's voluntary unemployment finding there was no evidence to support the Court's decision to impute Mr. Muller's prior earnings in the amount of $68,000.00 to him. Neither party submitted evidence as to the alleged availability of jobs for which Mr. Muller was qualified with earnings similar to that previously paid by his family run business.

SUMMARY OF ARGUMENT

Approximately one month after the parties were married, the Respondent's parents loaned their son $186,332.23 as a down payment towards the purchase of what ultimately became the marital residence. That down payment is reflected in a Promissory Note between William Muller and his parents dated November 22, 2006, but acknowledged August 18, 2009. (App. p. 5). Stan and Joan Muller's financial investment is also reflected in a Mortgage Deed filed in the Rockingham County Registry on October 14, 2009, Book 5057, p.2858-2859. (App., p. 6-7). Although the Petitioner and Family Division questioned the **elder** Mullers' motive in formalizing their loan agreement in the fall of 2009, they did not dispute that Joan and Stan Muller contributed $186,332.23 towards the purchase of the marital home.

The duly recorded Mortgage Deed is presumptively valid. To contest or set aside that Deed, Petitioner must bring a Petition to Set Aside the Mortgage and jurisdiction over that dispute lies exclusively with the Superior Court. RSA 498:5-a. The Family Division had no subject matter jurisdiction to invalidate the ***6** Mortgage Deed held by Joan and Stan Muller, To determine the validity of that Deed, Joan and Stan Muller are necessary parties and yet the Family Division has no jurisdiction over Joan and Stan Muller. See RSA 490-D:2. The Family Court's order, which invalidates the Mortgage Deed held by Joan and Stan Muller, is invalid as the Family Court lacked subject matter jurisdiction to address the Deed's validity. The Order is also unconstitutional as it was issued without affording the **elder** Mullers due process as they were not and could not be parties to the underlying divorce action. N.H. Const. pt. I, arts. 2, 14, 15.

The Family Division's order seeks an illegal/impossible result in that it orders the parties to sell the marital home without discharging the **elder** Muller's recorded Mortgage Deed. The parties cannot convey clear title to a third party, without paying the outstanding Mortgage, and if they attempt to make that payment they are in violation of the Court Order. If the parties pay the Mortgage in order to obtain a discharge, there would be no funds to distribute as the only equity in the marital home is the $186,000 payment made by Joan and Stan Muller.

If the Court's Order invalidating the Muller's $186,000 Note and Mortgage Deed is affirmed, the Court unsustainably exercised its discretion when it awarded fifty percent of those funds to Petitioner after finding that the $186,000 payment was a gift from the **elder** Mullers to their son. The Court should have awarded the gift funds to Mr. Muller pursuant to RSA 458:16-a which recognizes the propriety ***7** of an unequal distribution in a short-term marriage and/or when the property being distributed was given to one party as a gift,

The Circuit Court also found that William Muller is voluntarily unemployed and capable of earning $68,000, This Order contradicts the Court's earlier order which found William was not voluntarily unemployed. It is also based upon Petitioner's claim that William was terminated “for cause” Termination for cause is an involuntary termination and does not justify the imputation of income under RSA 458-C. Finally, Mr. Muller contests the Court's decision to impute income to him at the rate of $68,000 per year. Petitioner presented no evidence that there were jobs available for which Mr. Muller was qualified that

would generate income in the amount of $68,000. Mr. Muller's prior earnings at this rate were paid by a company previously owned by his parents. Mr. Muller disputes that he is voluntarily unemployed, but even if that finding were upheld on appeal, there is no support in the record for the Court's finding that he could find employment with annual earnings similar to that enjoyed in a familial run business.

ARGUMENT

1. The Circuit Court committed legal error when it ordered the parties to disregard the $186,332.23 Promissory Note and 10/14/09 Mortgage Deed securing that Note held by the Respondent's parents.

The Circuit Court ordered the parties to place the former marital residence on the market for sale, (Add. p. 41). The Court order states that after payment of ***8** the first mortgage, taxes and closing costs "the net proceeds of the property shall be divided equally between the parties. In entering the aforementioned order, this *Court is entering a specific finding that it does not find the Respondent's representations that the parties agreed to a $180,000 loan from the Respondent's parents (in order to purchase the aforementioned property) to be credible."* (Add, p. 41)(emphasis added). In support of its decision the Court referenced the **elder** Mr. and Mrs. Muller's failure to attend the Final Hearing. (Add., p. 42). The Court also questioned the motives of the parties with respect to the Note and Mortgage concluding that Respondent's recording of the mortgage was an attempt to divest the marital residence of any equity. (Add, p. 41-42). Despite these findings, the Court did not dispute that the senior Muller's contributed $186,332.23 toward the marital home purchase nor did it address how the marital home could be sold without a release of the duly recorded Mortgage Deed arising out of the $186,332.23 payment made by Joan and Stan Muller.

The Circuit Court lacked jurisdiction to invalidate Joan and Stan Muller's Mortgage Deed and Promissory Note. *In re Mallet and Mallet*, N.H.__ (January 13, 2012), this Court specifically rejected arguments that the Family Division of the Circuit Court had jurisdiction under RSA 490:D-3 to partition and or order the sale of real estate jointly owned by unmarried parents. In doing so, this Court noted that the Family Division of the Circuit Court is a court of limited jurisdiction that has no subject matter jurisdiction over matters involving real estate among unmarried parties. Based upon this Court's ruling in *Mallet*, the ***9** Derry Family Division lacked subject matter jurisdiction to address the legal interests of Joan and Stan Muller under the Mortgage Deed filed in the Rockingham County Registry of Deeds.

Mr. and Mrs. Muller's rights with respect to that Mortgage Deed must be litigated in the Superior Court as the Superior Court has exclusive jurisdiction over disputes involving real estate among non-married parties. *Compare* RSA 490-D:2, 498:5-a. Under RSA 498:5-a, Gabrielle Muller could have filed a petition to quiet title to challenge the validity of Joan and Stan Muller's Mortgage Deed. RSA 498:5-a provides in pertinent part that an action may be brought in Superior Court by "any person claiming title to, or any interest in, real or personal property... against any person who may claim. any interest in the same, or any lien or encumbrance thereon, adverse to the plaintiff..." Petitioner's challenge to the **elder** Muller's recorded Mortgage interests falls expressly within the jurisdiction of the Superior Court as part of its equity powers over real property disputes among non-married parties.

The Family Division Order which seeks to abolish Stan and Jan Muller's right to recover their $186,332.23 down payment when the Preston Way, Auburn property is sold is not binding upon Stan and Jan Muller as they were not parties to this proceeding, nor could they be, since the Family Division has no jurisdiction to adjudicate their rights under RSA 490-D. It is well settled law that "a necessary party who has not been named as a party to the action is not bound by the judgment." *Porter v. Coco* 154 N.H. 353, 357 (2006). Necessary parties are ***10** those "who have an interest in the subject-matter of the suit and whose rights may be concluded by the judgment." *Id.*

Although the Petitioner could have filed an action to challenge Joan and Stan Muller's Mortgage and Promissory note in the Superior Court, to which the **elder** Mullers could be joined as parties under the New Hampshire long arm statute, she instead asked the Family Division to enter an order invalidating the **elder** Muller's interests. The Family Division order purporting to invalidate the $186,332.23 interest which Joan and Stan Muller secured with a mortgage upon the marital residence is not

binding upon them as Joan and Stan Muller are necessary parties to any proceeding that seeks to set aside or invalidate that financial investment. *Accord, Castagnaro v. Mortgage Electronic Registration Systems, Inc.*, 2011 N.H. Super Lexis 22 (2011).

Under New Hampshire law, a recorded mortgage, such as the Mullers, is presumed to be an enforceable product of the parties' mutual agreement. *Mills v. Nashua Fed. Sav. & Loan Ass'n.*, 121 N.H. 722 (1981). A standard mortgage must have three key components, including mortgage covenants, statutory conditions and statutory power of sale. (RSA 477:29). Use of the phrase "statutory conditions" incorporates the covenants set forth in RSA 477:29 and is binding upon the parties until the mortgage is paid. *Id.* The mortgage Joan and Stan Muller issued to William Muller contains all three components required under RSA 477:29 and thus, the Court must initially presume it to be an enforceable product of the parties' mutual agreement. (App., p. 6-7).

***11** New Hampshire is considered a title state for mortgages, "in which the real estate owner is technically considered to be conveying title to the mortgagee conditionally, that is for so long as the mortgage remains unpaid." 17 *New Hampshire Practice, Real Estate,* Section 4.01 (2011); *See also* RSA 479:1. Because the mortgage to Joan and Stan Muller remains unpaid, they have a title interest in the marital home, which the Family Division cannot abolish especially when it has no jurisdiction over Joan and Stan Muller.

The Family Division Order which abolishes the **elder** Muller's $186,000 property interest must be vacated as it was undertaken without affording Joan and Stan Muller any due process. It is well settled law that "depriving one of property, without a prior hearing, is a violation of due process. U.S. Const. amend. XIV; N.H. Const pt. I, arts. 14, 15; *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Petition of Harvey,* 108 N.H. 196, (1967); *North Georgia Finishing Inc. v. Di-Chem., Inc.*, 419 U.S. 601 (1975). *N.H. Ins. Co. v. Duvall,* 115 N.H. 215, 218 (1975). It is also well settled law that Joan and Stan Muller's $86,000 investment into the marital home is a property interest, recognized as a fundamental right under New Hampshire law. RSA 479:1; *Ellison v. Daniels,* 11 N.H. 274, 279 (1840); N.H. const. pt. 1, art. 2.

The Muller's fundamental property interest, like a parent's fundamental rights to their children cannot be taken away without due process of law. In *In re Baby K,* 143 N.H. 201 (1998), this Court invalidated court proceedings that resulted in a termination of parental rights because the father was forced to ***12** participate by phone. This Court found that informal telephone procedure might prevent the Father from hearing witnesses and may have placed a greater burden on counsel affecting his ability to represent his client. These burdens denied the father due process. 143 N.H. at 206-207, citing to N.H. Const. pt. I, art. 2.

In sharp contrast to the inadequate telephone participation afforded Rodney P. in *In re Baby K,* Joan and Stan Muller were afforded no due process in the proceeding which abolished their $86,000 property interest secured in the marital home. Although Petitioner may argue that the Mullers were aware of the ongoing divorce through her ineffective efforts to serve a New Hampshire witness subpoena upon them in Maine to compel their attendance at the divorce trial, a N.H. subpoena has no affect in the State of Maine where the Mullers reside. [1] RSA 516:1. *See also Gunnison v. Gunnison,* 41 N.H. 121 (1860). Moreover, as noted in the preceding sections, the Family Court lacked jurisdiction to adjudicate the merits of the **elder** Mullers claim as the Mullers are entitled to have their $86,000 property interest adjudicated by the Superior Court. RSA 498:5-a. The Family Court's order, which abolishes the Mullers presumptively valid property interest in the marital home, without any due process is unconstitutional and requires that this Court vacate the underlying Order.

In addition to the jurisdiction issues implicated by this Order, as a matter of practicality, the Family Division's Order cannot be fulfilled as a bona fide purchaser cannot acquire clean title to the Preston Way Auburn NH property ***13** without a discharge of the Senior Muller's duly recorded mortgage deed. *See* RSA 479:6; 17 *New Hampshire Practice, Real Estate,* Section 4.05 (2011) *Generally Amoskeag Bank v. Chagnon,* 133 N.H. 11 (1990). To obtain a discharge of the Senior Muller's mortgage, the parties would be required to pay Joan and Stan Muller $86,323.23, yet the Family Division has ordered the parties to remove and distribute these funds as alleged equity under RSA 458:16-a and it has directed the parties not to pay the **elder** Mullers. If the parties do not pay the **elder** Mullers, they will not obtain a discharge and it will be impossible to convey clear title to a bona fide purchaser. The Family Division's Order to sell the marital home without obtaining a discharge of the Muller mortgage

is impossible and therefore must be excused by this Court. *Bower v. Davis & Symonds Lumber Co.,* 119 N.H. 605 (1979); *Cheshire Oil Co. v. Springfield Realty Co.,* 118 N.H. 232 (1978); *Perry v. Champlain Oil Co., Inc.,* 101 N.H. 97 (1957).

2. The Circuit Court unsustainably exercised its discretion when it awarded Petitioner 50% of the marital home equity, when she did not contribute toward the home's purchase and the parties separated after two years of marriage.

As noted in the preceding section, once the two duly recorded mortgages totaling $386,232 are discharged, there is no equity in the marital home to distribute under RSA 458:16-a. If for any reason the Family Division order, which anticipates equity in the marital home is upheld, the Court's distribution of $90,000 to Ms. Muller should be reversed as it is an unsustainable exercise of discretion. When dividing the marital estate after a short-term marriage, such as ***14** the Muller's two year marriage, the Family Court is supposed to return the parties to the economic positions they held prior to the marriage. *Rahn v. Rahn* 123 N.H. 222, 225 (1983). By statute, RSA 458:16-a authorizes the Court to consider the length of the marriage as a special factor to deviate from an otherwise presumed equal distribution of the marital estate, RSA 458: 16-a (a). A marriage of only one or two years is considered differently from a long-term marriage of 10 or more years. *Id.*

It was undisputed that Ms. Muller did not bring any assets into the parties' 2006 marriage. (T-337). Instead, Ms. Muller brought debt, which Mr. Muller paid off when Ms. Muller sold her Merrimack condominium. (T-310). Ms. Muller contributed no funds toward the purchase of the Preston Way, Auburn NH property. (T-337) Because Ms. Muller did not contribute funds toward the Auburn property and because she did contribute labor towards that property's improvement, due to the short term-two year marriage the Court order suggesting a $90,000 distribution to Ms. Muller from the sale of the marital home was an unsustainable exercise of discretion. In addition, Ms. Muller has been residing in the Auburn residence since the parties' separation in December 2008 without contribution to either the mortgages or taxes on the property. In essence, she has been residing in the home for free for over three years.

In an analogous case with a five year marriage, twice the duration of the Muller's marriage, this Court affirmed a Family Court order that segregated up to $10,000 in personal funds which the wife contributed to the marital home ***15** purchase. *In re Sarvela,* 154 N.H. 426 (2006). When affirming the unequal distribution this Court acknowledged that in a short-term marriage, "it is easier to give back property brought to the marriage and still leave the parties in no worse position than they were in prior to it." *Sarvela,* 154 at 431 (citing *Rahn v. Rahn,* 123 N.H. 222, 225 (1983)). The Family Division failed to recognize that the Muller's two year marriage was an exceedingly short-term marriage when distributing the alleged equity in the marital home. To the extent possible, the Family Division should have returned each of the parties in this short term marriage to the financial positions they held prior to the marriage. *Rahn,* 123 N.H. 222, Returning the parties to the position they held prior to the marriage requires crediting Mr. Muller with any and all equity in the marital home since the only equity in the home is as a result of either the $86,0000 loan and/or gift from his parents, as well as ongoing mortgage payments made in the three years since the parties' separation.

3. After characterizing the $186,332 down payment Joan and Stan Muller made toward the marital home purchase "as a gift to the Respondent" the Family Division unsustainably exercised its discretion when it refused to award that gift to the Respondent.

After the Family Division entered a finding that Stan and Joan Muller's contribution to the marital residence "is not recognized as a debt this Court is left with no other option than to determine that it was initially a gift to the Respondent and as such had no bearing on the disposition/division of the equity in the marital residence." (Add., p. 43). Having found that Mr. and Mrs. Muller gifted almost ***16** two hundred thousand dollars to their son, so that he could purchase a home, the Court should have awarded those gift proceeds back to Mr. Muller, following the termination of the parties two year marriage. When dividing the marital estate, one of the factors which justify an unequal division is the "value of any property acquired by gift." RSA 458:16-

a II(n)). The Court's decision to divide a $86,000 gift to Mr. Muller equally with Ms. Muller is contrary to the statutory factors recognized by the Legislature in support of an unequal distribution.

The Court's decision to allocate Joan and Stan Muller's alleged $86,000 "gift to Mr. Muller" equally with his wife of two years should be vacated as the Court failed to specify its reasoning for dividing a gift among two parties after finding the gift was bestowed solely upon Mr. Muller.

Having recognized that the only equity in the marital home was the parental gift of $86,000 to Mr. Muller, the Court should have awarded that equity to Mr. Muller. This Court has repeatedly recognized that property acquired "by gift" need not be equally distributed, In *Henderson v. Henderson,* 121 N.H. 807 (1981), for example, this Court affirmed a property distribution that awarded the wife approximately $80,000.00 in assets and husband $10,000.00 The 8 to 1 ratio was affirmed because the assets in question had been given to the couple by Mrs. Henderson's mother. On appeal, this Court noted that but for the generosity of Mrs. Henderson's mother, there would have been virtually no assets to distribute. The situation in Henderson is directly applicable to this case where the only potential marital asset to be distributed is as a result of Stan and Joan Muller's ***17** investment of $186,000 into the home two years before the couple separated. As in *Henderson,* the Family Division should have considered Joan and Stan Muller's gift as a special factor to warrant awarding any and all equity in the home to Mr. Muller under RSA 458:16-a(II)(o).

The Court's failure to deviate from an equal property division after characterizing the $86,000 investment as a gift to Mr. Muller was especially erroneous when one considers the short-term nature of the marriage. In *Henderson,* the parties had been married nine years and yet this Court affirmed a distribution on an 8-1 ratio because the marital estate consisted entirely of assets derived from Mrs. Henderson's mother. In this case, in addition to the parental gift of $186,000 to Mr. Muller, which justifies an unequal distribution under RSA 458:16-a(II) (o) an unequal distribution was also warranted because the parties had been married only two years, which justifies returning them to their pre-martial economic positions under RSA 458:16-a (II)(a). The Family Court's failure to apply the foregoing statutory factors justifying an unequal distribution renders its action unsustainable. *Accord, In re Sarvela,* 154 N.H. 426 (2006).

4. The Circuit Court's finding that Respondent was voluntarily unemployed contradicts the Court's earlier finding that he was not and the Court's decision to impute annual income of $68,000 is not supported by the record.

In late October 2010, after reviewing Mr. Muller's employment files, the Family Division refused to grant Petitioner's request that alimony and/or child support be reinstated due to Mr. Muller's alleged voluntary unemployment. ***18** Petitioner had argued that Mr. Muller's request to reduce his child support and alimony obligations, due to his recent job loss, should be denied because he was either "fired for cause and/or fired due to the Respondent's conscious decision to reduce his productivity at work in the hope that a loss of employment would result in the Court vacating its prior Orders relative to his financial obligations." (App. p. 58). The Family Division denied Petitioner's request, but agreed to an in-camera review of the Respondent's employment file and represented that if it found any support to Petitioner's representation, the Court would schedule a telephonic conference to address the issues. (App., p. 59). After reviewing Mr. Muller's employment file, the Family Division found no merit to Petitioner's claim that Mr. Muller was voluntarily unemployed. (App., p.62). As such, it was legal error for the Court to contradict its prior finding and impute income to Mr. Muller at the time of the Final Hearing.

The Family Court accepted Petitioner's representations that Mr. Muller was "'let go because he was not doing what the company wanted him to do and if he had done his job Matheson Tri-Gas (his employer) would not have fired him."' (Add., p. 44). The Family Division's decision to impute income to Mr. Muller because he was fired for just cause was legal error under RSA 458-C:2. This Court clarified, in In re Rossino, 153 N.H. 367 (2006) and in *In re Sarvela,* 154 N.H. 426 (2006), that an individual is not voluntarily unemployed or underemployed under RSA 458-C, simply because they have been terminated from employment. Under RSA 458-C:2 the Court may, in its discretion, impute ***19** gross income to an unemployed parent only if it finds that parent is intentionally un or underemployed. "A parent who is involuntarily terminated from his or her employment, or, as in the case of the obligor in *Rossino,* 153 N.H. at 368 involuntarily resigns from that employment, did not 'voluntarily'

become unemployed or underemployed." *In re Sarvela*, 154 N.H. 426, 436 (2006)(emphasis added). The Court's finding that Mr. Muller was voluntarily unemployed under the statute is legally erroneous as the testimony confirms he was involuntarily terminated. (T-190).

The Family Division's imputation of $68,000 in annual income was an unsustainable exercise of discretion as the Court failed to address Petitioner's continuing unemployment despite the Court's prior finding that "Petitioner has an obligation to contribute to the support of the marital estate and anticipates the Petitioner will be employed in some capacity prior to the parties' Final Hearing in June." (App., p. 60). Despite the Court's expectation that Petitioner, who holds a B.A. degree and was previously employed at Telephone Network Technologies earning $50,000 per year, would be employed, Petitioner was not employed at the time of trial. (Add., p. 45)(App., p. 22, Request no. 65). The Court's decision to impute income to only one parent, when both were unemployed in the same down economy was an unsustainable exercise of discretion.

Finally, the Court's decision to impute income at Mr. Muller's highest earnings rate was an unsustainable exercise discretion as the Court heard no testimony confirming that Mr. Muller was qualified to find employment at a ***20** comparable rate to that earned in his parent's company. Compare In re Bazemore, 153 N.H. 351 (2006). Mr. Muller testified that he was actively searching for employment but without success. (T-471-472). Mr. Muller's prior position was in sales and "new sales positions aren't just popping up." (T-472). Mr. Muller testified that he did not expect to see an opening in sales, until the market improved. (T-472). The Guardian Ad Litem, concurred in this testimony, noting he was not surprised Mr. Muller was still unemployed, given the current economy. (T-40). Yet, despite the difficult 2011 economy, the Court imputed annual earnings at Mr. Muller's highest rate of pay, $68,000, at a business previously owned by his parents. (T-187-189). No witness testified as to the amount of income which Mr. Muller might expect to earn in a business without family connections. The Family Division's decision to impute Mr. Muller's highest rate of pay from a family run business was an unsustainable exercise of discretion. See In the Matter of Bazemore, 153 N.H. 351 (2006).

CONCLUSION

For the reasons set forth above, this Court should vacate the Family Division Order that seeks to invalidate Joan and Stan Muller's Promissory Note and Mortgage Deed in the amount of $186,332.23.

Alternatively, this Court should vacate that portion of the Family Division Order which requires a distribution of 50% of any equity in the marital home to Petitioner when the only equity in the home is either a loan owed to the **elder** Mr. ***21** and Mrs. Muller and/or the proceeds of a gift by Mr. and Mrs. Muller to the Respondent. The Court's recognition that Mr. and Mrs. Muller's investment of $86,332.23 so that their son could purchase a home was a gift made to him as opposed to a gift to the couple. The Court erred when it distributed this gift on an equal basis in a short term marriage.

In addition to an Order vacating the pending property distribution, Mr. Muller also seeks an Order vacating the factual finding that he is voluntarily unemployed, as well as the Order which imputes income to him in the amount of $63,000 as it is not supported by the record.

Appendix not available.

Footnotes

1 Joan and Stan Muller reside at 32 Brookside Drive in Falmouth Maine. See App. p. 6.

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