

State of New Hampshire Supreme Court

NO. 2008-____

IN THE MATTER OF
VIRGINIA BURR
and
ROBERT BURR, SR.

NOTICE OF DISCRETIONARY APPEAL
Pursuant to Supreme Court Rule 7(1)(B)

By: Joshua L. Gordon, Esq.
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State of New Hampshire Supreme Court

NOTICE OF DISCRETIONARY APPEAL

This form should be used only for an appeal from a final decision on the merits issued by a superior court, district court, probate court or family division court in (1) a post-conviction review proceeding; (2) a proceeding involving a collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; (6) a probation revocation proceeding; (7) a landlord/tenant action or a possessory action filed under RSA chapter 540; (8) from an order denying a motion to intervene; or (9) a domestic relations matter filed under RSA chapters 457 to 461-A, except that an appeal from a final divorce decree or from a decree of legal separation shall be a mandatory appeal.

1. COMPLETE CASE TITLE AND DOCKET NUMBERS IN TRIAL COURT

In the Matter of Virginia Burr and Robert E. Burr, Sr.
217-2005-DM-0935

2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)

Concord Family Division (*Susan B. Carbon, P.J.*)

3A. NAME & ADDRESS OF APPEALING PARTY

Robert E. Burr, Sr.
c/o Jeff Burr
24 Gilmanton Rd.
Loudon, NH 03307

3B. NAME, FIRM, ADDRESS & TELEPHONE
NUMBER OF APPELLANT'S COUNSEL

Joshua L. Gordon
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26 S. Main St., #175
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4A. NAME & ADDRESS OF OPPOSING PARTY

Virginia G. Burr
6 Bow Center Rd. #2-213
Bow, NH 03304
(603) 230-2022

4B. NAME, FIRM, ADDRESS, & TELEPHONE
NUMBER OF OPPOSING COUNSEL

Diane M. Puckhaber, Esq.
Puckhaber Law Office
PO Box 2693
Concord, NH 03302

5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT

n/a

6. DATE OF CLERK'S NOTICE OF
DECISION OR SENTENCING

Order on Motion for Contempt:
June 17, 2008

DATE OF CLERK'S NOTICE OF
DECISION ON POST-TRIAL MOTION

Order on Husband's reconsideration:
July 9, 2008.

Order on Wife's reconsideration:
August 13, 2008.

Order on Husband's reconsideration:
September 23, 2008.

7. CRIMINAL CASES: DEFENDANT'S
SENTENCE AND BAIL STATUS

n/a

8. APPELLATE DEFENDER REQUESTED?

No.

9. IS ANY PART OF CASE CONFIDENTIAL? IDENTIFY WHICH PART AND CITE AUTHORITY

There no known basis for confidentiality.

10. NAMES OF PARENT, SUBSIDIARIES AND AFFILIATES OF CORPORATE PARTIES

n/a

11. DO YOU KNOW ANY REASON WHY ONE OR MORE SUPREME COURT JUSTICE WOULD BE DISQUALIFIED FROM THIS CASE?

There is no known basis for recusal.

IF YES, FILE MOTION FOR RECUSAL, SUPREME COURT RULE 21A

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY?

Yes.

IF YES, COMPLETE TRANSCRIPT ORDER FORM

13. NATURE OF CASE AND RESULT (limit two pages double-spaced):

Robert Burr is an 80-year old man diagnosed with dementia and other progressing cognitive impairments. He lives with Jeff Burr, his adult son, the Fire Chief of Loudon, who has power of attorney.

Virginia Burr procured a divorce from Robert in December 2007. The parties stipulated, among other things, that Robert Burr would maintain ownership of their marital home in Loudon, but that they would evenly share its equity. After considering evidence from appraisers, the court pegged the value of the home at \$250,000, and ordered Robert to pay Virginia one-half the assumed value – \$112,500 – within 90 days.

It became clear immediately after the divorce, during the winter of 2007-2008, that due to his mental health Robert Burr could not continue living in the house. Upon discussions with a bank, Robert (through his son) learned that, because of the declining real estate market, the condition of the house which had not been adequately maintained by the parties during their marriage, and Robert's health problems, he was not eligible for any of the variety of financing mechanisms that might allow him to retain the house and also pay Virginia the specified amount.

After the passage of 90 days, Virginia requested an order of contempt. In June 2008 the court ordered Robert to make arrangements to sell the house, or borrow against it and give Virginia \$112,500, or to deed the property to Virginia. Robert attempted to sell, but found only two interested potential buyers, and none at the price the court had declared the house was worth. Thus, Robert could not both effectuate the pay-off to Virginia and also retain one-half the equity as the parties had stipulated, the court had ordered, and the statute required.

Robert filed a motion to reconsider. The court appeared to understand the problem, and

found that “it was the *net equity* that was being divided equally, not the establishment of a per se property division of \$112,500.” ORDER (July 9, 2008) (emphasis in original). Virginia then filed a motion to reconsider, which prompted the court to “reaffirm[] that [Virginia] is entitled to \$112,500 as her share of the equity in the marital home” and to require the payment of \$112,500 to Virginia within 30 days. ORDER (Aug. 12, 2008). Robert then filed another motion to reconsider, which was denied.

The result is that Virginia can sell the house for any price she wishes, charge Robert with the costs of the transaction, take her fixed \$112,500 (rather than just a one-half share), and give Robert what remains. Given the market conditions and the actual value of the house, Robert will realize little equity.

This appeal followed.

14. ISSUES ON APPEAL (limit eight pages double spaced):

The New Hampshire Supreme Court reviews each discretionary notice of appeal and decides whether to accept the case, or some issues in the case, for appellate review. The following acceptance criteria, while neither controlling nor fully describing the court's discretion, indicate the character of the reasons that will be considered.

1. The case raises a question of first impression, a novel question of law, an issue of broad public interest, an important state or federal constitutional matter, or an issue on which there are conflicting decisions in New Hampshire courts.
2. The decision below conflicts with a statute or with prior decisions of this court.
3. The decision below is erroneous, illegal, unreasonable or was an unsustainable exercise of discretion.

Separately number each issue you are appealing and for each issue: (a) state the issue; (b) explain why the acceptance criteria listed above support acceptance of that issue; and (c) if a ground for appeal is legal sufficiency of the evidence include a succinct statement of why the evidence is alleged to be insufficient as a matter of law.

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I. Did the court err in enforcing a decree that could not be effectuated due to events beyond anyone's control.

II. Did the court err in requiring Mr. Burr to pay a fixed sum of \$112,500, which is more than one-half of the equity of the marital home?

III. Did the court err in penalizing Mr. Burr when the cause of his inability to pay Ms. Burr her share of the marital home was due to the vagaries of the real estate market, the over-valuing of the home by the court, the unfortunate condition of Mr. Burr's health, and other matters outside of Mr. Burr's control?

IV. Did the court err in effectively changing the property order after the divorce case was terminated by ordering Mr. Burr to give the marital home to Ms. Burr, despite Mr. Burr's reasonable efforts to sell it and his reasonable attempts at suitable financing arrangements?

V. Did the court err in penalizing Mr. Burr when, despite his reasonable efforts, he was unable to procure a mortgage, a reverse mortgage, or other suitable financing due to his age and infirmity?

VI. Did the court err in not decreasing the pegged value of the marital house (or simply ordering a one-half share), despite it becoming apparent that no buyer was available at the value the court insisted the home was worth?

VII. Did the court err in enforcing a decree which gives a much greater than one-half share of the value of the marital home to Ms. Burr, despite the court's intent to divide assets evenly, the parties' agreement to divide assets evenly, and the statutory requirement to split assets evenly?

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This Court has made clear that, unlike alimony and support, a decree dividing marital property cannot be later revisited for a mere change of circumstances. *McSherry v. McSherry*, 135 N.H. 451 (1992). Decrees can be revisited, however, upon a finding of fraud, undue influence, deceit, misrepresentation, or mutual mistake. *Shafmaster v. Shafmaster*, 138 N.H. 460 (1994).

Here, there was no change in circumstances, yet no mutual mistake either. Rather, events beyond anyone's control made it apparent that the original decree could not be carried out. This case thus falls squarely between the bar of *McSherry* and the allowance of *Shafmaster*. Moreover, unlike the long delay in *Spellman v. Spellman*, 136 N.H. 235 (1992), the difficulty here became apparent immediately after the decree.

In the months following the decree, the lower court granted three motions to reconsider, each time making findings that can be viewed as inconsistent. Both parties on different occasions reminded the court that property division, unlike alimony and support, does not involve the continuing jurisdiction of the court. This procedural oddity emphasizes the gap in existing law.

This Court should accept this case to address that gap, to give family courts guidance regarding the scope of their jurisdiction regarding enforcement of property divisions, and to settle what has turned out to be an inequitable situation between Robert Burr and Virginia Burr.

15. ATTACHMENTS

Attach to this notice of appeal the following documents in order: (1) a copy of the trial court decision or order from which you are appealing; (2) the clerk’s notice of the decision below; (3) any court order deciding a timely post-trial motion ; and (4) the clerk’s notice of any order deciding a timely post-trial motion.

Do not attach any other documents to this notice of appeal. Any other documents you wish to submit must be included in a separately bound Appendix, which must have a table of contents on the cover and consecutively numbered pages.

16. CERTIFICATIONS

I hereby certify that, upon information and belief, every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

Joshua L. Gordon, Esq.

I hereby certify that on or before the date below copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

December 9, 2008

Joshua L. Gordon, Esq.

ATTACHMENTS

1. FINAL ORDER ON PETITION FOR DIVORCE (Nov. 28, 2007) 10

2. ORDER (on Petition for Contempt) (June 19, 2008) 17

3. ORDER ON RESPONDENT’S MOTION TO RECONSIDER COURT ORDER
DATED JUNE 19, 2008 (July 9, 2008) 19

4. ORDER ON PETITIONER’S MOTION FOR RECONSIDERATION (Aug. 13, 2008) 20

5. NOTICE OF DECISION (Sept. 23, 2008) 22

6. ORDER (Sept. 19, 2008) 23

TRANSCRIPT ORDER FORM

INSTRUCTIONS:

1. If a transcript is necessary for your appeal, you must complete this form.
2. List each portion of the proceedings that must be transcribed for appeal, e.g., entire trial (see Superior Court Administrative Rule 3-1), motion to suppress hearing, jury charge, etc., and provide information requested.
3. Determine the amount of deposit required for each portion of the proceedings and the total deposit required for all portions listed. Do not send the deposit to the Supreme Court. You will receive an order from the Supreme Court notifying you of the deadline for paying the deposit amount to the trial court. Failure to pay the deposit by the deadline may result in the dismissal of your appeal.

LIST EACH PORTION OF CASE PROCEEDINGS TO BE TRANSCRIBED						
Date of Proceeding	Type of Proceeding	Length of Proceeding	Name of Judge(s)	Steno/Recorded	Previously Prepared?*	Deposit
6/11/08	Contempt hearing	1 hour	Susan B. Carbon, J.	Yes	no	\$175
DO NOT SEND DEPOSIT AT THIS TIME						TOTAL DEPOSIT: \$175

SCHEDULE OF DEPOSITS

Length of Proceeding

Deposit Amount

Hearing or trial of one hour or less
 Hearing or trial up to ½ day
 Hearing or trial of more than ½ day
 Previously prepared portions

\$ 175
 \$ 450
 \$ 900/day
 Number of pages x \$.50 per page per copy if additional copies are needed

NOTE: The deposit is an estimate of the transcript cost. After the transcript has been completed, you may be required to pay an additional amount if the final cost of the transcript exceeds the deposit. Any amount paid as a deposit in excess of the final cost will be refunded. The transcript will not be released to the parties until the final cost of the transcript is paid in full.

* For portions of the transcript that have been previously prepared, indicate number of copies that were prepared.