

State of New Hampshire
10th Circuit - Family Division - Salem

IN THE MATTER OF
DANIELLE C. ROSS
and
CHRISTOPHER K. ROSS

Salem Fam.Div.No. 2011-DM-0262

INTERLOCUTORY APPEAL STATEMENT

NOW COMES Christopher K. Ross, by and through his attorney, Joshua L. Gordon, and respectfully submits this interlocutory appeal statement pursuant to Supreme Court Rule 8 and Family Court Rule 1.31(B).

As grounds it is stated:

A. Parties and Counsel

1. Danielle C. Ross is the petitioner/appellee. She is represented by Steven G. Shadallah, Esq., Law Office of Steven G. Shadallah, 197 Main St., Salem, NH 03079, (603) 893-9000.

2. Richard Calvin is the co-respondent. He is represented by Patricia A. Murphy, Esq., of Raimo & Murphy, PC, 67 Central St., Manchester, NH 03101, (603) 625-2152.

3. Christopher K. Ross, the respondent/appellant, lives in Hudson, New Hampshire. He is represented by Charles Perrault, Esq., Perrault Law Group, PLLC, 79 Haverhill St., Methuen, MA 01844, (978) 975-4100. For the purposes of this interlocutory appeal, he is also represented by Joshua L. Gordon, Esq., Law Office of Joshua Gordon, 75 South Main St. # 7, Concord, N.H. 03301, (603) 226-4225, www.AppealsLawyer.net.

B. Statement of Facts

4. Christopher Ross and Danielle Ross, both dentists with operating practices, were married in 2002 and have two children. Several years ago, Christopher suspected Danielle was having an affair, as she had become cold and distant with little interest in family life.

5. On December 12, 2011 one Connie Calvin contacted Christopher and informed him that her husband, Richard Calvin, had recently informed her that he had had sexual relations with Danielle. (Danielle was later named as a co-respondent in the Calvins' divorce.) Upon learning this, Christopher immediately moved out. The next day, Christopher confronted Danielle, who denied the affair. The day after that, Danielle changed the locks on the marital home and Christopher has never returned. Christopher and Danielle have never attempted reconciliation, and Danielle has continued her extra-marital relationship.

6. On December 16, 2011, three days after Christopher learned of the adultery and moved out, Danielle filed for divorce. A month later Christopher cross-petitioned alleging Danielle's adultery caused the breakdown of the marriage. Litigation ensued, including numerous pleadings, several motion hearings, 8 or 10 depositions, and extensive exchange of personal and business financial records.

7. According to depositions in the Calvins' divorce case, Connie Calvin and Christopher Ross commenced a sexual relationship on November 9, 2012, 11 months after Christopher learned of Danielle's infidelity and left the marital residence. This prompted Danielle to request dismissal of Christopher's allegation of fault, on the grounds that he was no longer an innocent spouse. The court issued a short order declaring that the matter will be "deferred to final hearing." PETITIONER'S MOTION TO DISMISS FAULT GROUND (May 23, 2013), *handwritten order* (June 13, 2013).

8. In September 2013, the Salem Family Division (*Thomas G. Cooper*, MM) held a half-hour argument wherein it heard from the attorneys but took no evidence. It then made a handwritten decision: “After conducting a hearing ... regarding [Danielle’s] motion to dismiss fault grounds, and, having considered the well-crafted arguments of counsel along with the memoranda and [illegible] case law, [Danielle’s] motion is granted.” ORDER (Oct. 10, 2013), *attached*.

9. On October 17, 2013 the court issued its handwritten order. NOTICE OF DECISION (Oct. 17, 2013), *attached*. A four-day trial is scheduled to begin on October 29, 2013. (Christopher is filing herewith in the Family Court a request to stay the trial pending this request for interlocutory appeal.)

B. Questions for Appeal

- I. Did the court err in finding Christopher is not an “innocent spouse” pursuant to RSA 458:7 when, although he was involved in an extra-marital affair, it did not commence until nearly a year after the marriage was irretrievably broken?
- II. Did the court err in not holding an evidentiary hearing regarding whether Christopher is an “innocent spouse”?

D. Reasons Why a Substantial Question Exists

10. New Hampshire law provides that “[a] divorce from the bonds of matrimony shall be decreed in favor of the innocent party for any of the following causes: ... Adultery of either party,” RSA 458:7, II, and the New Hampshire Supreme Court has long held that lack of innocent-spouse status prevents a finding of fault. *Shatney v. Shatney*, 76 N.H. 391 (1912); *Rockwood v. Rockwood*, 105 N.H. 129 (1963); *In re Dube*, 163 N.H. 575 (2012) (“[A] spouse cannot be the innocent party if he is guilty of an offense against the other spouse, which would be grounds for divorce.”) (quotations omitted).

11. The timing of the allegedly non-innocent respondent’s conduct matters, however.

12. Where the respondent's fault conduct occurs before the breakdown of the marriage, the respondent cannot be considered innocent. *Rockwood v. Rockwood*, 105 N.H. 129 (1963) (husband engaged in adulterous relationship, fathering two children, before the breakdown of the marriage); *Yergeau v. Yergeau*, 132 N.H. 659 (1990) (husband at fault because "the adultery occurred prior to the filing of [wife's] cross-libel alleging it.").

13. Where the respondent's fault conduct occurs *after* the breakdown of the marriage, however, the respondent is still an innocent spouse. In *Murano v. Murano*, 122 N.H. 223 (1982), the parties separated in 1974. The husband started his affair, however, in 1975 after separation and breakdown. The New Hampshire Supreme Court found:

"The evidence revealed that the parties separated at the beginning of 1974 as a result of mutual differences. Although the record indicated that the [husband] had a relationship with another woman, the evidence showed that this relationship began after the [wife] and the [husband] had separated."

Murano v. Murano, 122 N.H. at 229. Accordingly, the husband could not be guilty of any fault.

14. *Murano* controls this case. Christopher Ross moved out on December 12, 2011 immediately upon learning of Danielle's infidelity, and no attempts were ever made at reconciliation. He began his affair 11 months later, long after separation and breakdown. The only difference between *Murano* and the facts here is that in *Murano* the New Hampshire Supreme Court considered whether one can be at *fault* at a time after separation and breakdown, whereas here the issue is whether one can be an *innocent-spouse* after separation and breakdown. This case should be reviewed to clarify *Murano* and extend it to the innocent-spouse defense.

15. Fault-based divorces are plead because of the opportunity for more advantageous financial awards. *Compare Chabot v. Chabot*, 126 N.H. 793, 795 (1985) ("Evidence of fault may be considered in an award of alimony or division of property if a fault ground is proven to be the primary cause of the marital

breakdown.”), with *Boucher v. Boucher*, 131 N.H. 377, 379 (1988) (“If the master considered fault in making a property division following the grant of a no-fault divorce, he made a reversible error.”), and *In re Nassar*, 156 N.H. 769, 774 (2008) (“[W]hen a court grants a divorce on the ground of irreconcilable differences, fault would not be considered on the questions of property division or alimony.”) (quotations omitted).

16. Because of the *Boucher* and *Nassar* bar to consideration of fault in an irreconcilable-differences divorce, by dismissing the fault grounds the Salem Family Court eliminated Christopher’s ability to present evidence at trial of Danielle’s fault. That virtually guarantees a later appeal of the issue, a remand, and a re-trial, wasting the resources of the parties and the judicial system. Resolving the issue on an interlocutory basis avoids the waste yet creates no prejudice to any party.

17. Moreover, because both parties here are highly-educated, well-employed, and remunerated commensurately, the dismissal of fault grounds is likely to create a large disparity between the division that will be awarded versus the division that should be awarded. Because Christopher and Danielle Ross are not the only people in this situation, the outcome here matters to New Hampshire families generally.

18. Finally, the Salem Family Court found that Christopher is a non-innocent spouse without hearing any evidence. At first the Salem Family Court deferred the determination of fault for trial, but then decided it after a short non-evidentiary hearing before trial. The New Hampshire Supreme Court has held that a hearing should be held to determine whether a party is at fault or innocent:

The determination of who qualifies as the innocent party is a difficult task. In domestic relation cases testimony of the parties may be unconsciously colored by emotion and consciously slanted by vindictiveness. To distinguish fact from assertion frequently requires the delphic powers of a judicial Solomon and the attainment of that objective should not be unduly diluted in the process of appellate review. The one hundred per cent innocent one may be a rare breed but the Trial Court does its best which sometimes demands a saline evaluation of the total testimony when the domestic relations proceeding is uncontested or contested only in theory.

Pollini v. Pollini, 103 N.H. 183, 184 (1961) (quotations and citations omitted); *Chabot v. Chabot*, 126 N.H. 793,

795 (1985) (“[T]he court’s denial of the motion to amend [to add fault ground] without affording a hearing was an abuse of discretion which requires us to reverse and remand the case.”). To the extent that *Pollini* and *Chabot* may be less than crystal-clear, they leave little doubt that the court’s summary finding without evidence was in error. This case should be reviewed to add clarity to the matter for the purposes of both this case and New Hampshire jurisprudence generally. It should be determined on an interlocutory basis to avoid unwise use of the parties’ and judicial resources.

WHEREFORE, the family court should approve this interlocutory appeal statement, and the Supreme Court should likewise accept it for review.

Respectfully submitted
for Christopher K. Ross
by his attorney,

Dated: October 25, 2013

Joshua L. Gordon, Esq.
NH Bar No. 9046
Law Office of Joshua Gordon
75 South Main Street # 7
Concord, NH 03301
(603) 226-4225

I hereby certify on this 25th day of October 2013, a copy of the foregoing is being forwarded to Steven G. Shadallah, Esq.; Patricia A. Murphy, Esq.; and Charles Perrault, Esq.

Dated: October 25, 2013

Joshua L. Gordon, Esq.

E. Interlocutory Appeal Approved:

Dated: _____

Marital Master/Judge

Dated: _____

Marital Master/Judge