

## THE STATE OF NEW HAMPSHIRE

### SUPREME COURT

**In Case No. 2008-0106, In the Matter of Gabriello Gabrielli and Concetta Gabrielli, the court on October 3, 2008, issued the following order:**

Having considered the parties' briefs and the appellate record, we conclude that oral argument is unnecessary for the disposition of this appeal. See Sup. Ct. R. 18(1). The petitioner, Gabriello Gabrielli, appeals a final decree of divorce issued by the Portsmouth Family Division. He challenges the trial court's award of alimony to the respondent, Concetta Gabrielli, arguing that the parties waived alimony under the terms of their 1984 stipulation, that the award is barred by the doctrine of laches, and that the award is inconsistent with the statutory requirements for an award of alimony, see RSA 458:19 (Supp. 2007). Finding no error, we affirm.

At the outset, we address the respondent's contentions that the petitioner failed to preserve his waiver and laches arguments, and that he should be judicially estopped from arguing waiver. "It is a long-standing rule that parties may not have judicial review of matters not raised in the forum of trial." In the Matter of Hampers & Hampers, 154 N.H. 275, 287 (2006). It is the petitioner's burden to submit so much of the record as is sufficient to establish that he raised his appellate issues in the trial court. See *id.*

We agree with the petitioner that, to the extent he is arguing that the parties waived alimony under the language of the 1984 stipulation, he adequately raised the issue by his motion to enforce the stipulation and his arguments at trial. Nor did the petitioner concede that alimony may not be waived under Massachusetts law. To the extent, however, the petitioner is arguing that, under Massachusetts law, the stipulation did not "merge" with the judgment of separate support and, thus, that the stipulation is a separately enforceable bar to alimony, the record does not reflect that the petitioner raised the argument at trial. That argument, therefore, is not preserved.

Likewise, the record does not reflect that the petitioner ever raised his laches argument. While the respondent may have argued in her trial memorandum that alimony was not barred by laches, laches is an affirmative defense that the petitioner was required to plead. See Nordic Inn Condo Owners' Assoc. v. Ventullo, 151 N.H. 571, 582 (2004) (laches is affirmative defense); Family Div. R. 2.5(B) (party seeking affirmative relief in divorce must file a responsive pleading). Cf. In the Matter of Maynard & Maynard, 155 N.H. 630, 634 (2007) (party seeking to raise affirmative defense in divorce must do so in a responsive pleading). Inasmuch as the record does not reflect that the petitioner pleaded laches or argued that the trial court should consider the

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defense despite his failure to plead it, we cannot conclude that the trial court erred by granting the respondent's requested ruling of law that the petitioner had waived the defense by not pleading it.

Turning to the merits of the petitioner's remaining arguments, we disagree that the 1984 stipulation reflects an intent to waive alimony. We construe stipulations in domestic relations matters in accordance with ordinary contract interpretation principles. See *Miller v. Miller*, 133 N.H. 587, 590 (1990). The interpretation of a contract, including whether a term of the contract is ambiguous, is a question of law which we review *de novo*. See *Sherman v. Graciano*, 152 N.H. 119, 121 (2005). A contract term is ambiguous only where the parties reasonably differ as to its meaning. See *id.* Absent fraud, duress, mutual mistake, or ambiguity, we determine the parties' intent solely from the language of the contract. See *id.* at 121-22.

In this case, the parties' stipulation comprehensively divided the marital property. Nowhere in the stipulation, however, do the parties address alimony or support issues. Contrary to the petitioner's argument, their agreement "to waive[] any and all statutory rights as husband or wife in the estate of the other" does not evince an intent to waive alimony.

The plain meaning of the term "estate" is "[t]he degree, quantity, nature, and extent of interest which a person has in real and personal property." *Black's Law Dictionary* 547 (6<sup>th</sup> ed. 1990). Within the context of Massachusetts domestic relations law, the term "estate" denotes "all property to which a party holds title, however acquired." *Williams v. Massa*, 728 N.E.2d 932, 939 (Mass. 2000). Alimony, however, is a concept that is distinct from property rights.

The Massachusetts statute governing alimony, for instance, provides that "[i]n addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other." Mass. Gen. Laws ch. 208, § 34 (2007) (emphasis added). Unlike an award of "all or any part of the estate of the other," an award of alimony ordinarily terminates upon the death of the obligor, and may be modified. See *Barron v. Puzo*, 610 N.E.2d 973, 974 (Mass. 1993) (alimony ordinarily terminates upon death of obligor); *Pavlucik v. Sullivan*, 495 N.E.2d 869, 874 (Mass. Ct. App. 1986) (enforcing property division in separation agreement after the death of one of the parties); *Kirtz v. Kirtz*, 421 N.E.2d 1270, 1272 (Mass. Ct. App. 1981) (no further division of property after the court has divided it is allowed in the absence of fraud); Mass. Gen. Laws ch. 208, § 37 (2007) (allowing court to modify alimony from time to time upon application of a party).

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We conclude, therefore, that the parties' waiver of "statutory rights as husband or wife in the estate of the other," viewed within the context of the overall agreement and Massachusetts domestic relations law, constituted nothing more than a waiver of the right to seek a further property division, or to otherwise assert an interest in the property of each other. Because the stipulation is unambiguous and does not waive the respondent's right to seek alimony, we reject the petitioner's invitation to determine the parties' intent from extrinsic evidence. *See Sherman*, 152 N.H. at 122.

Finally, we address the petitioner's argument that the respondent was not entitled to alimony pursuant to RSA 458:19. The trial court had discretion to award the respondent alimony in the event it found: (1) the respondent lacked sufficient income or property to provide for her reasonable needs considering the style of living to which the parties became accustomed during the marriage; (2) the petitioner could continue to meet his reasonable needs considering the parties' marital standard of living; and (3) the respondent cannot be self-supporting at a standard of living to meet her reasonable needs. *See In the Matter of Letendre & Letendre*, 149 N.H. 31, 38-39 (2002).

The record contains more than ample support for the trial court's award of alimony. In light of the respondent's age, health, level of education, and current monthly income, and in view of the evidence submitted regarding needed improvements to her home, the trial court reasonably could have found that she lacked sufficient income to provide for her reasonable needs, and that she could not be self-supporting through employment. *See id.* at 39. The record also reflects that the petitioner's monthly income far exceeds his expenses, and that \$4,000.00 is well within his ability to pay while maintaining the marital standard of living. Under these circumstances, the trial court's decision to award alimony of \$4,000.00 per month was not unsustainable.

*Affirmed.*

Broderick, C.J., and Dalianis, Duggan, Galway and Hicks, JJ., concurred.

**Eileen Fox,  
Clerk**

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Portsmouth Family Division, 670-2006-DM-00486

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