

State of New Hampshire Supreme Court

IN THE MATTER OF
SUSAN (FLOROS) WALLACK
and
PETER N. FLOROS

N.H. Sup.Ct. No. 2012-0388

MOTION FOR SUMMARY AFFIRMANCE

or in the alternative

MOTION FOR STAY PENDING RESOLUTION OF OTHER CASES

NOW COMES Peter Floros, by and through his attorney, Joshua L. Gordon, and respectfully requests this honorable court to either summarily affirm Ms. Wallack's appeal, or in the alternative, stay this appeal pending resolution of other cases which will decide the subject matter raised.

As grounds it is stated:

I. The College Tuition Series of Cases

1. Until 2004 it was New Hampshire's policy to encourage parents in divorce to pay for the college education of their children. That changed by legislation, which provides, "No child support order shall require a parent to contribute to an adult child's college expenses or other educational expenses beyond the completion of high school." RSA 458:17, XI-a (2004) (effective February 2, 2004; repealed and recodified as RSA 461-A:14, V, effective October 1, 2005).

2. The statute has been the subject of eight decisions of this Court, and is currently the subject of two more pending, which are summarized in the table below:

| Name of Case (date of decision) | Date of underlying order | Language of underlying order | Order enforceable? |
|--|---|---|--|
| <i>Goldman</i> , 151 N.H. 770 (March 2005) | 1991 | whether statute applies to modification filed before, but hearing held after, enactment – situation now incapable of repetition | n/a |
| <i>Donovan</i> , 152 N.H. 55 (April 2005) | 2000 | amount proportional to income | Yes |
| <i>Forcier</i> , 152 N.H. 463 (July 2005) | 2000 | portion of child support into college trust fund | Yes |
| <i>Cole</i> , 156 N.H. 609 (December 2007) | 2003 | best of abilities | Yes |
| <i>Goulart</i> , 158 N.H. 328 (January 2009) | 2005 | dad pays | No |
| <i>Johnson</i> , 158 N.H. 555 (April 2009) | 1993 | best of abilities | Yes |
| <i>Scott</i> , 160 N.H. 354 (June 2010) | 1989 | discuss amount in future | Yes for older child finished with college No for younger child |
| <i>Moore</i> , N.H. Sup.Ct. No. 2010-0472 (3JX, May 2012) | 1997 | extent each is financially able | Yes |
| <i>Poulin</i> , N.H. Sup.Ct. No. 2011-0682 (argued June 13, 2012, pending) | 1996 | extent each is financially able | |
| <i>Kinney</i> , N.H. Sup.Ct. No. 2011-0556 (pending) | 1996 | extent each capable, given financial status | |

3. *Donovan* and *In the Matter of Goldman*, 151 N.H. 770 (2005), established that the statute operated prospectively only. After *Donovan*, it was clear that if entered before February 2, 2004 (the date the statute became effective) the order was enforceable. The only exception in the series is *Goulart*, in which the parties stipulated to college tuition explicitly despite the enactment. All the cases in the series flow from the initial decision in *In the Matter of Donovan*, 152 N.H. 55 (2005).

4. After *Donovan* decided the statute operates only prospectively, the remaining question is: Prospectively from what types of orders? The other cases in the series answer that question: *Donovan* (from order specifying payment proportionate to income); *In the Matter of Cole*, 156 N.H. 609 (2007) (from order specifying payment to best of parties' abilities); *In the Matter of Johnson*, 158 N.H. 555 (2009) (same); *In the Matter of Moore*, N.H. Sup.Ct. No. 2010-0472 (3JX, decided May 2012) (from an order specifying payment to the extent parties financially able).

5. *In the Matter of Scott*, 160 N.H. 354 (2010), however, appears to have injected a new analysis. It suggests, but does not make clear, that for a pre-enactment order to be enforceable, it must contain a "specific proportion or amount" of college contribution by the parties. *Scott*, 160 N.H. at 363. *Scott* may imply – but does not explicitly say – that when a post-enactment court merely enforce an existing order that is known in proportion or amount, it can be enforced; but that if the court must undertake such efforts as determining facts and making findings, then the order was not specific enough.

6. If this is the meaning of *Scott*, it would appear to overturn parts of several of the previous cases in the series: *Donovan* because it specified payment only in an amount proportionate to the parties' income; *In the Matter of Cole*, 156 N.H. 609 (2007) and *In the Matter of Johnson*, 158 N.H. 555 (2009), because they specified payment only to the best of the parties' abilities; and *In the Matter of Moore*, N.H. Sup.Ct. No. 2010-0472 (3JX, decided May 2012), because it specified payment only to the extent the parties are financially able.

7. On the other hand, the order in *Scott* called only for a discussion – amorphous compared to the orders in the other cases. It specified no amount at all, but merely committed the parties to later discuss an amount. This may account for this Court's commentary regarding a “specific proportion or amount.”

8. Whether this Court in *Scott* was reacting to the parties' lack of specificity, or whether this Court intended to inject a new analysis is an open question.

9. Two cases already pending before this, squarely present that question for answer by this Court.

10. *In the Matter of Poulin*, N.H. Sup.Ct. No. 2011-0682, was argued on June 13, 2012. The order in *Poulin* says that college contribution will be “to the extent each party is financially able” – essentially identical to *Moore*. In their briefs and oral argument, the parties in *Poulin*, ask whether *Scott* intends a new analysis. See *POULIN*, BRIEF OF ROSE MARIE WALL; *POULIN*, BRIEF OF CHRISTIAN POULIN (documents on file at Supreme Court); *POULIN*, ORAL ARGUMENT, <<http://www.courts.nh.gov/pastsessions/June12/20110682va.aspx>>.

11. *In the Matter of Kinney*, N.H. Sup.Ct. No. 2011-0556, is procedurally coming along;

counsel understands it is awaiting transcripts. The order in *Kinney* says the parties' college contribution will be "to the extent he or she is capable, given his or her financial status" – essentially identical to *Cole* and *Johnson*. The appellant in *Kinney* appears to ask the same question as *Poulin*. See *KINNEY*, NOTICE OF APPEAL (document on file at Supreme Court).

II. This Case Asks the Same Question as *Poulin* and *Kinney*

12. The present case, *In the Matter of Floros*, is essentially identical to the others previously decided and pending. The order below says: "To the extent they then may be financially able ... the parties shall contribute proportional to their then income and assets." See ORDER, NOTICE OF APPEAL at 12 (quoting 2003 stipulation at ¶ 6).

13. Given the pending cases of *Poulin* and *Kinney*, the appellant here asks no new question and presents no new issue. *Poulin* and *Kinney* will provide guidance regarding whether *Scott* requires specificity as to "proportion or amount," or whether the pre-*Scott* cases in the *Donovan* series will remain precedent. Those cases will determine the outcome here, without further litigation.

14. Accordingly, there is no jurisprudential reason to accept the case for review. Rather, this Court should summarily dispose of it by declining acceptance. N.H. SUP.CT. R. 25. In the alternative, the Court should stay this case pending resolution of *Poulin* and *Kinney*. N.H. SUP.CT. R. 7-A.

WHEREFORE, Peter Floros respectfully requests this honorable Court to either:

A. Summarily affirm Ms. Wallack's appeal;

or in the alternative,

B. Stay this appeal pending resolution of *Poulin* and *Kinney*, cited herein, which will individually or collectively decide the subject matter raised in this appeal

Respectfully submitted
for Peter Floros
by his attorney,

Dated: June 20, 2012

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I hereby certify on this 20nd day of June 2012, a copy of the foregoing is being forwarded to Susan V. Denenberg, Esq.; Susan R. Wallack; Stephen Dibble, Esq.; and to Mark Moeller, Esq.

Dated: June 20, 2012

Joshua L. Gordon, Esq.