

State of New Hampshire
Supreme Court

NO. 2015-0345

2015 TERM

DECEMBER SESSION

In the Matter of

Danielle C. Ross & Christopher K. Ross

RULE 7 APPEAL OF FINAL DECISION OF THE
SALEM FAMILY COURT

BRIEF OF RESPONDENT/APPELLANT, CHRISTOPHER ROSS

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QUESTIONS PRESENTED

- I. Did the court err in dismissing fault grounds when Danielle engaged in a several-year extra-marital affair which caused the breakdown of the marriage, and Christopher began a post-separation relationship nearly a year later?

Preserved: MOTION TO DISMISS FAULT GROUND (May 24, 2013), *Appx.* at 36;
OBJECTION TO MOTION TO DISMISS FAULT GROUND (June 3, 2013), *Appx.* at 41.

- II. Did the court err in not taking into account the investments Christopher made into Danielle's career development and orthodontic business startup costs?

Preserved: *Trial* at 634, 664; CHRIS'S FOF&ROL (Dec. 1, 2014), *Appx.* at 82.

- III. Did the court err in not retroactively modifying child support and marital home support when it was revealed that Danielle under-reported her income at the time the court issued temporary orders?

Preserved: MOTION TO MODIFY TEMPORARY ORDERS (Mar. 19, 2013), *Appx.* at 20.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Christopher Builds a Life Together With Danielle

When she was in dental school at Tufts, Danielle met Christopher¹, who was a few years ahead of her in his dental education. While she finished her post-graduate training in Florida to be an orthodontist, in 2001 he established an endodontist practice in Lowell, Massachusetts, and the couple carried on a long-distance relationship. Danielle financed her education, but Christopher paid for their travel between Miami and Lowell, and for their wedding. *Trial* at 22-25, 212, 706-711.²

In 2002 they were married a few weeks after her graduation, and Christopher bought his wife a home in Windham, New Hampshire. *Trial* at 26, 101, 712. They gave birth to a girl and a boy in 2004 and 2006.

Danielle went to work for several orthodontist offices, and starting in 2003 began to earn a significant income. DANIELLE'S SOCIAL SECURITY STATEMENT (Apr. 18, 2013), Exh. 37, *Appx.* at 170 (partially reproduced in chart at right); *Trial* at 41-44. Added to Christopher's salary from his practice, averaging about \$220,000 over the same period, the family lived well. CHRISTOPHER'S SOCIAL SECURITY STATEMENT (Mar. 3, 2011), Exh. 38, *Appx.* at 135.

Danielle Ross Earnings, 2003-2009	
2003	\$116,400
2004	\$115,250
2005	\$137,088
2006	\$134,640
2007	\$137,280
2008	\$136,650
2009	\$129,020

¹Both parties' last names is Ross. To minimize confusion, they are referred to herein by their first names.

²The record includes five pre-trial hearing days. They are cited herein by their dates, "*July 4, 1776 Hrg.* at #." Trial occurred over five days between August and November, 2014. Because the trial transcripts are consecutively paginated, reference herein omits dates, and they are cited as "*Trial* at #." Documents sealed by order, rule or discretion are included in the court's appendix, but omitted from the public copy.

II. Christopher is Happy in Danielle's Success

Observing Christopher's success, Danielle considered buying a practice. Together the couple sought advice from their accountant, Raymond Anstiss, whom they had met when they were dating. *Trial* at 600-01. He helped estimate the possibility of buying and operating an existing practice, using as an example one of the dentists for whom Danielle regularly worked on a *per diem* basis; the idea was rejected. *Trial* at 45-46, 666, 703-04.

Mr. Anstiss then explored the notion of Danielle opening her own practice. CHRIS'S FOF&ROL ¶67 (Dec. 1, 2014), *Appx.* at 82. He helped the couple understand the process of starting a business, *Trial* at 46, 60, and to appraise costs and benefits into the future. *Trial* at 608. He educated them about the significant financial burden in the short term. *Trial* at 608.

The accountant assumed that Danielle would lose the possibility of working for other dentists when the community heard she was starting her own practice, that it would take about two years before she could expect to replace her then-current income, and that her earnings would be near zero in the interim. *Trial* at 609, 614, 749. The accountant modeled *pro forma* spreadsheets projecting Danielle could take some salary beginning the thirteenth month, and maybe replace her former salary in the twenty-fifth month. PROJECTED MONTHLY SCHEDULE OF CASH FLOW (June 14, 2010), Exh. U, *Appx.* at 102; *Trial* at 610, 616. Mr. Anstiss suggested the family shrink its lifestyle, recommended taking accelerated tax depreciation to ameliorate the short-term cash-flow problems, *Trial* at 359-61, 619, 693; AFFIDAVIT OF RAYMOND L. ANSTISS JR. (Mar. 6, 2014), Exh. 82, *Appx.* at 110, and be aware of existing commitments such as their mortgage and student loans. *Trial* at 748.

The total "opportunity cost" of the two-year period, including both lost income (\$90,000 per year) and start-up expenditures (\$24,000 per year) was estimated at \$228,000. *Trial* at 611-613, 614-15, 666, 792; FINANCIAL CALCULATIONS (undated), Exh. OO, *Appx.* at 113; CHRIS'S

FOF&ROL ¶¶ 81-84; *but see, id.* ¶71. Danielle financed the remainder start-up costs by borrowing from family, banks, and an economic development agency, a total of \$420,000, with about \$210,000 still owing at the time of trial. *Trial* at 71-75, 144, 164-65; CHRIS'S FOF&ROL ¶ 36.

With Mr. Anstiss's aid Danielle developed a business plan, which incorporated the accountant's projections. *Trial* at 71, 77, 160, 166, 600, 607-08; BUSINESS PLAN (undated), Exh. T (omitted from appendix). While it was Danielle's project and Christopher had a number of concerns, he backed the plan, cheered Danielle's career, lent emotional and intellectual support, and was generally "supportive." CHRIS'S FOF&ROL ¶¶ 30, 32, 79; *Trial* at 60-61, 144, 745-47, 759. He also participated in prosaic errands – conferring with brokers to scope business locations, suggesting design considerations for the facility, locating contractors, meeting with dental equipment representatives, maintaining office machines, and shopping for supplies. *Trial* at 64-71, 236-237, 752-54, 756-57, 759; CHRIS'S FOF&ROL ¶¶ 30, 31, 79; *but see, id.* ¶ 33.

Christopher made direct financial contributions to Danielle's orthodontic venture. He increased hours at his own office in contemplation of start-up costs, *Trial* at 155, 215-216, 733-734, 749-750; CHRIS'S FOF&ROL ¶ 80, and depleted savings. *Trial* at 164; CHRIS'S FOF&ROL ¶¶ 73-76; *June 26, 2014 Hrg.* at 25. Christopher sold the Porsche sports car he had treated himself for his fortieth birthday. *Trial* at 216, 750-751, 871; CHRIS'S FOF&ROL ¶¶ 85-90. After Danielle opened, Christopher made referrals to her practice, *Trial* at 237, 284, 756, and recounts he temporarily hired a dental assistant Danielle wanted but could not initially afford. *Trial* at 756-57; CHRIS'S FOF&ROL ¶ 91.

As Mr. Anstiss anticipated, Danielle's reported earnings declined in 2010 and 2011. But she had her first patient in October 2010, and began generating income from the practice beginning in December 2011. *Trial* at 78; CHRIS'S FOF&ROL ¶ 82. Christopher is "happy for her" and "happy in the advancement of her career." *Trial* at 746, 759.

III. Danielle Cheats, Christopher Leaves, the Locks are Changed, and the Marriage is Broken

As far as Christopher knew, although the couple had been in counseling, he did not suspect misbehavior. INTAKE RECORD (Feb. 10, 2010), Exh. P (withdrawn), *Appx.* at 115; *Trial* at 232.

But on Monday, December 12, 2011, Connie Calvin, theretofore unknown, appeared at Christopher's office and told him she had learned that her husband, dental colleague Richard Calvin, was having an affair with Danielle. *Trial* at 783-84; CHRIS'S FOF&ROL ¶ 92. Christopher confronted Danielle with the news, left the marital home that same day, and never returned. *Trial* at 259, 707; CHRIS'S FOF&ROL ¶ 1; DANIELLE'S FOF&ROL ¶¶ 2, 87 (Dec. 1, 2014), *Appx.* at 68.

On Wednesday Danielle changed the locks. *Sept. 24, 2013 Hrg.* at 6. There was never an attempt at reconciliation, *Sept. 24, 2013 Hrg.* at 16-17; *Trial* at 258-59; MEMO OPPOSING MOTION TO DISMISS (Sept. 24, 2013), *Appx.* at 54, and on Friday Danielle filed her petition for divorce. PETITION FOR DIVORCE (Dec. 16, 2011), *Appx.* at 1.

Danielle acknowledged that for Christopher her dalliance was the cause of the breakdown of the marriage. *Apr. 12, 2012 Hrg.* at 5. Christopher later learned Danielle had cuckolded him for up to five years. *Apr. 12, 2012 Hrg.* at 20, 30; *Trial* at 292. He found the news "traumatic," and a rupture of "a sacrament in our church." He got himself tested for sexually-transmitted diseases, and found solace in mental health counseling. *Trial* at 871; TEST RESULTS (Dec. 19, 2011), Exh. M (withdrawn), *Appx.* at 146; INITIAL CLINICAL ASSESSMENT (Dec. 11, 2011), Exh. O (withdrawn), *Appx.* at 139.

Christopher counterclaimed on grounds of adultery, RESPONDENT'S ANSWER AND COUNTERCLAIM ¶14 (Jan. 17, 2012), *Appx.* at 7, and sought a greater-than-half share of assets. PROPOSED FINAL DECREE (Apr. 24, 2013) at 7-8, *Appx.* at 28. Because Danielle's affair generated thousands of travel, phone and text records over a long period, and because of concern for the self-incrimination rights of both Danielle and Richard Calvin the co-respondent, discovery became

protracted. *See, e.g.*, ORDER (Jan. 17, 2013), *Appx.* at 17; MEMO SUPPORTING CO-RESPONDENT’S FIFTH AMENDMENT PRIVILEGE (Jan. 2, 2013), *Appx.* at 14; *see* 2014 LAWS Ch. 44 (repealing crime of adultery). And trial was delayed several times. *See e.g., Aug. 8, 2012 Hrg.* at 7 (discussing trial in April or May 2013); NOTICE OF DECISION (Oct. 28, 2013) (staying trial until resolution of interlocutory appeal).

Eleven months after she brought him the news of Danielle, Christopher began a relationship with Connie Calvin. INTERROGATORIES IN *MATTER OF CALVIN & CALVIN* ¶ 1 (May 10, 2013), *quoted in* MEMO SUPPORTING DISMISSAL (Sept. 24, 2013), *Appx.* at 46 (Connie Calvin: “The first time I had sexual intercourse with [Christopher] Ross was November 9, 2012.”); *Trial* at 860. Christopher considers Connie his “girlfriend.” *Trial* at 814.

Alleging Christopher was no longer an innocent spouse for not remaining abstemious the entire period of the divorce proceeding, Danielle asked the court to dismiss Christopher’s adultery grounds, MOTION TO DISMISS FAULT GROUND (May 24, 2013), *Appx.* at 36; MEMO SUPPORTING DISMISSAL (Sept. 24, 2013), *Appx.* at 46, to which Christopher objected. OBJECTION TO MOTION TO DISMISS FAULT GROUND (June 3, 2013), *Appx.* at 41; MEMO OPPOSING MOTION TO DISMISS (Sept. 24, 2013), *Appx.* at 54.

The Salem Family Court (*Thomas G. Cooper*, MM.) initially deferred decision to the final hearing, but later heard argument on the motion. *Sept. 24, 2013 Hrg., passim.* The court granted the dismissal,³ MARGIN ORDER (Oct. 16, 2013), *Appx.* at 64, and also approved Christopher’s interlocutory appeal statement on the adultery issue. This Court later denied interlocutory review. INTERLOCUTORY APPEAL STATEMENT (Oct. 25, 2013) (omitted from appendix); SUPREME COURT ORDER, Case No. 2013-0733 (Nov. 20, 2013) (omitted from appendix).

³Consequently the court also granted co-respondent Richard Calvin’s request to be removed from the proceedings. MOTION TO REMOVE RICHARD CALVIN AS PARTY TO PROCEEDINGS (Oct. 22, 2013), margin order (Mar. 24, 2014), *Appx.* at 65.

IV. Temporary Orders Based on Danielle Underreporting Her Income

Meanwhile, the court had issued temporary orders in April 2012, a few months after Danielle first petitioned for divorce. The temporary decree calculated Christopher's child support and marital home support obligations based on Danielle's financial affidavit, in which she claimed \$91,848 in annual income. DANIELLE'S FINANCIAL AFFIDAVIT (Apr. 12, 2012), *Appx.* at 153; DANIELLE'S CHILD SUPPORT GUIDELINES WORKSHEET (Apr. 12, 2012), *Appx.* at 147.

During subsequent discovery, it was learned her income was much higher:

- Danielle's 2012 tax return shows income of \$203,000. TAX FORM 1040 (Apr. 8, 2013), Exh. 32, *Appx.* at 156. This includes income from her own practice and *per diem* work for other dentists. *Trial* at 173-192, 289, 293. Danielle admitted and the court found her income was that amount in 2012. *Trial* at 183; CHRIS'S FOF&ROL ¶ 23.
- For the valuation of the parties' dental practice, each presented reports and testimony of expert witnesses. Christopher's expert, based on information gathered for the valuation, estimated Danielle's 2012 "net discretionary cash flow" at \$201,000. AFFIDAVIT OF RANDALL DUNHAM ¶ 1 (Mar. 19, 2013), *attached to MOTION TO MODIFY TEMPORARY ORDERS FOR SUPPORT* (Mar. 19, 2013), *Appx.* at 20.
- The court found that Danielle "reported total personal income of \$229,537.00 in 2012." CHRIS'S FOF&ROL ¶ 23.
- On November 20, 2011, a month before the separation, Danielle bought a car and applied for a loan at Tulley BMW in Nashua. She listed her employer as her own dental practice, and her "gross annual" income as \$125,000. BMW CONSUMER CREDIT APPLICATION (Nov. 20, 2011), Exh. Y, *Appx.* at 107; *Trial* at 210-212.
- In testimony, Danielle conceded, based on her own expert's calculations: "In 2012, I believe I earned [\$]153,757." *Trial* at 179.

Whatever source is used to peg Danielle's 2012 income, all show income significantly greater than the \$92,000 she swore in her financial affidavit and guidelines worksheet. Consequently, about mid-way through these proceedings, Christopher filed a motion to modify

the temporary orders for an adjustment *nunc pro tunc* to the date of the orders, to which Danielle objected. MOTION TO MODIFY TEMPORARY ORDERS (Mar. 19, 2013), *Appx.* at 20; OBJECTION TO MOTION TO MODIFY (Apr. 12, 2013), *Appx.* at 25. The court heard argument on the matter. *June 26, 2014 Hrg.*, *passim*. While it moderately modified Christopher’s temporary obligations on other grounds, it denied modification based on Danielle’s 2012 income under-reporting. ORDER ¶ 3 (July 2, 2014), *Addendum* at 19 (“All other aspects of the [t]emporary [o]rders shall remain in full force and effect.”).

Subsequently, Danielle has been even more successful in her orthodontic practice. At the time of trial in 2014, the court estimated her income at about \$16,000 per month. CHILD SUPPORT CALCULATOR (Apr. 16, 2015), *Appx.* at 174.

V. Five-Day Trial in 2014 on No-Fault Grounds

Trial finally went forward on no-fault grounds over five days in the fall of 2014, about half of which concerned valuation of the dental practices not relevant here. The court granted divorce on irreconcilable differences, and divided remaining property with an intent to split equally. FINAL ORDER (Apr. 16, 2015), *Addendum* at 21; DANIELLE’S FOF&ROL ¶¶ 95A-95J, 96; *Trial* 110, 790. This appeal followed.

SUMMARY OF ARGUMENT

Christopher first points out that Danielle's affair caused the breakdown of the marriage. He acknowledges his own affair, but his was eleven months after separation, and thus could not have been the cause of the marital breakdown. He argues the recrimination defense to adultery is therefore not available to Danielle, and it is not reasonable that in order to maintain an adultery claim he must remain celibate for the lengthy duration of litigated divorce proceedings.

Christopher notes his contributions to the establishment of Danielle's orthodontic practice, both his general emotional support and his specific actions to ensure the family could afford the financial costs of a start-up business. He then expresses his injury at being left for another man on the eve of Danielle's success, and argues he should not have been denied the gain from his investment.

Finally, Christopher identifies that at the time temporary orders were entered, Danielle had underreported her income by as much as \$140,000. He argues that the court should have addressed the matter by retroactively compensating him for the error.

Christopher waives questions II, III, IV, and VII stated in his notice of appeal.

ARGUMENT

I. Danielle's Adultery Caused the Marital Breakdown, Not Christopher's Relations Eleven Months Later

New Hampshire law allows that “divorce from the bonds of matrimony shall be decreed in favor of the innocent party for ... [a]dultery of either party.” RSA 458:7, II. The statute, essentially unchanged since 1842, *Rockwood v. Rockwood*, 105 N.H. 129, 131 (1963); *Bascomb v. Bascomb*, 25 N.H. 267, 271 (1852), is silent on what constitutes adultery, who is an “innocent party,” the timing of a party’s innocence, or whether innocence once lost can be regained; so a significant jurisprudence has developed.

To prove adultery as a grounds for divorce, the party alleging it must prove marital infidelity. *Yergeau v. Yergeau*, 132 N.H. 659 (1990) (wife saw husband’s truck parked at other woman’s house overnight on multiple occasions was sufficient to prove adultery), *but see, In re Blanchflower*, 150 N.H. 226, 228 (2003) (coitus necessary condition of adultery); Bethany Catron, *If You Don’t Think This is Adultery, Go Ask Your Spouse*, 30 U. DAYTON L. REV. 339 (2005) (suggesting *Branchflower* may be limited to non-heterosexual context).

The party alleging adultery must also prove that the infidelity caused the breakdown of the marriage. *Yergeau*, 132 N.H. at 659 (wife proved husband’s adultery caused marital breakdown because adultery occurred after and destroyed the couple’s efforts to reconcile); *Murano v. Murano*, 122 N.H. 223 (1982) (wife failed to prove causation because husband’s relations with other woman was after couple separated); *Jeanson v. Jeanson*, 96 N.H. 308 (1950) (wife proved husband’s adultery was cause of her refusal to cohabit).

The spouse alleging adultery must be an “innocent party.” *Shatney v. Shatney*, 76 N.H. 391, 392 (1912) (“[T]he statute provides that the divorce shall be given to the libelee, who asks for it, when the libelee is, and the libelant is not, an innocent party.”). “Innocent” means “free from

guilt.” *In re Dube*, 163 N.H. 575, 579 (2012). But:

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.

Pollini v. Pollini, 103 N.H. 183, 184 (1961) (quotations omitted), citing *Ballou v. Ballou*, 95 N.H. 105, 105 (1948) and *Kibbee v. Kibbee*, 99 N.H. 215, 216 (1954).

The party opposing an adultery allegation traditionally has several defenses: *e.g.*, connivance, *Bailey v. Bailey*, 67 N.H. 402 (1893) (husband connived with brother to have wife do it again so husband could develop proof), collusion, *see Berman v. Bradford*, 142 A. 751, 752 (Me. 1928) (“Collusion may consist in an understanding, express or implied, that the court shall be deceived by misrepresentation, exaggeration, or suppression of facts.... But collusion, perhaps more commonly, takes another form: it sometimes happens that the innocent party deplors the disruption of the family, is desirous of reconciliation, is ready to forgive and forget, but, yielding to the importunities, threats, or bribes of the guilty party, signs on the dotted line, comes reluctantly into court, and tells her pitiful story.”), and condonation. *Masten v. Masten*, 15 N.H. 159, 161-62 (1844) (husband panders wife to farmhand in exchange for a “scythe and snath”); *Quincy v. Quincy*, 10 N.H. 272, 273 (1839) (“If either party to a marriage thinks proper to forgive the infidelity of the other, it cannot afterwards be set up as a ground of divorce, without evidence of a farther injury. Forgiveness, or condonation as it is usually termed, may be express or implied. It is said to be accompanied with the implied condition that the party shall be treated afterwards with conjugal kindness.”). *See generally*, Annotation, *Proof of Adultery As Grounds for Dissolution of Marriage*, 49 AM. JUR. PROOF OF FACTS 3d 277 §§ 25-30.5. Such defenses are not available in a

no-fault regime. *Rodrique v. Rodrique*, 113 N.H. 49 (1973).

The defense Danielle offers here is recrimination – where the libelee alleges the libelant is also guilty of fault conduct, PETITIONER’S MEMO SUPPORTING DISMISSAL (Sept. 24, 2013) at 5-6, *Appx.* at 46 – and suggests that in order to allege adultery Christopher is obliged to remain celibate from the time this proceeding commenced in 2011 until it resolves probably in 2016. *Sept. 24, 2013 Hrg.* at 23.

Proof of recrimination is identical to proof of the underlying fault grounds – only the parties are reversed. *Tibbetts v. Tibbetts*, 109 N.H. 239, 241 (1968) (“The defense of recrimination is available only where the spouse seeking relief is guilty of a marital offense that would give the other party grounds for divorce.”); *Gordon v. Gordon*, 77 N.H. 597 (1914) (parties cross-alleged fault grounds of extreme cruelty); Annotation, *Recrimination as an Absolute or Qualified Defense in Divorce Cases*, 170 A.L.R. 1076 (“It is well settled in this country under the doctrine of recrimination that the defendant to an action for divorce may set up as a defense in bar that the plaintiff was guilty of misconduct which in itself would be a ground for divorce.”).

Thus the party asserting recrimination of adultery must prove both marital infidelity and that the infidelity caused the breakdown of the marriage. For example, in *Rockwood v. Rockwood*, 105 N.H. 129 (1963), husband fathered children by another woman, causing wife to move out. Wife asserted adultery, and husband alleged recrimination based on fault grounds of abandonment. Because husband’s infidelity was the cause of the marital breakdown, this Court held he could not be an innocent spouse. Adultery that occurs after the couple irreconcilably splits cannot be the cause of the split. *Murano v. Murano*, 122 N.H. 223 (1982) (no causation proved, as husband’s relations with other woman were after marital separation); *Yergeau*, 132 N.H. at 664.

Here, it cannot be disputed that Danielle’s infidelity was the cause of the breakdown of

the marriage, and Danielle admits it. Christopher moved out the day he learned of it, Danielle changed the locks two days later, and she filed for divorce two days after that. That Christopher found a girlfriend eleven months subsequent did not and could not cause the marital breakdown. *See Handy v. Handy*, 124 Mass. 394 (1878) (husband committed to jail, which was grounds for fault divorce as wife's subsequent adultery not available to husband's recrimination defense because it occurred after his fault); *Parker v. Parker*, 519 So. 2d 1232, 1236 (Miss. 1988) (defense of recrimination not available to husband because "misconduct of the appellant wife occurred after the destruction of the marriage").

Accordingly, Danielle cannot prove the causation element of adultery, and thus the defense of recrimination is not available to her. The court erred in denying Christopher a divorce on fault grounds, and this Court should reverse.

II. Christopher Should be Awarded a Greater-Than-Half Share of the Marital Estate Because of His Contributions to Danielle’s Career Success

To gain a greater share of the marital estate based on Danielle’s adultery, Christopher must show that her adultery caused the marital breakdown, and that it harmed him or resulted in his economic loss.⁴ In a fault-based divorce, the spouse seeking a greater share need not be completely innocent, but rather only “the more innocent of the two”:

While any experienced trial attorney knows that the completely innocent spouse is frequently a myth, it is recognized that the more innocent of the two is entitled to favorable consideration in the division of their property and funds.

Kibbee, 99 N.H. at 216.

Harm in the context of fault divorce is not what a hypothetical reasonable person might have experienced, but what the party actually experienced. *Routhier v. Routhier*, 128 N.H. 439, 440 (1986) (“Divorce for injuring health or endangering reason ... does not require proof that the defendant’s conduct would have affected an average or reasonable person, but only that the plaintiff’s health or reason was actually so affected.”). Harm may be shown by odd behavior, *Yergeau*, 132 N.H. at 664 (“robot-like behavior”), severe acting out, *Dube*, 163 N.H. at 577 (arson), or “by calling in the succors of religion and the consolations of friends.” See *Robinson v. Robinson*, 66 N.H. 600, 605 (1891).

⁴RSA 458:16-a, II provides:

When a dissolution of a marriage is decreed, the court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution of property, unless the court establishes a trust fund under RSA 458:20 or unless the court decides that an equal division would not be appropriate or equitable after considering one or more of the following factors:

...

(1) The fault of either party as specified in RSA 458:7 if said fault caused the breakdown of the marriage and:

- (1) Caused substantial physical or mental pain and suffering; or
- (2) Resulted in substantial economic loss to the marital estate or the injured party.

It is indisputable Danielle's infidelity caused the breakdown of the marriage. And Christopher was an uxorious husband. As a result, he suffered both mental and physical pain and suffering. He felt traumatized as both a personal and religious matter, was obliged to undergo testing for sexually-transmitted diseases, and used counseling to ease the process.

Before he learned he was being cuckolded, Christopher spent several years planning on, saving and selling assets for, and working toward Danielle's success in her start-up orthodontic practice. Then she abandoned him for another man, depriving him the fruits of his efforts. *In re Gronvaldt*, 150 N.H. 551 (2004) (divorcing spouse may share in contribution to career of other spouse); *In re Fowler*, 145 N.H. 516 (2000) (same); *Hoffman v. Hoffman*, 143 N.H. 514 (1999) (same); *Kibbee*, 99 N.H. at 216 ("Where the wife has contributed to the accumulation of property of her husband by her funds and industry the court is warranted in granting a larger award in her favor.").

And Danielle's success has been substantial.

Danielle's adultery "[r]esulted in substantial economic loss" to Christopher. RSA 458:16-a, II(1)(2). While the court acknowledged the matter should be considered, CHRIS's FOF&ROL ¶ 9, it is absent from the decree, and apparent the court did not factor it into the property division. This Court should remand with orders that the family court calculate Christopher's contribution to Danielle's success, and adjust the property division accordingly.

III. Temporary Orders Should Have Been Modified Because Danielle Underreported Her Income

The family court has authority to modify a child support order for “substantial change of circumstances,” RSA 458-C:7, I(a), retroactive to the date the obligee was notified of the request to modify. RSA 458-C:7, III. An inaccurate assessment of income is reason to retroactively modify. *In re Birmingham*, 154 N.H. 51, 57-58 (2006). Here, Christopher gave notice in March 2013.

While it is unclear what Danielle’s income was at the time of the temporary proceedings in April 2012, it is clear that it was much higher than the \$92,000 she claimed in her financial affidavit. At a minimum it was \$33,000 higher, and given the court’s findings, it probably was as much as \$140,000 higher.

When the matter was brought to its attention, the court refused to modify on these grounds, and that was error. This Court should remand to determine Danielle’s income in 2012, and order that Christopher be reimbursed for his resultant overpayments as of the date he gave notice in 2013.

CONCLUSION

It is not reasonable to suggest, in these times of protracted discovery and litigation, that a party to a divorce must remain celibate for the duration of the proceedings – here already longer than four years. This Court should hold that because the marriage was irreconcilably broken at the time Danielle changed the locks in December 2011, that Christopher starting a relationship eleven months later did not and could not cause the breakdown of the marriage.

Christopher was part of Danielle's business planning, was concerned about the effect it would have on the family finances for the two years it took to establish Danielle's new practice, and adjusted his own behavior in accordance with those concerns and their accountant's advice. That represents an investment in Danielle's success, which she deprived from him just as it started to pay. This Court should remand with orders that Christopher's contribution to Danielle's success be calculated, and order that the property division be accordingly adjusted.

Upon discovery that Danielle's income was higher than she reported at the time temporary orders were established, Christopher asked for a retroactive modification, which the court denied. This Court should remand to determine Danielle's income in 2012, and order that Christopher be reimbursed for his overpayment.

REQUEST FOR ORAL ARGUMENT

Christopher Ross requests that his attorney, Joshua L. Gordon, be allowed oral argument because post-breakdown relations in the context of the recrimination defense to adultery is not clearly addressed in New Hampshire jurisprudence, because reimbursement for opportunity cost investments in a spouse’s business has never been addressed, and because the resolution of the matters raised may have significant financial implications for the parties.

Respectfully submitted,

Christopher K. Ross
By his Attorney,

Law Office of Joshua L. Gordon

Dated: December 23, 2015

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CERTIFICATIONS

I hereby certify that the decisions being appealed are addended to this brief. I further certify that on December 23, 2015, copies of the foregoing will be forwarded to Steven G. Shadallah, Esq.

Dated: December 23, 2015

Joshua L. Gordon, Esq.

ADDENDUM

- 1. ORDER (July 2, 2014) (denying retroactive modification of temporary order). 19
- 2. FINAL ORDER (Apr. 16, 2015). 21