

State of New Hampshire
Supreme Court

NO. 2009-0244

2009 TERM

OCTOBER SESSION

In the Matter of Kim G. Kirby and Christopher Kirby

RULE 7 APPEAL OF FINAL DECISION OF
BRENTWOOD FAMILY DIVISION COURT

BRIEF OF PETITIONER/APPELLEE KIM KIRBY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	<i>ii</i>
STATEMENT OF FACTS AND STATEMENT OF THE CASE	<i>1</i>
I. Chris Kirby is an Habitual Drunkard	<i>1</i>
II. Mr. Kirby’s Habitual Drunkenness Affected his Wife, his Children, his Community, his Work, his Finances, his Marriage	<i>4</i>
A. Habitual Drunkenness Affected Kim	<i>4</i>
B. Habitual Drunkenness Affected the Children	<i>5</i>
C. Habitual Drunkenness Affected the Family	<i>6</i>
D. Habitual Drunkenness Affected Chris’s Job and the Family Finances ...	<i>7</i>
E. Habitual Drunkenness Affected Chris	<i>8</i>
III. Chris Kirby’s Habitual Drunkenness and the Breakdown of the Marriage	<i>9</i>
IV. Chris Kirby’s Habitual Drunkenness and the Disproportionate Property Division	<i>11</i>
V. Divorce Decree	<i>13</i>
A. Narrative Portion of Decree	<i>13</i>
B. Numbered Portion of Decree	<i>14</i>
C. Findings and Rulings Portion of Decree	<i>14</i>
D. Appeal from Decree	<i>16</i>
SUMMARY OF ARGUMENT	<i>17</i>
ARGUMENT	<i>18</i>
I. Divorce Decreed Because Christopher Kirby is an Habitual Drunkard	<i>18</i>
II. Plenty of Drunkenness in the Years Leading up to the Divorce	<i>21</i>
III. Even an Habitual Drunkard is Allowed Sometimes to be Sober	<i>23</i>
IV. Court Considered Fault Grounds Because the Divorce was Based on the Habitual Drunkard Statute	<i>25</i>
V. Court Awarded Kim Her Proper Share of the Marital Estate	<i>26</i>
CONCLUSION	<i>28</i>
REQUEST FOR ORAL ARGUMENT AND CERTIFICATION	<i>28</i>

TABLE OF AUTHORITIES
NEW HAMPSHIRE CASES

<i>Bailey v. Bailey</i> , 67 N.H. 402 (1893)	23
<i>Batchelder v. Batchelder</i> , 14 N.H. 380 (1843)	23
<i>Boucher v. Boucher</i> , 131 N.H. 377 (1988)	20
<i>Desrochers v. Desrochers</i> , 115 N.H. 591 (1975)	19
<i>Easter v. Easter</i> , 75 N.H. 270 (1909)	23
<i>Ebbert v. Ebbert</i> , 123 N.H. 252 (1983)	20
<i>Fox v. Town of Greenland</i> , 151 N.H. 600 (2004)	18
<i>Gammans v. FHP Constructors, Inc.</i> , 146 N.H. 702 (2001)	18
<i>James v. James</i> , 58 N.H. 266 (1878)	22
<i>Kibbee v. Kibbee</i> , 99 N.H. 215 (1954)	25, 26
<i>In re Letendre</i> , 149 N.H. 31 (2002)	25, 26, 27
<i>McIntire v. Lee</i> , 149 N.H. 160 (2003)	22
<i>In re Nassar</i> , 156 N.H. 769 (2008)	20
<i>In re Nicholas L.</i> , 158 N.H. 700 (2009)	18

<i>O'Brien v. O'Brien</i> , 141 N.H. 435 (1996)	23
<i>In re Peirano</i> , 155 N.H. 738 (2007)	25, 26
<i>Porter v. City of Manchester</i> , 155 N.H. 149 (2007)	19
<i>In re Sarvela</i> , 154 N.H. 426 (2006)	23, 26
<i>State v. Porter</i> , 144 N.H. 96 (1999)	22
<i>State v. Stern</i> , 150 N.H. 705 (2004)	20
<i>State v. Tselios</i> , 134 N.H. 405 (1991)	18
<i>Tulley v. Sheldon</i> , __ N.H. __ (decided Sept. 18, 2009)	18

OTHER STATE'S CASE

<i>Hampton v. State</i> , 988 So. 2d 103 (Fla.App. 2008)	20
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NEW HAMPSHIRE STATUTES

RSA 458:16-a, II(1)	25, 26
RSA 458:7-a	11
RSA 458:7, VII	11, 15, 21

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Christopher Kirby was a doctor in Derry, where he specialized in internal medicine. Kim Kirby is a nurse practitioner. 1 *Trn.* at 154. Chris and Kim were married in 1988. Both worked throughout their marriage, with Kim being the primary caretaker of their home. 1 *Trn.* at 155. They have two children – a son now age 19 and a daughter, now in eighth grade. They own a home in Hampstead and a condominium on the lake in Tuftonboro, and also have a variety of investments and retirement plans. Kim filed for fault divorce in September, 2007, alleging Chris was a habitual drunkard, and it caused the breakdown of their marriage.

I. Chris Kirby is an Habitual Drunkard

Mr. Kirby is an alcoholic. Both he and Ms. Kirby testified, and the court found, that he had a drinking problem when they got married, and throughout their marriage. 1 *Trn.* at 79-80, 99, 156, 226; KIM’S FOF&ROL¹ ¶¶ 13-14, *appx.* at 7; FINAL DECREE at 2, *appx.* at 30.

Testimony of both parties and another witness confirmed many specific instances where Chris was severely intoxicated. One was the family’s vacation to Disney World in 2007, during which Chris was half-dressed, loud, slurring, and generally embarrassing to himself, his wife, his two teenage children, and his friends throughout the entire week in Orlando, on rides, at meals, in the pool, and at the hotel. 1 *Trn.* at 119, 115-120, 182-189. Mr. Kirby acknowledged this behavior. 2 *Trn.* at 284-85.

“He was swinging from the poles on the bus. ... There is no way that a man, a doctor,

¹In this brief, the abbreviations 1 *Trn.* and 2 *Trn.* refer to transcripts of the first and second days of trial, respectively. The abbreviation “KIM’S FOF&ROL” refers to Ms. Kirby’s REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW (Nov. 12, 2008), *appx.* at 7. The abbreviation “CHRIS’S FOF&ROL” refers to Mr. Kirby’s REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW (Nov. 12, 2008), *appx.* at 13.

with the education that he has in his right mind, which I've seen him a million times, would have ever been doing that had he not been inebriated.” 1 *Trn.* at 148 (testimony of family friend). Mr. Kirby had to be removed from the hotel by security. 1 *Trn.* at 121.

On a Saturday in 2005, Chris was drunk and eating shrimp in the aisle of the Hannaford market. He couldn't speak or walk, nor drive. His children witnessed the police delivering him home. 1 *Trn.* at 159-60.

I looked up to my window, and there were my two children looking out the window with looks of fright on their face as they saw their father be escorted by the police. As he got out of the car it was very obvious to me that he was severely intoxicated.

1 *Trn.* at 60. Around the same time, the family took a week at their condo on Lake Winnepesaukee. Chris Kirby was drunk the entire week, day and night. Over his family's pleading, he attended the condo association meeting, showing discombobulated thinking and uncogent speech. 1 *Trn.* at 161-2.

On another occasion in 2006, Kim was asleep at her home when she heard noises in the attic. She went to investigate and found Chris passed out on the floor. 1 *Trn.* at 166-67.

I tried to get him up, and he physically – it was like it was a dead rat. I couldn't even move him. He was totally out of it. I could not arouse him. I tried for a while. I mean, my concern was I had two kids sleeping downstairs, and what if they hear, what if they come see him. What am I going to do, you know. I was in total shock. ... He was obviously extremely intoxicated, and he was lying on the attic floor, which is just wood. He was like just lying there, I mean, like somebody you'd find on the street.

1 *Trn.* at 167.

While at work in 2005 a friend answered a call from Kim requesting she come to the Kirby's house. The friend found Chris at home in the middle of the day, obviously intoxicated.

He couldn't walk or talk steadily. 1 *Trn.* at 114, 148.

On occasions Chris drove his children in their car and boat while he was drunk. 1 *Trn.* at 163-64, 166. The children saw him once with what he claimed was soda in a cup, but they knew by the smell it was alcohol. 1 *Trn.* at 163. Prior to their marriage, Mr. Kirby had been discharged from the military due to his drinking, and had at least one drunk-driving conviction. 1 *Trn.* at 76, 226; KIM'S FOF&ROL ¶¶15, 16, *appx.* at 7. There were times when Chris was absent for long periods and would not answer his phone. 1 *Trn.* at 171.

Kim testified that the number of times Chris had been intoxicated in the years leading up to her libel were "so recurrent" they were "too numerous to count." 1 *Trn.* at 157-58, 160, 171.

Mr. Kirby exhibited typical alcoholic behavior by hiding his drinking – at least from adults. Kim testified that in her 20 years of marriage to him, she had never seen a drink in Chris's hand. 1 *Trn.* at 161. A friend testified that even though she had been with Mr. Kirby hundreds of times, she had never seen him drink. 1 *Trn.* at 145. He did not hide it from the children, however; they saw Mr. Kirby drink. 1 *Trn.* at 58, 185, 208. Both Kim and the children had, nonetheless, found hidden bottles everywhere – some empty, some partly consumed – in garbage cans and storage barrels, in the basement and attic, in closets and drawers, in his briefcase and in his car. 1 *Trn.* at 161-63. Chris admits trying to hide his drinking. 2 *Trn.* at 281.

The twenty years of drunkenness appears to have been punctuated by some bouts of sobriety. The parties agree, for instance, that he drank frequently in 2005 and 2006, less so in 2007. 1 *Trn.* at 85-88, 95-96, 171; 2 *Trn.* at 288-89.

II. Mr. Kirby's Habitual Drunkenness Affected his Wife, his Children, his Community, his Work, his Finances, his Marriage

Chris's drinking had devastating effects on his wife, his children, his community, his work, his finances, and caused the breakdown of his marriage.

A. Habitual Drunkenness Affected Kim

When Mr. Kirby drank, he was nasty to Kim and treated her "like a piece of dirt." 1 *Trn.* at 184-185. Kim testified that when he was drinking Chris did not respect personal boundaries, and would not listen to others. 1 *Trn.* at 189. It made her feel "anxious, irritable, frightened ... disappointed." 1 *Trn.* at 170. A friend noted that while Kim is normally an assertive, outgoing and talkative person who smiles, likes people, and is involved with her community, when Chris drank she appeared visibly upset, downtrodden, diminished, blank, agitated, and afraid. 1 *Trn.* at 126-27.

Kim testified that Chris's drinking caused her physical as well as emotional pain. When she saw him drunk she felt "physically sick," 1 *Trn.* at 164, with a "sick feeling in my stomach, in the pit of my stomach," 1 *Trn.* at 170, a "sick gnawing feeling." 1 *Trn.* at 188. Kim described it as: "It's like your whole body is in terror. It's like – have you ever had a flight or fright response? That's exactly what it is, you know. It's a horrible feeling." 1 *Trn.* at 188.

Kim repeatedly confronted Chris about his drinking. 1 *Trn.* at 170. He often denied it, even when shown evidence. 1 *Trn.* at 169. At other times it induced promises to be sober. 1 *Trn.* at 170. Kim testified that it was "infuriating" when he denied it, because she knew he was lying. 1 *Trn.* at 170. After a time of sobriety, she was "devastated" when she found evidence because she knew it was starting again. 1 *Trn.* at 169.

Chris acknowledged this harm. He testified his drinking caused Kim a “sense of lack of trust, inability to trust the one that she was married to, the uncertainty of what was going to happen, the repeated broken promises.” 1 *Trn.* at 83. He acknowledged he caused her “a lot of hurt and pain, emotional – you know, just sadness over that time. 1 *Trn.* at 84. He understood that it created “an inability to be a good social partner for Kim.” 2 *Trn.* at 280.

B. Habitual Drunkenness Affected the Children

When Chris drank he treated his children poorly also. “He belittles them.” “[H]e would just lie to them ... basically discredit what they see with their own eyes and what they hear with their own ears. [H]e would shame them.” 1 *Trn.* at 191. He put them in danger, drunk-driving them in the boat and car. 1 *Trn.* at 163-64, 166. When they were parked at his son’s football game, Chris surreptitiously let the air out of Kim’s tires. 1 *Trn.* at 180-82.

The children knew when he had been drinking, and witnessed him both drinking and drunk. 1 *Trn.* at 58, 185, 208. A family friend testified the children knew he was drunk during the episode at Disney World. 1 *Trn.* at 116. Kim testified that one evening, at around 7:00, Chris came home obviously intoxicated. When he denied it, their daughter ran to her room, wrapped herself in a blanket and hid under her bed. Kim later found her under the bed, crying and shaking. 1 *Trn.* at 172.

From the testimony of a family friend, the effect of this on the children was they became anxious, worried and angry, 1 *Trn.* at 121, and were very upset after the incident in Florida. 1 *Trn.* at 117. It made their daughter scared, and gave her bad memories of their home. 1 *Trn.* at 141-2. Kim testified that at times their daughter had recalled specific episodes with fright and flashbacks. 1 *Trn.* at 208.

As a result of this, the children are alienated from their father. GAL REPORT, *passim*²; 1 *Trn.* at 197, 194-196. They shut him out emotionally, and when he drank would get disrespectful and angry toward him. 1 *Trn.* at 192-194. Chris acknowledged that his children were not able to trust him, did not feel safe or secure around him, felt a spiritual loss, and felt the absence of a father figure in their lives. GAL REPORT, *passim*; 1 *Trn.* at 84-5.

The children have repeatedly been in counseling for these troubles – including individual, group, and family sessions. There have been professional diagnoses as a result, and efforts at “reunification” and “reconciliation.” GAL REPORT; 1 *Trn.* at 12, 19-23, 28-29, 53, 199-200.

C. Habitual Drunkenness Affected the Family

On several occasions Kim and the children were forced to decamp to a friends’ house to avoid Chris drunk, staying four or five days each time, 1 *Trn.* at 137, sometimes not even having packed for an extended stay. 1 *Trn.* at 134-35. The friend testified that the children had told her they were there because “my dad has been drinking again.” 1 *Trn.* at 134. All three had been crying, and felt disappointed and hurt. One of these occasions was the evening the family returned from Disney World and when Chris had been drinking. 1 *Trn.* at 135-137, 190. Another was an evening when Chris came home drunk, causing the daughter to start “freaking out.” Kim testified, “[h]e started to come up the stairs, started to come into [the daughter’s] bedroom.... I didn’t even bring any clothes. I grabbed [the daughter] and left. My son was already over there.” 1 *Trn.* at 172.

Chris’s drinking caused several marital separations. The GAL calculated that Chris was

²The report of the guardian *ad litem* is part of the record below and is cited in this brief. It has not been made part of the appellate record, however, because it contains information of a private nature, particularly about the children, who are affected by but not parties to this appeal.

physically absent for a total of about two-and-a-half years when their daughter was between 10 and 13 years old, 1 *Trn.* at 39, 44, including a five-month separation in 2005. 1 *Trn.* at 173.

Mr. Kirby testified he “admitted that my behavior has caused harm in the family,” 1 *Trn.* at 89, that he broke promises that he would not drink, 2 *Trn.* at 282, and that his drunkenness “impacts the entire family,” 2 *Trn.* at 314. The GAL reported that it has broken up the family generally. GAL REPORT. As a result the family has often been in counseling. 1 *Trn.* at 31-32; 1 *Trn.* at 81.

D. Habitual Drunkenness Affected Chris’s Job and the Family Finances

As a result of his drinking, Mr. Kirby lost his job. 1 *Trn.* at 76-77; 2 *Trn.* at 304, 4-6, 325; LETTER FROM KENNETH WASHINGTON, VP PARKLAND PHYSICIAN SERVICES TO DR. CHRISTOPHER KIRBY (Oct. 14, 2008). At the time of trial he was unemployed and making no money. 1 *Trn.* at 76; 2 *Trn.* at 317. After a proceeding before the state Medical Board, however, and upon completion of conditions, he will have maintained his medical license. 1 *Trn.* at 76, 78; 2 *Trn.* at 306, 309. Chris hopes to continue practicing. 2 *Trn.* at 347.

As noted, the entire family has been in counseling as a result of Mr. Kirby’s drinking. The programs – in-patient, out-patient, drug testing, counseling for Chris, counseling for other members of the family – have been costly. 1 *Trn.* at 15, 26-27, 82-83, 176-178, 216; 2 *Trn.* at 236, 253, 275, 278, 304-305. Kim estimated that at the time of trial, they had spent \$150,000 on these services. 1 *Trn.* at 177.

Due to his drinking, Chris missed payments on a variety of obligations. He refused to interact with a realtor to sell the condo, 2 *Trn.* at 250, 258-259, did not pay counselors, 1 *Trn.* at 62, his mortgage, or condo fees. He is in arrears with child support. 2 *Trn.* at 306-307, 343-344.

Mr. Kirby allowed his life insurance policy to lapse because “I was in a bad place, and I kept putting off” payment. “Then I tried to renew it, and then at this point, because of what’s been going on ... they won’t renew it. 2 *Trn.* at 324.

E. Habitual Drunkenness Affected Chris

Mr. Kirby has been to hundreds or thousands of AA meetings over many years. 2 *Trn.* at 275, 279. He has attended all types of programs, and admits that while they have helped him, they have not solved his problems. 2 *Trn.* at 279-80. He has repeatedly relapsed after attending. KIM’S FOF&ROL ¶¶ 17, 19, 20, *appx.* at 7. He admits that he is addicted to alcohol, and that it is a “habit.” 2 *Trn.* at 336-337. He planned to enter a 16-month program at the completion of trial. CHRIS’S FOF&ROL ¶6; 2 *Trn.* at 239-240.

Chris believes that leading up to Kim filing for divorce he “spiraled down” in a “tailspin.” 2 *Trn.* at 306. He believes he has hit “rock bottom,” 2 *Trn.* at 278-9, but he cannot rule out relapses in the future. 2 *Trn.* at 335.

III. Chris Kirby's Habitual Drunkenness and the Breakdown of the Marriage

Kim is opposed to divorce, and finds support for her position in her church. 1 *Trn.* at 179. She believes that, even though she put up with it for a long time, Chris's drinking is a violation of their marriage vows. 1 *Trn.* at 174-75.

The day their daughter crawled under the bed Kim resolved to herself "this is it." 1 *Trn.* at 172. She told Chris when he moved back into their home in 2007, and before they went to Florida, that if he relapsed again, it would mean the end of their marriage. 1 *Trn.* at 179-180, 190. Chris testified: "Kim had told me, if you ever drink again, it's over." 2 *Trn.* at 284. Thus during the Disney World episode, Chris knew there was no hope for the marriage. 2 *Trn.* at 285. Kim knew it. 1 *Trn.* at 190. The family's travel friends knew it too. 1 *Trn.* at 137, 149.

She found it aggravating and frustrating that even after extensive counseling, both individual and as a couple, and after Chris's promises to be sober and to deal with his underlying problems, there appeared to be no improvement. 1 *Trn.* at 170, 174, 178. She had hoped and prayed he would fulfill his promises. 1 *Trn.* at 179.

Chris largely confirmed Kim's understanding of the breakdown. He offered some tepid alternative explanations for his marriage woes, vaguely citing "communication style differences" 1 *Trn.* at 100, 101; 2 *Trn.* at 311, an eating disorder, 1 *Trn.* at 100, and his depression. 2 *Trn.* at 329. But he conceded his habitual drunkenness was a "contributing factor," 1 *Trn.* at 91, in the breakdown in his marriage. He understood from their counseling and their private discussions that it was a difficult issue for Kim throughout the marriage, and that it caused many of their problems. 1 *Trn.* at 81, 99, 102, 107. He understood his drinking was the cause of his several lengthy separations from Kim. 1 *Trn.* at 81. He knew it had caused problems for their children

and their family. 2 *Trn.* at 313. He acknowledged in an email “it is my fault for where we are right now.” 1 *Trn.* at 94-95. He testified he knew his marriage was over as the result of having gotten drunk in Florida. 2 *Trn.* at 285, 287.

Kim seeks divorce on the grounds of habitual drunkenness because “it’s the truth.” 1 *Trn.* at 156; 2 *Trn.* at 253. Chris Kirby, however, does not want to get divorced. 1 *Trn.* at 89; 2 *Trn.* at 308, 311-312. Importantly, he continues to believe there is the possibility of reconciliation. 2 *Trn.* at 311-312.

IV. Chris Kirby's Habitual Drunkenness and the Disproportionate Property Division

Kim petitioned for divorce on grounds of habitual drunkenness, RSA 458:7, VII (“A divorce from the bonds of matrimony shall be decreed in favor of the innocent party ... [w]hen either party is an habitual drunkard, and has been such for 2 years together.”), and also irreconcilable differences. PETITION FOR DIVORCE (Sept. 24, 2007), *appx.* at 1; RSA 458:7-a. Chris cross-petitioned based on irreconcilable differences. ANSWER AND CROSS PETITION FOR DIVORCE (Dec. 4, 2007), *appx.* at 3. In pleadings, Kim requested Chris’s no-fault cross-petition be dismissed. (PROPOSED) FINAL DECREE OF DIVORCE ¶ 1 (Nov. 12, 2008), *appx.* at 17. A *Guardian Ad Litem* was appointed for the children. The court held a two-day trial in November 2008.

In her pleadings and at trial Kim maintained she had the need for alimony and child support, but recognizing that Chris had become unemployed, she instead sought a disproportionate share of the property. *Id.*; 1 *Trn.* at 217-218. She suggested a $\frac{3}{4}$ to $\frac{1}{4}$ split. Kim supported this request by pointing out she was the primary caretaker of the house and had also consistently held a job during the marriage. Given Chris’s alcoholism and imminent entry into a 16-month residential treatment program with an extended after-care program, Kim would continue to house and supervise the children. Given his arrangement with the Medical Board, he cannot earn any money for some long while. Kim noted she was nonetheless solely responsible for all the obligations Chris had supported when he was employed. 1 *Trn.* at 218-225. Kim testified:

There is no alimony, child support coming in, and now I’m responsible for two homes and all the expenses, as well as the children’s welfare and their future. So, yes, I do believe a division of assets that is unequal is appropriate.

2 *Trn.* at 253. Kim also pointed out that when he completes counseling, Chris will be able to resume earning. 2 *Trn.* at 253.

Chris conceded that an equal split would not be equitable, for the exact same reasons Kim noted. 2 *Trn.* at 325, 342-344. The only difference was Chris's suggestion that the split should be more like $\frac{2}{3}$ to $\frac{1}{3}$. RESPONDENT'S PROPOSED ORDERS, exhibit (undated), *appx.* at 23, 29; 2 *Trn.* at 319-322, 327-328. He conceded that even under Kim's $\frac{3}{4}$ to $\frac{1}{4}$ proposal, he would not be left penniless, 2 *Trn.* at 347, and acknowledged that because he retained his medical license, his future earning potential remains much greater than hers. 2 *Trn.* at 348.

V. Divorce Decree

The court issued its decree of divorce in three parts – in a narrative, in numbered orders on each issue, and in findings and rulings which had been submitted by the parties. FINAL DECREE (Feb. 27, 2009), *appx.* at 30.

A. Narrative Portion of Decree

In a lengthy portion of the narrative entitled “Grounds for Divorce,” the court recited the “family’s long term struggle with alcoholism” and Chris’s reticent acknowledgment of it.

DECREE at 2. The court noted that Kim “and the children have been forced to witness and endure the alcoholic behavior of a husband and father, many times causing each of them significant pain and embarrassment.” *Id.*

The court found that Chris’s drinking “has been a source of discussion and controversy between [the couple] for their entire married life. It was the basis for their most recent separation and the reason for this divorce action.” *Id.* at 2. One of its “consequences is the loss of [Kim] as his wife, and, the estrangement – which is hopefully not a permanent one – of his children.” *Id.*

The court referred to various incidents in the years leading up to the divorce, and specifically mentioned the 2006 event when the police picked up Mr. Kirby for shoplifting and the children saw them bring him home drunk, “disheveled and slurring” from the Hannaford store. *Id.* at 3.

The court discussed the habitual drunkard portion of the divorce statute at some length. *Id.* at 2-3. It recognized that Chris “has been able to string together several months of sobriety at a time within the past two years.” *Id.* It found, however, that those periods do not defeat fault grounds of habitual drunkenness because it would produce the “illogical result” that “a party

could drink excessively for 23 months, stop for one, and resume again for another 23 months without being subject” to the fault provisions of the divorce statute. *Id.* at 2-3.

The court then further discussed Chris’s alcoholism, expressed its hope that he is now a recovering alcoholic, noted as “the primary breadwinner of this family [he] will not be earning income for the foreseeable future,” and anticipated he will one day return to “a productive member of the professional medical community.” It thus “adopted orders which have divided the parties’ assets in a manner which will enable him to provide for the needs of his family ... to be financially cared for until his return.” *Id.* at 4.

B. Numbered Portion of Decree

In the standard-format numbered portion of its order, FINAL DECREE at 6-12, the court surprisingly wrote, “[t]he parties shall be awarded a Decree of Divorce on the grounds of irreconcilable differences having caused the irremediable breakdown of the parties’ marriage.” *Id.* at 6.

It went on, however, to issue a decree that both parties agree is obviously grounded on fault. Regarding alimony, the court noted that Kim has the need, but Chris has no ability to pay. *Id.* at 7. Regarding property, it awarded Kim 70 percent of the value of the marital home, *Id.* at 10, and of the proceeds from sale of snowmobiles and boats. *Id.* at 8. It gave her 65 percent of the 401(k) plan, the condo, and some other investments. *Id.* at 8-9. Other accounts were awarded to one or the other individually. *Id.* at 8-9. The resulting split of all assets is thus somewhere between the $\frac{3}{4}$ to $\frac{1}{4}$ division requested by Kim and the $\frac{2}{3}$ to $\frac{1}{3}$ requested by Chris.

C. Findings and Rulings Portion of Decree

As noted, the court also ruled on both parties’ requests for findings of fact and rulings of

law. It made a number of findings regarding Chris’s long record alcoholism and treatment for it. KIM’S FOF&ROL ¶¶ 13-21, *appx.* at 7. The court made several specific findings regarding the effect of alcohol on the marriage. It made seven findings and one ruling particularly significant to the issues Chris has raised in this appeal:

Findings

- “The Respondent’s abusive drinking and frequent intoxication constitutes habitual drunkenness.” KIM’S FOF&ROL ¶ 22.
- “The Respondent’s habitual drunkenness has exceeded the requirement that it last for two years together. KIM’S FOF&ROL ¶ 23.
- “The Respondent’s habitual drunkenness caused the Petitioner emotional stress.” KIM’S FOF&ROL ¶ 24.
- “The Respondent’s habitual drunkenness had a negative financial impact upon the family and the marital estate.” KIM’S FOF&ROL ¶ 25.
- “The Respondent’s habitual drunkenness *was the cause of the breakdown of the parties’ marriage.*” KIM’S FOF&ROL ¶ 26 (emphasis added).
- “Christopher Kirby’s habitual drunkenness has caused Kim Kirby significant mental pain and suffering.” KIM’S FOF&ROL ¶ 59.
- “Christopher Kirby’s habitual drunkenness has caused substantial economic loss to the family.” KIM’S FOF&ROL ¶ 60.

Ruling

- “Kim Kirby is entitled to a *divorce on the grounds of habitual drunkenness*, pursuant to RSA 458:7(VII).” KIM’S FOF&ROL ¶ 1, at 6 (emphasis added).

The court thus found that Mr. Kirby’s actions constituted “habitual drunkenness,” that habitual drunkenness resulted in both economic loss and mental pain and suffering, that habitual drunkenness caused the breakdown of the marriage, and that Kim is “entitled to a divorce on the grounds of habitual drunkenness.” Finally, the court found that “[t]he facts of this case support an unequal distribution of marital assets favoring Kim Kirby. KIM’S FOF&ROL ¶ 71.

D. Appeal from Decree

Christopher Kirby did not file a motion to reconsider the decree, nor a motion to clarify the obvious discrepancy in it – both the narrative portion and its findings and rulings clearly declare a divorce based on fault grounds of habitual drunkenness, while the numbered portion grants it on grounds of irreconcilable differences. Rather, he took this appeal directly from the decree.

SUMMARY OF ARGUMENT

Kim Kirby first shows that the apparent discrepancy in the decree regarding the grounds of divorce was not preserved for appeal, and that the issue was waived in a variety of ways, including by Chris Kirby's own testimony. She then points out that the court did no wrong because, beyond a scrivener's error, it made crystal-clear that divorce was grounded on Chris's habitual drunkenness. She also shows that even if there were error, it was harmless because of the overwhelming evidence of drunkenness in the years leading up to the divorce.

The legal issue Chris presents appears to be whether fault grounds requires that two years of drunkenness must immediately precede the filing of the petition for divorce. Kim shows that because Chris successfully had the lower court limit evidence of drinking to the years immediately preceding the filing, he cannot now point to any error. She also notes, again, that because the evidence of drunkenness during that period is so overwhelming, any error is harmless.

Kim puts to rest Chris's apparent allegation that a period of sobriety defeats a claim of habitual drunkenness by pointing to the absurdity of the claim – few can be perpetually drunk for two years.

Finally, Kim defends the court's disproportionate property award by pointing out that the divorce was because Chris is a habitual drunkard, that the conditions of the fault statute was met, and that given the facts the award is reasonable.

ARGUMENT

I. Divorce Decreed Because Christopher Kirby is an Habitual Drunkard

Mr. Kirby maintains in his brief that the court erred because it “fail[ed] to decide whether the breakdown of the marriage was caused by irreconcilable differences or ... on the fault ground of habitual drunkenness.” APPELLANT BRF. at 10. This issue does not benefit him for several reasons.

First, despite the obvious discrepancy between the narrative and findings section of the decree on the one hand – where the court thrice made clear the grounds were habitual drunkenness – and the numerical portion on the other – which contains boilerplate irreconcilable differences language – Chris Kirby did not bring the matter to the lower court’s attention. Where an issue is not raised in the trial court, it is not preserved for review here. *Tulley v. Sheldon*, ___ N.H. ___ (decided Sept. 18, 2009). To preserve a matter it must be raised in the trial court at the “earliest possible time” in the litigation process so that it can be addressed in that forum. *Fox v. Town of Greenland*, 151 N.H. 600, 604 (2004). Where the alleged error is in the final decree, the time to raise it is in a motion to reconsider. *Gammans v. FHP Constructors, Inc.*, 146 N.H. 702, 704 (2001); *State v. Tselios*, 134 N.H. 405, 407 (1991). Accordingly, the issue was waived because it was not presented to the lower court.

The issue was waived for a second reason. In his notice of appeal, Mr. Kirby posed for review two questions, neither of which mention the discrepancy in the decree, or allege an inability to determine what is the grounds of the divorce. An issue presented for the first time in a brief but absent from the notice of appeal is waived. *In re Nicholas L.*, 158 N.H. 700 (2009).

The issue was also waived because it is not comprised in the questions presented for

review in his brief (which are essentially the same as those posed in his notice of appeal³).
SUP.CT.R. 16(3)(b).

There is yet a fourth waiver. In his notice of appeal, Mr. Kirby posed for review the question of whether “the trial court abuse[d] its discretion in erroneously *granting the divorce for cause, on the ground of habitual drunkenness.*” APPELLANT NOA at 3 (emphasis added). The appellant there assumes the decree was based “on the ground of habitual drunkenness” – the opposite of the allegation he makes in his brief. Where a party takes one position, he is estopped from asserting the opposite. *Porter v. City of Manchester*, 155 N.H. 149 (2007).

The most striking waiver of the issue, however, is Chris Kirby’s own testimony. He told the court he believed his marriage was salvageable, and that through sufficient efforts the parties were reconcilable. *2 Trn.* at 311-312; *see Desrochers v. Desrochers*, 115 N.H. 591 (1975) (belief in reconciliation not a bar to divorce). But he now claims the opposite – that his divorce should have been granted because the marriage was not reconcilable. *See Porter v. City of Manchester*, 155 N.H. at 149.

Even if the matter were preserved and not waived, however, there was no error. The six-page narrative portion of the order makes abundantly clear that the divorce was grounded on habitual drunkenness. The repeated explicit findings on the parties’ requests show the same. The numbered portion of the decree contains boiler-plate irreconcilable differences language that appears to be a word-processing error from a standard-form template. Scrivener’s errors do not

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- ³I. Did the trial court err as a matter of law in ruling that the Husband was a “habitual drunkard” within the meaning of the fault-based divorce statute, when the statute requires a finding that the “party is a habitual drunkard, and has been such for 2 years together?
 - II. Did he court below unsustainably abuse its discretion in ordering a significantly disproportionate distribution of marital property between the parties?

APPELLANT BRF. at 1.

create substantive rights. *State v. Stern*, 150 N.H. 705 (2004); *Hampton v. State*, 988 So.2d 103 (Fla.App. 2008) (concurring opinion) (recognizing court clerk's error created by word-processing equipment). Thus, there was no error.

In the cases cited by Mr. Kirby, this Court remanded for clarification of whether the divorce was granted on fault or no-fault grounds because it could not determine from the decree or the record what were the grounds of divorce. *Ebbert v. Ebbert*, 123 N.H. 252 (1983) (court granted each spouse divorce on differing grounds); *Boucher v. Boucher*, 131 N.H. 377 (1988) (court considered fault in property division after granting no-fault divorce); *In re Nassar*, 156 N.H. 769 (2008) (same).

Here there is no mystery – and thus no error. Despite the scrivener's error in the numerical portion of the decree, the lower court left no room for doubt in its narrative that it granted a divorce based on habitual drunkenness. Its findings and rulings were likewise clear, definitive, and unequivocal.

Finally, to the extent there was error, it is harmless. The evidence of habitual drunkenness, and how it caused the breakdown of the marriage, was overwhelming. Even Chris himself admitted he was an habitual drunk, and that it was the cause of the breakdown of his marriage. He posited no cogent alternative reason for its unraveling.

For these reasons this court should affirm that this was a fault-based divorce.

II. Plenty of Drunkenness in the Years Leading up to the Divorce

Chris Kirby claims the habitual drunkenness statute requires that the two years of drunkenness must immediately precede the filing of the petition for divorce.⁴

The issue is moot. At the beginning of trial Kim's attorney attempted to bring in some older evidence. Chris's lawyer objected, arguing that, as the libel was filed in 2007, it should hear about incidents of drunkenness only from 2005 to 2007. 1 *Trn.* at 69-75.

Although the court did not categorically bar evidence from before 2005, it issued a warning to the parties:

Well, here's what we're going to do. I'm going to overrule the objection, but I'm going to caution you that I don't want to spend a lot of time on incidents that are that far back in time.

1 *Trn.* at 73. After further argument, the court again ruled:

I'm overruling your objection at this point. You can proceed, but, again, I want to caution you. Let's focus on the issue, which is more recent than this.

1 *Trn.* at 75. Throughout trial, the parties largely complied with the order.

Accordingly, the court heard just two items from before 2005 – that Mr. Kirby's disengagement from the military involved a drunk driving conviction sometime in the 1980s, and that alcohol had generally been an issue between the parties throughout their marriage. Beyond that, the parties presented no aged evidence.

Thus, whatever should be the appropriate time-frame for a showing of drunkenness, the

⁴RSA 458:7, VII provides:

A divorce from the bonds of matrimony shall be decreed in favor of the innocent party for any of the following causes: ... When either party is an habitual drunkard, and has been such for 2 years together.

issue is moot – the appellant received the relief he sought. *State v. Porter*, 144 N.H. 96, 100 (1999) (acquiescence to trial court ruling waives appeal of ruling).

But even if the court heard evidence of older incidents, the amount of drunkenness during the two years preceding the filing of the divorce was overwhelming. Kim testified, and the point appears conceded, that the number of times Chris had been drunk in the two years leading up to her filing were “so recurrent” they were “too numerous to count.” 1 *Trn.* at 157-58, 160, 171. She and others, including Chris, recounted numerous specific instances in 2005, 2006 and 2007.

Thus, to the extent there was error, it was harmless. *McIntire v. Lee*, 149 N.H. 160, 167 (2003) (“An error is considered harmless if it is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party asserting it. Where it appears that an error did not affect the outcome below, or where the court can see from the entire record that no injury has been done, the judgment will not be disturbed.”); *James v. James*, 58 N.H. 266 (1878) (“The living with an habitual drunkard, in the wretchedness, suffering, and poverty resulting from such a life, may be more intolerable to a wife than occasional acts of cruelty.”).

Accordingly, this Court should take no action on this issue.

III. Even an Habitual Drunkard is Allowed Sometimes to be Sober

Mr. Kirby suggests that any period of sobriety defeats the requisite two years of drunkenness. The suggestion, however, is merely a sufficiency-of-the-evidence claim recast in legal jargon.

Whether one is an habitual drunkard is a factual matter for determination by the trial court. *Batchelder v. Batchelder*, 14 N.H. 380 (1843) (it is “left it to the court to judge whether or not [facts] amounted to habitual drunkenness”); *Easter v. Easter*, 75 N.H. 270 (1909) (period of time spouse refused to cohabit for divorce based on abandonment is question of fact).

Although it is clear that occasional intoxication does not constitute habitual drunkenness, *Bailey v. Bailey*, 67 N.H. 402 (1893) (“The plaintiff has used cider habitually and spirituous liquor occasionally, and has been intoxicated, but is not an habitual drunkard.”), “[t]he plain meaning of ‘drunkard’ is ‘one who habitually becomes drunk; one suffering from or subject to acute or chronic alcoholism.’” *In re Sarvela*, 154 N.H. 426, 429 (2006) (quoting dictionary)

Nonetheless, it would take a prodigious dipsomaniac to consume alcohol around the clock every day for two years. A statute cannot demand what cannot be humanely accomplished. *O’Brien v. O’Brien*, 141 N.H. 435, 436 (1996) (statutes are construed “with an eye towards avoiding absurd results”). And as the trial court noted, it would produce the “illogical result” that “a party could drink excessively for 23 months, stop for one, and resume again for another 23 months without being subject” to the fault provisions of the divorce statute. *Id.* at 2-3.

Even an habitual drunkard is allowed sometimes to be sober.

Given the overwhelming evidence, the court found Mr. Kirby’s periods of drunkenness were sufficiently frequent and deep, and his periods of sobriety sufficiently short and shallow, to

properly determine he was an habitual drunkard. Although Kim does not dispute that Mr. Kirby was sober for some months in 2007, the parties had discussed, and Chris knew, that their marriage would be over if Chris again partook. He did, and that was the end of the marriage.

IV. Court Considered Fault Grounds Because the Divorce was Based on the Habitual Drunkard Statute

In his brief, Mr. Kirby claims that because this was a no-fault divorce, and the court used fault-based evidence in making its property division, the court committed error. There are several problems with the argument.

First, as noted *supra*, this is not a no-fault divorce.

Second, the issue is not preserved. It was not raised during trial. As with the issue to which it is related – whether this was a fault or no-fault divorce – it should have been raised in a motion for reconsideration. But it was not.

The court properly considered fault grounds because the divorce was based on the habitual drunkard statute. RSA 458:16-a, II(1); *see In re Peirano*, 155 N.H. 738 (2007); *In re Letendre*, 149 N.H. 31 (2002); *Kibbee v. Kibbee*, 99 N.H. 215 (1954). It thus committed no error.

V. Court Awarded Kim Her Proper Share of the Marital Estate

Chris Kirby argues in his brief that the court was in error for awarding Kim a disproportionate share of the assets of the marital estate. On both procedural and substantive grounds, he is mistaken.

The issue was not preserved. It was not raised during trial, as any error could not have occurred until the property division was decreed. As with the other issues to which it is related, it should have been raised in a motion for reconsideration, but was not.

The property division statute allows a court to determine that an unequal division is equitable when there is fault which:

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

RSA 458:16-a, II(1) (1)& (2). The law is thus clear that in a fault-based divorce, the non-fault party can be awarded a disproportionate share of property. *In re Peirano*, 155 N.H. 738 (2007); *In re Letendre*, 149 N.H. 31 (2002); *Kibbee v. Kibbee*, 99 N.H. 215 (1954). The amount of the disproportionality is within the discretion of the trial court. *Peirano*, 155 N.H. at 738; *In re Sarvela*, 154 N.H. 426 (2006).

The court here made clear why it awarded a disproportionate share – it was a long marriage, Kim has the responsibility of the children and the obligation of the family’s assets, Chris will not be capable of earning for some foreseeable future and when he can his earning potential will be much greater than Kim’s, Chris’s habitual drunkenness caused Kim pain and suffering and caused the family substantial economic losses. The court essentially determined that Kim may spend some of Chris’s assets due to his fault. These factors are sensible and within

the discretion of the court.

The percentage of the disproportionality is also within the court's discretion. *In re Letendre*, 149 N.H. 31 (2002), is remarkably similar to the Kirby's case. In *Letendre*, the court decreed a fault-based divorce. The parties owned two homes and a variety of other assets. They had a long-term marriage and a child. The husband was the primary earner. In making a disproportionate property division, the lower court "considered the fault of the [husband] for the divorce, the length of the parties' marriage, the [wife's] ability to acquire future assets, the [wife's] needs and the [husband's] ability to pay. Based on this, it decreed "a sixty-eight/thirty-two percent apportionment in [wife's] favor," which this Court approved.

The percentage of the estate distributed to Kim here is virtually the same as in *Letendre*. Moreover, it is about the same as what Chris requested, thus estopping him from attacking it.

Accordingly, the Court should leave intact the property division decreed below.

CONCLUSION

Based on the foregoing, this Court should affirm the judgment of the Brentwood Family Division.

Respectfully submitted,

Kim G. Kirby
By her Attorney,

Law Office of Joshua L. Gordon

Dated: October 31, 2009

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Kim Kirby requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case are novel in this jurisdiction.

I hereby certify that on October 31, 2009, copies of the foregoing will be forwarded to Brian G. Germaine, Esq.

Dated: October 31, 2009

Joshua L. Gordon, Esq.