2013 WL 8599382 (Me.) (Appellate Brief)
Supreme Judicial Court of Maine.

Paul J. SMITH, Appellee,
v.
Kathleen N. SMITH, Appellant.

No. KEN-13-255.
October 8, 2013.

On Appeal from Judgment of the Waterville District Court

Brief for Appellant Kathleen N. Smith

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*1 STATEMENT OF FACTS

At the time of the trial in this case, on October 30 and November 1, 2012, Kathleen Smith was 49 years old, was the mother of a 14-year-old son, Kyle, and held both a Bachelor's and a Master's Degree in Education. Sadly, Kathleen will not live as long as she should, will not be able to care for her son, and will never have the chance to employ her education and experience for any useful purpose.

Kathleen suffers from Wernicke's Encephalopathy, a medical condition of the brain with consequences akin to those of a traumatic brain injury. It is caused by a combination of the excessive use of alcohol, inadequate nutrition evidently from an eating disorder, and the absence of early and effective treatment. The condition is permanent. Margaret (Peg) Soucy, a licensed and certified expert hired to manage the planning for Kathleen's long-term care, described the condition:

It's an acute neurological disorder due to a thiamine deficiency. Its usually caused by alcohol misuse and a lack of nutrition. Without early and adequate treatment, it results in permanent brain damage. Persons may appear normal, be of average intellect, able to carry on conver-sations, but actually have a severe impairment of current and recent memory. Long term memory prior to the brain injury usually stays intact, but current and recent memory is impaired severely.

Some of the symptoms that are listed that I've also seen present in Kathleen, unable to form new memories, a severe loss of current memory, loss of muscle coordination affecting balance, confabulation or making up stories and believing that they're true, confusion, and in some cases there's also difficulty with personal or social interaction, permanent loss of thinking skills, memory skills or ability to acquire or learn new skills, and a shortened life span."

This condition appeared with full force one weekend in August 2008. Gradually, Kathleen had developed an unhealthy level of alcohol use, in particular white wine. Her use of alcohol led to her being placed on leave from her employment and, shortly thereafter, to stop operating a motor vehicle. Because of her demands and her behavior ***2** if she was not accommodated, Paul would purchase bottles of wine for her. Kathleen's mother, Norma Bickford, who lives in New Hampshire, became concerned about her conduct and offered to assist Paul in taking steps to correct it. However, no action was taken to enforce treatment.

During the summer of 2008, Kathleen developed an eating disorder, manifested by poor appetite; nausea and vomiting as soon as she began eating; and the loss of a considerable amount of weight. Late in August, on a weekend, she began exhibiting confusion, agitation, and what Paul described as "some sort of hallucination." She was resistant to going to the hospital for examination, and again, no action was taken to enforce treatment.

On the Monday after this weekend, Paul went home from his office to check on Kathleen when he was unable to reach her by telephone. He found her lying on the floor beside the bed in "dire straits." She was taken to MaineGeneral Medical Center by ambulance, where she remained for three weeks and the diagnosis was confirmed. From there, she went to a rehabilitation center for three months, and then home. Paul arranged for home care personnel to provide services to her, initially for 521/2 hours each week. He filed for divorce on June 24, 2010.

Kathleen and Paul Smith were married on August 9, 1986. At the time of hearing, both of them were 49 years old. Their son and only child, Kyle, was born on XX/XX/1998, and was 14 years old at the time of hearing.

Paul is a Licensed Veterinarian with both Bachelor's and Doctoral degrees in Veterinary Medicine. Paul was, and is, the owner and sole shareholder of Kennebec Veterinary Services, Inc., a Maine corporation. His veterinary practice is conducted in a building constructed specifically for that purpose in the First Park business development in Oakland, Maine. The building and the land on which it is located were owned individually by Paul and Kathleen as Joint Tenants. Paul received a salary of ***3** $125,000 per year and bonuses based on extra work performed after normal office hours. Based on a written lease, the corporation paid $4,200 per month to Paul and Kathleen as rent for the use of the office building, money that Paul used to pay the mortgages on that property.

Paul also holds a share in a limited partnership owned by his family, which operates a farm in New Hampshire. It is undisputed that this asset is non-marital. Although the cash income from the partnership has not been large, when Paul was in need of funds for the expenses of his veterinary practice while the divorce was pending, the partnership promptly gave him $100,000. Although characterized as a loan, the money was given “with no conditions or terms.”

Kathleen had held a position as a Guidance Counselor at M.S.A.D. #47, also in Oakland, Maine. She is permanently disabled from any gainful employment. Paul processed her application for disability retirement through the Maine Public Employees Retirement System, and she receives a net benefit of $1,504.96 per month. This is her only source of income. Through Counsel, her application for Social Security Disability was processed and approved, making her eligible for Medicare coverage for health expenses. This allowed Paul to remove her from his family health insurance coverage even before the divorce was granted, at a savings of $6,000 per year.

At first, Paul's plan for Kathleen's long-term care was to contact her mother, saying:

Kath now has her disability, you can come and pack a couple of suitcases and take her with you. And I'll return the rest of her stuff to you.

Elderly, widowed, and still working, Mrs. Bickford was unable to assume this responsibility.

From the beginning, the parties agreed that the house, the office building, and the corporation would be awarded to Paul and that no payment as a property division would ***4** be asked. Spousal support for Kathleen's long-term care was a necessity, and the tax advantages to Paul of providing assistance in the form of spousal support would be considerable.

Facilities for persons with brain injuries are virtually non-existent in Central Maine, and Kathleen presented additional unique circumstances. The length of time that the divorce was pending was occupied with efforts by Kathleen's team to find a safe and suitable placement for her. Her mother was appointed as her Guardian ad Litem for the divorce action, and Peg Soucy was hired to provide professional assistance in the preparation and oversight of a plan for her care.

In addition to requiring a placement that could provide adequate supervision, it was important to keep Kathleen in the Waterville area, if at all possible. Her ability to retain memory from before her injury meant that this area would be familiar to her, while her inability to form current memory meant that she would have great difficulty adapting to a new and unknown area. Her doctors are located in this area. Importantly, her son lives in this area, and arrangements that would be suitable for visits between them were essential.

Many options were considered. Paul and Peg Soucy were in contact, and Paul's suggestions were taken into account. None of the available resources proved satisfactory.

- Kathleen did not qualify for Assisted Living Facilities due to an age cut-off. She was too young.

- Kathleen did not qualify for a newly opened secure low-income apartment complex built in a former school because her Maine PERS income was a little too high.

- A licensed residential home was not suitable for Kyle and made Kathleen uncomfortable because she felt like she “was living in some else's home.” In e-mail correspondence with Peg Soucy, Paul agreed that this was not an appropriate placement.

***5** - A separate apartment was risky, because of the lack of supervision and uncertainty about Kathleen's relationships with neighbors. This option would have required at least two Personal Care Assistants working several shifts, at significant expense.

Peg Soucy had looked into a facility known as Goudreau's Retirement Inn in Winslow, but had rejected this possibility because it only offered a single room to residents. When he became aware of the circumstances, the owner, Herbert Goudreau, offered to create a small apartment for Kathleen by removing the walls between several rooms and installing a galley kitchen. This offered a living room with its own bathroom, suitable for Kyle or Mrs. Bickford to stay in overnight, the kitchen, and a separate bedroom with bath for Kathleen. The location in the building was accessible by a separate entrance. Meals were included, the facility was staffed at all times, and medication supervision was available if needed.

Goudreau's was the placement recommended by Peg Soucy. It is a living arrangement customized for Kathleen and her particular circumstances. She is described as safe and comfortable and "loves her apartment."

Paul was informed of the plan, met with the owner, visited while the apartment was under construction, and helped to move furniture into it upon completion. It had been important to him that Kathleen move out of the home, as living with her condition had become "challenging."

Kathleen moved into Goudreau's in November 2011.

Kathleen has had the services of a Personal Care Assistant, Jamie Fitzgerald, from the time she returned home from the rehabilitation facility. Jamie was hired by Paul and shortly became Kathleen's only caregiver. She worked 521/2 hours per week when Kathleen was still at the Zachary Drive home, but that schedule had reduced to 40 hours ***6** by the time Kathleen moved to Goudreau's. The schedule was further reduced to 35 hours per week by the time of hearing.

Kathleen requires the services of an assistant. For medical appointments, she not only needs to be transported, but someone familiar with her must be available to provide accurate information on how she is doing and to receive instructions regarding her care and medications. She needs to be prompted to perform basic home care tasks, which involve re-learning and maintaining skills. Her primary care physician recommended that she be taken to a gym for exercise to help with issues of balance and her gait, her weight, and her emotional health as Kathleen is afflicted with both depression and anxiety as a result of her injury.

Kathleen was evaluated by Dr. Robert Riley of The Brain Clinic of Central Maine in Hallowell, Maine, just weeks before the hearing. He had performed a previous evaluation of her in 2010. His current evaluation recommended that Kathleen have "significant assistance" in her daily life and reported that "she does need somebody with her much of the time." Peg Soucy concurred in this recommendation.

A detailed budget of Kathy's projected expenses was prepared, presented to Paul and his counsel, and admitted as an exhibit at trial. The budget called for total monthly expenses of $6,485, with the largest expenses being rent at Goudreau's in the amount of $2,200 and the services of Jamie as Personal Care Assistant in the amount of $2,730. Of this total, Kathleen's net Maine PERS benefit paid $1,504.96, so spousal support in the amount of $4,980.04 per month was requested from Paul. The written closing argument and proposed Divorce Judgment submitted to the court on behalf of Kathleen proposed continued oversight by Peg Soucy and regular re-evaluation by Dr. Riley to determine if her skills and adaptations had improved to the point that costs for the Personal Care Assistant or otherwise could be reduced, and the award of spousal support adjusted accordingly.

***7** Before her relocation to Goudreau's, Paul had not raised any question about the cost of the plan for her long-term care. At no time had he presented any budget or limit to the support he was prepared to pay. Up to her relocation, he had regularly paid the monthly bill incurred on the Discover credit card that Jamie used for purchases for Kathleen's benefit. Once she had moved, Paul stopped making those payments. Even then, the only expense he directly questioned was the cost of laundry, and that was ended by Jamie taking Kathleen's laundry to her home and washing it there, without charge. In his testimony at trial, Paul did not present any amount of spousal support that he was prepared to pay, and it was only in the written closing argument and proposed Divorce Judgment submitted to the court on his behalf that a proposed spousal support payment in the amount of $1,500 per month was presented.

In his testimony, Paul focused on two things: First, his belief that Kathleen was in better condition and required less assistance than Dr. Riley and Peg Soucy recommended; and second, the business reverses he had experienced in the year 2011, when several veterinarians previously employed left his practice. In that year, the corporation had gross revenues of $1,246,667, and reported a significant tax loss. In 2012, by the time of trial, that loss had turned into a small profit.

In 2011 and into 2012, Paul decided that the corporation would not pay rent for the office building. Instead, to pay the mortgages on the office building, he drew $51,000 out of $53,000 from accounts held jointly with Kathleen and into which her Maine PERS benefit had been deposited, using those funds to make the mortgage payments. Despite his business difficulties, Paul's salary of $125,000 per year was not affected.

In addition to the requested spousal support, the court was also asked to award Kathleen the balance due for her counsel fees and other professional expenses, including fees owed to Peg Soucy. The total requested for counsel fees for services by Sherman & Sandy was $20,354.76. The total requested for services by **Elder** Care Planning and ***8** Solutions was $4,368. Also requested was reimbursement to Norma Bickford of $4,045 advanced by her towards counsel fees.

In the Divorce Judgment the court ordered that Paul pay Kathleen the sum of $2,500 per month as general spousal support. The court noted that "the reduced budget will likely result in changes to Kathleen's care plan that the professionals will deem inappropriate."

The court denied the request that Paul pay Kathleen's counsel fees and other professional fees, ordering that each party pay his or her own attorney's and other professional fees associated with this case.

Counsel for Kathleen filed a Motion for Finding of Fact and Conclusions of Law, to which the court responded with further findings on April 29, 2013. Kathleen filed a timely Notice of Appeal on May 17, 2013. Paul filed Notice of Appeal on May 29, 2013.

The court granted an Order for Immediate Execution regarding the disposition of assets and debts that are not in dispute. The disposition of one-half of Paul's 401(k) account remains subject to the automatic stay pending the outcome of these appeals.

9** ***PROCEDURAL HISTORY

June 24, 2010	Complaint for Divorce filed
September 27, 2010	Case Management Conference held
September 27, 2010	Norma Bickford, mother of Kathleen Smith, appointed Guardian ad Litem for Kathleen
January 21, 2011	First Mediation held, unresolved
January 26, 2012	Second Mediation held, unresolved
January 27, 2012	Interim Order on matters pertaining to minor child entered by agreement
March 14, 2012	Interim Order on spousal support entered by agreement
October 30, 2012	Trial commences in Waterville District Court
November 1, 2012	Trial continues and concludes
January 18, 2013	Divorce Judgment entered

January 28, 2013	Motion for Findings of Fact filed
February 7, 2013	Motion to Set Aside Omitted Property filed
March 5, 2013	Order on Motion to Set Aside Omitted Property filed
March 27, 2013	Motion for Immediate Execution filed
April 29, 2013	Order on Motion for Findings of Fact entered. Motion granted, findings entered.
May 16, 2013	Order on Motion for Immediate Execution entered. Motion granted in part.
May 17, 2013	Notice of Appeal by Kathleen Smith filed
May 29, 2013	Notice of Appeal by Paul Smith filed
June 5, 2013	Qualified Domestic Relations Order entered
June 14, 2013	Motion by Kathleen Smith for Attorney's Fees on Appeal filed
July 1, 2013	Order on Motion for Attorney's Fees on Appeal entered. Motion Denied.

*10 ISSUES PRESENTED FOR REVIEW

1. Did the court **abuse** its discretion by awarding an inadequate amount of spousal support to Kathleen?

2. Did the court **abuse** its discretion by failing to award her attorney's and other professional fees to Kathleen?

*11 SUMMARY OF ARGUMENT

I. THE COURT ABUSED ITS DISCRETION BY AWARDING AN INADEQUATE AMOUNT OF SPOUSAL SUPPORT TO KATHLEEN.

The court's award of $2,500 per month as spousal support is inadequate to fund the plan for her care and is an **abuse** of the court's discretion because:

A. The plan of care is appropriate.

B. The cost of the plan of care is reasonable.

C. Paul raised no objection to the cost of the plan before Kathleen was committed to it.

D. Paul can afford the amount of spousal support needed for the plan.

E. There is no alternative.

An award of spousal support is reviewed for an **abuse** of discretion. *Macomber v. Macomber*, 2003 ME 1, ¶ 6, 814 A.2d 456, 457.

The findings of fact on which an award of spousal support is based are reviewed for clear error. *Id.*

II. THE COURT ABUSED ITS DISCRETION BY FAILING TO AWARD HER ATTORNEY'S AND OTHER PROFESSIONAL FEES TO KATHLEEN.

The court's order that each party pay his or her own attorney's fees and other professional fees associated with this case was an **abuse** of the court's discretion because:

A. The court failed to adequately consider the substantial difference in the parties' relative capacity to absorb the costs of litigation.

B. The court overlooked the fact that the expenses incurred were not limited to the cost of litigation, but included other services required by Kathleen's unique circumstances.

C. The court's conclusion that:

***12** As to the conduct of a party contributing to the duration of the litigation, Kathleen and her agents made the strategic decision to put on an expensive and persuasive case for Kathleen's needs. However, they knew or should have known that it was a real long shot that the spousal support award would fund the care plan developed. Under such circumstances, the Court finds it fairest that responsibility for the fees lie with the side that made those strategic decisions.

applies an unreasonable and inappropriate standard on those responsible for the representation and protection of an incapacitated person who is incapable of making plans or decisions for herself, and is unjust.

The grant of attorney's fees is reviewed for an **abuse** of discretion. *Miele v. Miele*, 2003 ME 113, ¶ 14, 832 A.2d 760, 764.

***13 ARGUMENT**

I. THE COURT ABUSED ITS DISCRETION BY AWARDING AN INADEQUATE AMOUNT OF SPOUSAL SUPPORT TO KATHLEEN.

The award of spousal support in an action for divorce is reviewable by this Court for an **abuse** of discretion. *Macomber v. Macomber*, 2003 ME 1,¶3, 814 A. 2d 456, 457. An award of spousal support that is inadequate in the circumstances exceeds the discretion ofthe trial court and will be set aside. *Nixon v. Nixon*, 2008 ME 157, 957 A.2d 101.

Kathleen's condition, Wernicke's Encephalopathy, has resulted in her permanent and total disability. (Divorce Judgment, ¶ 13; Appendix, pp. 13-14.) The primary, although not only, symptom of her condition is an almost total loss of short-term memory. (Divorce Judgment, ¶ 13; Appendix, pp. 13-14.) This condition pervades every aspect of her life and care. She requires ongoing supervision and support. An evaluation of Kathleen conducted by Dr. Robert Riley of The Brain Clinic of Central Maine just days before trial, concluded as follows:

> Given the severity of Ms. Smith's memory impairment, along with her reported impairments in daily adaptive functioning skills, it is recommended she continue to have significant assistance in her daily life to maintain her health, safety, and well-being. While she is able to carry out some tasks of daily functioning relatively well on her own due to her relatively intact cognitive skills in some areas, *she does need somebody with her much of the time* to ensure that she remembers to provide herself with meals, take her medications consistently, and other such basic daily skills... It is clear now that her impairments are essentially permanent, and as such it would be recommended that she continue to have substitute decision-makers for major decision-making such as financial issues. She should also have assistance with more

> complex test [sic] such as cooking or driving, as she cannot safely conduct these activities on her own and will be very unlikely to be able to do so in the future.

***14** (Neuropsychological Evaluation, October 8, 2012, Defendant's Exhibit 1, Appendix p. 69.)

A detailed budget for the cost of Kathleen's care was presented to the court and called for a current payment of spousal support of an estimated $4,980 per month. (Defendant's Exhibit 6, Appendix, pp. 63-64.) Throughout his testimony, Paul did not present any amount of spousal support that he was prepared to pay. In written closing argument, his attorney proposed payment of $1,500 in monthly spousal support.

The court ordered Paul to pay Kathleen $2,500 per month as spousal support, or just half of what her budget required. (Divorce Judgment, Orders, ¶ 16; Appendix, pp. 24-25.) This amount is inadequate to support the plan of care that has been prepared for Kathleen and, in the unusual circumstances of this case, exceeded the discretion of the trial court.

A. The plan of care is appropriate.

The plan of care for Kathleen was developed over an extended period of time. It was prepared with the oversight and assistance of an expert, Margaret (Peg) Soucy. Ms. Soucy was employed by MaineGeneral Medical Center for care management and discharge planning for patients, and in that capacity had become familiar with Kathleen from her August 2008 hospitalization. (Transcript, Oct. 30, 2012, pp. 207-09.) She is also self-employed as **Elder** Care Planning and Solutions, providing assessments, care management, and coordination for geriatric patients and persons with disabilities. (Transcript, Oct. 30, 2012, p. 207.) She is a Licensed Social Worker, licensed in Maine for over 30 years, and holds national certifications as a credited care manager for hospitals and certified care manager for community care management. (Transcript, Oct. 30, 2012, p. 208.)

***15** The plan of care settled on was placement at Goudreau's Retirement Inn in Winslow, Maine. At the suggestion of the owner, a small apartment, customized for Kathleen's needs and circumstances, was created by combining several single rooms and constructing a small galley kitchen. This plan offered privacy, staff available that could respond to emergencies, medication supervision on days when Kathleen was home alone, an environment suitable for visits by her son Kyle, and amenities including a garden, trails, and permission for her to have a cat. (Transcript, Oct. 30, 2013, pp. 217-20.)

Having the opportunity to perform basic tasks of daily life was important for Kathleen to maintain those skills that she still had. Without that, both Ms. Soucy and Dr. Riley concluded that Kathleen's limited skills would decline and that she would become increasingly isolated, depressed, and withdrawn. (Transcript, Oct. 30, 2012, pp. 226-227; Neuropsychological Evaluation, Appendix, pp. 69.) Ms. Soucy's recommendations for Kathleen's care matched the recommendations made by Dr. Riley. (Transcript, Oct. 30, 2012, p. 227.)

From the time she returned home after several months at a rehabilitation center, Kathleen has required home care assistance. Paul hired Jamie Fitzgerald as a Personal Support Specialist for Kathleen, initially along with another provider. Before long, Jamie was the sole person providing support services to Kathleen. Initially, she worked 521/2 hours per week, but by the time Kathleen moved into her apartment at Goudreau's that schedule had been reduced to 35 hours. It took nearly two years for the relationship between Jamie and Kathleen to become comfortable. (Transcript, Oct. 30, 2013, pp. 155-58.)

The plan of care included continuing Jamie's services to Kathleen at the rate of 35 hours per week, the amount of service recommended by Ms. Soucy (Transcript, Oct. 30, 2012, pp. 225-26) and consistent with Dr. Riley's recommendation that Kathleen have somebody with her “much of the time.” (Neuropsychological Evaluation, ***16** Appendix, p. 69.) The support services available through staff at Goudreau's provided important back-up and emergency supervision, but could not substitute for Jamie's work. (Transcript, Oct. 30, 2012, pp. 224-27.)

The majority of the cost of Kathleen's plan of care came from rent at Goudreau's, in the amount of $2,200 per month, and the cost of Jamie's services, in the amount of $2,730 per month as of the time of trial. (Divorce Judgment, Findings, ¶¶ 20, 22; Appendix, pp. 15-16.) By cutting $2,500 from the budget for her care, the trial court effectively eliminated the services provided by Jamie, but for a very few hours a month.

In its Findings of Fact and Conclusions of Law, the court focused on the services provided by Jamie, finding, without expressly saying so, that those services were no longer necessary except for incidental contacts:

> The spousal support award is adequate, along with Kathleen's Maine PERS disability benefits, to allow Kathleen to remain in her housing at Goudreau's Retirement Inn and cover her routine expenses. *The Court recognizes that the award is inadequate to support personal care assistant services at the level to which Kathleen has become accustomed, and the level recommended by Peg Soucy and Dr. Riley.* Dr. Riley's recommendation is based on Kathleen's memory impair-ment, measured by objective testing, and Kathleen's adaptive functioning impairment, as rated by her personal care assistant Jamie Fitzgerald. Jamie rates Kathleen's adaptive functioning as exceedingly poor, in the first to fifth percentile on a variety of indicators. While the Court finds that Jamie has rendered services to Kathleen with kindness and competence, the Court does not believe that Jamie's estimation of Kathleen's adaptive functioning should be assigned decisive weight, as no person should be the sole arbiter of the necessity and value of her own work.

(Findings of Fact and Conclusions of Law, ¶ 2; Appendix, pp. 34-35.)

The court's finding is clearly erroneous, for several reasons:
1. The court recognizes that its finding regarding the need for Jamie's services is not what is recommended by Ms. Soucy and Dr. Riley. Both witnesses are clearly experts. Paul did not present any opposing expert testimony. Of course, the ***17** testimony of any witness, experts included, is not binding on the court. However, "uncontradicted testimony is not to be utterly disregarded and arbitrarily ignored without reason." *Thompson v. Johnson*, 270 A.2d 879, 881 (Me. 1970). The trial court's good judgment and common sense can only go so far when the issue at hand is as technical and complex as the medical and behavioral issues presented in this case.

2. The information reported by Jamie was only a small part of the evaluation process conducted by Dr. Riley. In describing the methods of his evaluation, Dr. Riley identified *thirteen* tests administered in addition to the clinical interview with the patient and the patient's caregiver, including the Adaptive Behavior Assessment System Second Edition. The court overlooked Dr. Riley's observation that "[r]esults of testing are considered to be an accurate depiction of her current level of functioning." (Neuropsychological Evaluation, Appendix, pp. 65, 66.)

3. Jamie's testimony regarding Kathleen's level of skills and her deficits is corroborated by the testimony of both Norma Bickford and Ms. Soucy. Ms. Soucy's recommendations for Kathleen's care match those of Dr. Riley (Transcript, Oct. 30, 2012, p. 227.)

4. To the extent that the court accepted Paul's testimony regarding his own beliefs about Kathleen's current level of functional ability, as it evidently did, the court's reliance on that testimony was clearly erroneous as well. Paul's perception that no "negative events" occurred when he was away over the weekend could only be speculation, as he was not present to observe Kathleen's behaviors and she would not remember. (Transcript, Oct. 30, 2012, p. 30.) The events of those weekends, and the other events cited by Paul in an effort to show that Kathleen's adaptations were better than reported by the experts, placed her in locations or with people who were familiar to her from before her brain injury, and therefore involved long-term memory, which was largely intact. These included the weekends at the marital residence in Oakland, walks ***19** Judgment, Findings, ¶ 26, Appendix, p. 17.) Only in its Findings of Fact and Conclusions of Law did the court take a different tack and rely instead on a finding that Kathleen did not need the level of care and supervision from her Personal Support Specialist that was proposed and recommended. (Finding of Fact and Conclusions of Law, ¶¶ 2, 4; Appendix, pp. 34, 35.) That finding is unsupported by the evidence.

B. The cost of the plan of care is reasonable.

Peg Soucy, who was familiar with the cost of possible living arrangements, testified that the cost of the plan at Goudreau's is "very reasonable" compared to other possibilities. (Transcript, Oct. 30, 2012, p. 221.) She provided detailed comparisons with the costs of other facilities, which did not meet Kathleen's needs as well. While renting a private apartment would have resulted in lower rent, the cost of hiring additional in-home care would have been much greater. (Transcript, Oct. 30, 2012, pp. 221-22.)

The rate of pay paid to Jamie for her services is below the rate charged by home health care agencies. (Transcript, Oct. 30, 2012, pp. 231-32.) Agency personnel would not be able to provide the same level of care that Jamie is able to do; and because of the nature of her disability, Kathleen does not respond well to strangers. (Transcript, Oct. 30, 2012, pp. 231-32.) It took nearly two years for the relationship between Kathleen and Jamie to become comfortable. (Transcript, Oct. 30, 2012, p. 158.)

Efforts to reduce the cost of Kathleen's care are ongoing and have been successful. Because Kathleen is reluctant to eat in the dining hall at Goudreau's, Ms. Soucy arranged with the owner for Jamie and Kathleen to obtain groceries and household supplies through its pantry, at no extra cost and with the ability to place special orders. (Transcript, Oct. 30, 2012, pp. 222-23.) The cost of laundry has been eliminated by Jamie taking laundry to her home and doing it herself, without additional ***20** charge. (Transcript, Oct. 30, 2012, p. 175.) Jamie uses her vehicle to provide transportation with only the cost of fuel being reimbursed, not mileage charges. (Transcript, Oct. 30, 2012, p. 181.) Window shopping has been substituted for shopping. (Transcript, Oct. 30, 2012, p. 176.) Through counsel, Kathleen was determined disabled by the Social Security Administration, qualifying her for Medicare coverage for the majority of her health expenses. (Transcript, Nov. 1, 2012, p. 44.) Supplement plans were put into place to cover otherwise uncovered expenses and medications. (Transcript, Nov. 1, 2012, p. 44.)

As recommended by Dr. Riley, management of Kathleen's finances has been taken over by Martha Phillips, a paralegal and certified professional legal secretary employed by the office of counsel for Kathleen. Ms. Phillips, Ms. Soucy, and Jamie confer and consult on expenses, with an eye to keeping costs to a minimum. All expenses are subject to oversight and supervision. (Transcript, Nov. 1, 2013, p. 47.)

The cost of Kathleen's plan of care is carefully supervised and is reasonable. Other than the court's thought that the services by Jamie could be cut back drastically, there was no finding made in either the Divorce Judgment or the Findings of Fact and Conclusions of Law that the cost of the plan was excessive or included unnecessary expenditures. Kathleen's needs are "unusually high," and the cost of meeting those needs has been controlled to the greatest extent possible. Of course, inasmuch as those expenses are met primarily by an award of spousal support, there is a continuing opportunity for the court to review and revise the amount of that award if circumstances justify doing so. 19-A M.R.S. § 951-A(4).

C. Paul raised no objection to the cost of the plan before Kathleen was committed to it.

In searching for a suitable plan of care for Kathleen, Ms. Soucy provided progress reports, met with Paul, spoke with him, and communicated with him by e-mail. ***21** (Transcript, Oct. 30, 2012, pp. 212-13.) When the plan at Goudreau's was settled on, Paul went to the facility and met with Herbert Goudreau several times. He paid the required down payment for the construction of the apartment for Kathleen. (Transcript, Oct. 30, 2012, pp. 223-24.)

Paul did not raise any concern about the cost of the plan for Kathleen's care to Ms. Soucy as the plan was being implemented. (Transcript, Oct. 30, 2012, p. 224.) He did not raise any concern about the cost of the plan to Norma Bickford either, even though she had been appointed as Kathleen's Guardian ad Litem. (Transcript, Oct. 30, 2012, p. 137.)

The concern that Paul did raise was his desire that Kathleen move out of the marital residence as soon as possible. When she had qualified for disability retirement benefits through the Maine Public Employees Retirement System, he contacted Mrs. Bickford, saying:

> Kath now has her disability, you can come and pack a couple of suitcases and take her with you. And I'll return the rest of her stuff to you.

(Transcript, Oct. 30, 2012, p. 129.)

According to Mrs. Bickford, Paul was very anxious to have Kathleen move out. (Transcript, Oct. 30, 2012, p. 137.) Paul stated that it was "challenging" to have Kathleen at home and difficult for Kyle. It was a relief when she finally moved. (Transcript, Oct. 30, 2012, pp. 77-78.) When construction of the apartment for Kathleen at Goudreau's didn't move as quickly as had been hoped, Paul visited the site to see if he could speed things along. (Transcript, Oct. 30, 2012, p. 224.) On Cross-Examination, he testified:

Q. Okay. Before Kathy was moved into Goudreau's, before the move -

A. Uh-huh.

***22** Q. - do you recall raising any objection or question to the plan of care or the cost of care before she moved into it?

A. No.

(Transcript, Oct. 30, 2012, p. 101.)

Even after Kathleen moved out, the only expenditure that Paul questioned specifically was the cost of laundry. (Transcript, Nov. 1, 2012, p. 49.) That cost was eliminated by Jamie taking Kathleen's laundry to her home and washing it there, at no charge. (Transcript, Oct. 30, 2012, p. 175.)

In his testimony, including rebuttal testimony on the second day of trial, Paul did not present an amount of spousal support that he proposed to pay, and had not done so while the plan for Kathleen's care was being implemented. If cost was of primary importance, Paul could, and should, have raised that issue while plans for Kathleen's care were being evaluated. Instead, his focus was on moving her out of the marital residence. Only after that was accomplished did the cost of her care become predominant. By then, it was too late.

It was error for the court to allow Paul's financial concerns to undermine the very plan that he was so anxious to have put into place. He acquiesced in the plan and helped to put it into operation, all without presenting any monetary constraints. It was an **abuse** of discretion for the court not to hold Paul to the costs of the plan that, by his silence and with his participation, he had agreed to.

D. Paul can afford the amount of spousal support needed for the plan.

Paul is the sole shareholder of Kennebec Veterinary Service, Inc., and also holds the positions of president and treasurer of the corporation. He makes all of the decisions for the corporation. (Transcript, Oct. 30, 2012, p. 64.) Paul's salary from the corporation is $125,000 per year. (Transcript, Oct. 30, 2012, p. 42.)

***23** The veterinary practice is conducted in a building constructed for that purpose on Highland Drive in Oakland. That property, land and buildings, was owned jointly by Paul and Kathleen. (Transcript, Oct. 30, 2012, pp. 8-9.) The use of the

building by the corporation was governed by a written lease. (Transcript, Oct. 30, 2012, p. 86.) The corporation paid Paul and Kathleen rent of $4,200 each month, which Paul used to pay the mortgages secured by the business property. (Transcript, Oct. 30, 2012, p. 9.)

Paul testified to gross revenues from his veterinary practice as follows:
2008 - $1,240,000

2009 - $1,893,000

2010 - $1,963,000

2011 - $1,246,000

Paul described business reverses in the year 2010. These included losing two of the four veterinarians whom he had employed. (Transcript, Oct. 30, 2012, p. 47.) This resulted in a reportable loss for the year 2011 for the corporation. The court cited Paul's "business difficulties" as its reason for an award of spousal support that the court acknowledged "will likely result in changes to Kathleen's care plan that the professionals will deem inappropriate." (Divorce Judgment, Findings, ¶ 26; Appendix, p. 17.)

The loss reported for tax purposes for the year 2011 did not accurately reflect Paul's actual circumstances:
- The losses entitled Paul to tax refunds for the year 2011 of over $30,000. (Transcript, Oct. 30, 2012, p. 87.)

- The reported loss included depreciation deductions of almost $20,000 on the corporate return and almost $15,000 on the personal return, according to Paul's accountant, James Boulette. (Transcript, Oct. 30, 2012, pp. 115-16.) Though treated as losses, these deductions sheltered income in the same amounts in Paul's possession and control.

***24** - Because of the carryover of losses from 2011, Mr. Boulette estimated that Paul would not owe any tax for the year 2012. (Transcript, Oct. 30, 2012, p. 114.)

- According to Paul, a veterinary practice is sensitive to the economy, and business would improve as the economy improved. (Transcript, Oct. 30, 2012, p. 81.)

- A year-over-year comparison for the periods January to mid-September 2011 and January to mid-September 2012, close to the time of hearing, showed that a loss of $71,000 in 2011 had turned into a profit of $995 in 2012. (Transcript, Oct. 30, 2012, p. 82.)

- Qualification of Kathleen for Medicare resulted in savings to Paul of family health insurance costs of $500 per month, or $6,000 per year. (Transcript, Oct. 30, 2012, pp. 121-22.)

Other factors compel the conclusion that Paul can afford Spousal Support in an amount at least close to the amount needed to support Kathleen's plan of care:
- When needed, Paul was able to obtain $100,000 from his family's farm limited partnership, of which he owned a share. Though characterized as a loan, the funds were given "with no conditions or terms." Though this asset is non-marital, the court may consider actual or potential income from non-marital property in determining a party's ability to pay spousal support. 19-A M.R.S. § 951-A(5)(P)(1).

- According to Mr. Boulette, payments that had been made by Paul for Kathleen's health-related care expenses would have only been partially tax deductible. Those same expenses, however, if paid by Paul as spousal support to Kathleen so that she paid for

the services would likely be fully deductible as alimony. (Transcript, Oct. 30, 2012, pp. 119-20.) Thus, the same costs after the divorce and paid as spousal support are more affordable than those costs paid before the divorce as health-related care expenses.

Most importantly, despite the reported losses for tax purposes in the year 2011, and despite the Court's concern for Paul's business difficulties, Paul's salary and bonuses ***25** remained unaffected. (Transcript, Oct. 30, 2012, p. 83.) However, for part of the year 2011 and into the year 2012, Paul decided to stop the payment of rent by the corporation. Instead, he drew almost all the funds, $51,000 out of $54,000, from bank accounts in order to make the mortgage payments on the office property that was to be set apart to him in the divorce. (Transcript, Oct. 30, 2012, pp. 83-84.) The accounts from which these funds were withdrawn were held jointly by Paul and Kathleen. (Transcript, Oct. 30, 2012, p. 84.)

In its Findings of Fact and Conclusions of Law, the court addressed both the change in the payment of rent by Kennebec Veterinary Service, Inc., and its improvement from a large loss to a small profit from the year 2011 to the year 2012:

> To the extent Kennebec Veterinary Service, Inc., has "returned to profitability" in 2012, as counsel for Kathleen claims, it has only done so by shunting the mortgage payment to Paul and Kathleen personally, and shorting most supply vendors. As Paul was actively considering bankruptcy for the business, he was trying to avoid making preferential payments to any creditor, especially to himself and Kathleen personally.

(Findings of Fact and Conclusions of Law, ¶ 1; Appendix, p. 34.)

This finding is clearly erroneous:
- The Profit and Loss Statements for the corporation for the years 2011 and 2012 do not reflect the $100,000 received from Paul's limited partnership. (Plaintiff's Exhibit 7; Appendix, pp. 57-60.)

- The court did not consider the inverse relationship between corporate profitability and Paul's personal financial condition. Paul's accountant confirmed that payments by the corporation to Paul, whether as salary, bonus, or rent, reduce the corporation* profitability while providing Paul more money personally. (Transcript, Oct. 30, 2012, p. 117.)

***26** - The payment of rent by the corporation could not be considered a preferential payment in any bankruptcy proceeding, as it was based on a written lease agreement (Transcript, Oct. 30, 2012, p. 86), and it had been a regular business practice for the rent to be paid. (Transcript, Oct. 30, 2012, p. 101.) There was no evidence that any bankruptcy proceeding had actually been filed.

The court did not consider all of the testimony of Paul's accountant. Although Mr. Boulette referenced a concern about preferential payments, he added "I'm not an attorney." (Transcript, Oct. 30, 2012, p. 117.) More importantly, he explained that in these circumstances "you really look to protect the business *and the business owner* as best you can." (Transcript, Oct. 30, 2012, p. 111.) (Emphasis added.) Kathleen's best interests were not within his focus, but must be within the court's.

Mr. Boulette saw the payment of rent and salary as a case where "all of the eggs are in one basket." (Transcript, Oct. 30, 2012, p. 111.) This is not the case when a divorce is pending and a preliminary injunction is in effect. Mr. Boulette admitted that he was not familiar with that order. (Transcript, Oct. 30, 2012, p. 118.) The money drawn by Paul from personal accounts so that the corporation was relieved of its obligation to pay rent constituted the disposition of assets owned by the parties not in the usual course of business. The accounts were joint accounts into which Kathleen's disability benefit had been deposited, as well as Paul's salary. (Transcript, Oct. 30, 2012, pp. 86-87.) Paul had not disclosed his plan to use these accounts for that purpose before doing so, and therefore did not have the written consent of Kathleen or her Guardian ad Litem or the permission of the court. (Transcript, Oct. 30, 2012, p. 101.)

- The consequence of Paul's actions to use $51,000 out of $54,000 in joint accounts to relieve the corporation of its obligation to pay rent was to spend assets that should have been available for distribution by the court in its Divorce Judgment, in violation of the preliminary injunction, while protecting his personal salary and bonuses.

***27** Key findings of fact relied on by the court to support its spousal support award are clearly erroneous upon closer examination. The conclusion that Paul could not afford at least most of the spousal support requested exceeded the court's discretion. In the worst year described in the evidence, Kennebec Veterinary Service, Inc., generated gross revenues of just about 1.3 *million* dollars. The full amount of spousal support requested amounts to just 4.8% of that gross revenue, all of which is deductible for tax purposes. With that consideration added, the net effect of the entire amount requested is likely no more than 3.5% of gross revenue, in the worst year. As the sole shareholder, president, and treasurer, Paul is in complete control of the disposition of those revenues, and there are already signs of an improving business picture. There is more than enough revenue available to cover the amount reasonably necessary for Kathleen's plan of care.

E. There is no alternative.

Paul's only solution to Kathleen's long-term care was to expect her **elderly** mother to take her back. (Transcript, Oct. 30, 2012, p. 129.) It fell to Kathleen's team to try to find a suitable long-term placement for her. However, facilities suitable for the long-term care of an individual suffering from a brain injury are rare. Ms. Soucy was unaware of any facility suitable for Kathleen in the State of Maine, and certainly none in the central Maine area. (Transcript, Oct. 30, 2012, p. 211.)

All possible alternatives were considered, but none worked:
- Area residential care facilities had to be ruled out because of age cut-offs. Kathleen was too young to qualify. (Transcript, Oct. 30, 2012, pp. 213-214.)

- A newly constructed apartment complex, Gilman Place in Waterville, was suggested by Paul but had to be ruled out because of strict income limitations. A low-income facility, Kathleen had a little too much income. (Transcript, Oct. 30, 2012, pp. 214-15).

***28** - Private apartments were examined, but had to be ruled out because of the lack of “safety net” supervision and the uncertainty of the status of neighbors, in particular whether Kathleen might be offered alcohol. (Transcript, Oct. 30, 2012, p. 215.) Without on-site supervision, additional in-home support would have to be hired, making the actual cost prohibitive. (Transcript, Oct. 30, 2012, pp. 221-22.)

- A licensed residential home was inspected. A private home capable of accom-modating three long-term care residents, this had to be ruled out because of a lack of privacy and a setting unsuitable for visits with Kathleen by Kyle. (Transcript, Oct. 30, 2012, pp. 215-16.) Kathleen was uncomfortable with the setting, Mrs. Bickford did not consider it suitable, and by e-mail Paul concurred that this was not an appropriate placement. (Transcript, Oct. 30, 2012, p. 216.)

The customized arrangement at Goudreau' meets Kathleen's needs, at least with assistance from Jamie. In failing to fund adequately this carefully constructed plan, the court made several findings which are clearly erroneous:
¶ 3. Despite Kathleen's deficits, she has, within the past few years, adapted to major changes in her life. She has lost her profession and her family. She has been moved out of her home. Still, according to Dr. Riley's report, she is only mildly to moderately depressed, and moderately anxious.

¶4. The weight of evidence tends to show that Kathleen can and does adapt to change, but only when change is impressed upon her.

(Findings of Fact and Conclusions of Law, Appendix, p. 35.)

What the court failed to consider is that Kathleen's ability to adapt to change and the findings by Dr. Riley reflect her behavior and capacity when in the hands of the support system that the court declined to fund. Without that support system, primarily in the form of the services provided by Jamie at this time, her outlook is bleak:

***29** Dr. Riley:

> Given Ms. Smith's ongoing issues with relatively mild depression and anxiety, it would also be advised that she continue to have caregiver assistance to maintain some social contacts such as going to the gym or other such activities *to keep her from becoming more isolated and likely further depressed or withdrawn.*

(Neuropsychological Evalution, Appendix, p.69.) (Emphasis added.)

Ms. Soucy:

> If we only put in somebody to make sure she had something to eat and her medications and she was basically left alone for 22 hours out of the day, I think she would be isolated. I think she wold become very depressed and withdrawn and I think over a period of time, you would see her decline significantly to the point - until she eventually needed to be in a nursing home.

(Transcript, Oct. 30, 2012, p. 227.)

It is noteworthy that the court's award of spousal support, all other expenses being equal, does not fund even two hours of in-home services per day, for five days a week.

Left completely unsaid by the court was how a care giver, with only extremely limited contact with Kathleen, would be able to accompany her to medical appointments and provide an accurate assessment of her condition to her treating physicians, much less be able to carry out treatment recommendations.

Among other challenges, there is no family member available who can be relied on to assist with Kathleen's care. Ms. Soucy summarized the plan of care:
A... there's no local family member to pull in to take care of some of Kathy's needs.

Q. And what does that mean with regard to the use of Jamie's time?

A. Jamie is actually making sure that Kathy's, besides her daily needs are met, that her health care needs are met. That she tracks medical needs, getting her to medical appointments, when things are due.

***30** Maybe taking - maybe performing some of the activities that a family member could do if they were local.

Q. Is there anyone else available who could fill Jamie's role?

A. No, I do not believe so at this time.

Q. And with respect to the decision that this Court has to make, what will your recommendation be with regard to the plan for Kathy's placement and care that's currently in place?

A. I think we should continue with the current plan and the living situation that we've been able to customize to meet Kathy's needs and to consider Kyle's needs as well.

(Transcript, Nov. 1, 2012, pp. 5-6.)

The court also failed to take into account the pace of change to which Kathleen may be able to adapt, even with supervision. Her improvement from her hospitalization in August 2008, had occurred gradually over more than four years at the time of trial, with adequate supervision and support. It took years for her relationship with Jamie to become comfortable.

The court's inadequate award of spousal support, if upheld, will force a sudden and overwhelming change upon Kathleen that there is no reason to believe she can manage, especially without the support on which she relies.

It may be that, over time, Kathleen's needs will moderate. It is appropriate, and was suggested by counsel for Kathleen in written closing argument, that the Divorce Judgment include provisions for periodic review of the care plan and the amount still needed for spousal support. Creating the circumstances that those professionals familiar with Kathleen and her condition predict will cause isolation, decline, and depression, however, with only speculation to support the decision, exceeds the discretion of the trial court.

***31** If the current plan of care cannot be continued because of the lack of an adequate award of spousal support, it is not at all clear what will become of Kathleen:
Q. If for any reason this plan could not be continued, whether for any orders that might be entered or for financial reasons, what would we do with Kathy Smith?

A. (Ms. Soucy) I really don't know. We do not have anything in this area that she is eligible for that would meet her needs.

(Transcript, Nov. 1, 2012, p. 6.) (Emphasis added.)

***32 II. THE COURT ABUSED ITS DISCRETION BY FAILING TO AWARD HER ATTORNEY'S AND OTHER PROFESSIONAL FEES TO KATHLEEN.**

At the time of trial, Kathleen had incurred professional fees and expenses:
A. For the services of **Elder** Care Planning and Solutions, Peg Soucy, the sum of $4,368.

B. For the services of Sherman & Sandy, LLC, a balance due of $20, 354.76.

C. For the services of Sherman & Sandy, LLC, a contribution by her mother, Mrs. Norma Bickford, who became her Guardian ad Litem, the sum of $4,045.

These requests were supported by a billing from **Elder** Care Planning and Solutions and by an affidavit of counsel fees and expenses from Sherman & Sandy, LLC. (Defendant's Exhibits 24 and 25.)

In its Divorce Judgment, the court did not award Kathleen any of these expenses, ordering instead that:
18. Professional Fees

Each party shall pay his or her own attorney's and other professional fees associated with this case.

(Divorce Judgment, Appendix, p. 25.)

The court also ordered:
13. Retirement or Tax-Deferred Accounts

A. The 401 (k) account held by Paul J. Smith through Kennebec Veterinary Service, Inc.,... is set apart to Kathleen N. Smith as her sole property. The award of this account to Kathleen is intended to help pay the substantial professional fees she has incurred in developing a care plan and litigating this case. It also may be necessary to bridge the gap between her current care plan and a care plan that she can afford with her own income and the spousal support awarded in this judgment.

(Divorce Judgment, Appendix, p. 23.)

***33** The balance in the 401(k) account was $70,076.15. (Divorce Judgment, Findings, ¶ 27C; Appendix, p. 17.)

An award of attorney's fees is reviewable by this Court for an **abuse** of discretion. *Miele v. Miele*, 2003 ME 113, ¶14, 832 A.2d 760, 764. This Court has said:
An award of attorney's fees should "be based on the parties' relative capacity to absorb the costs of litigation" and all relevant factors that serve to create an award that is "fair and just under the circumstances."

Clum v. Graves, 1999 ME 77, ¶ 17, 729 A.2d 900, 907.

The court's failure to award attorney's fees and her other professional fees fails to adequately consider the parties' relative capacity to absorb the costs of litigation and results in a decision that is not fair and just under the circumstances. The decision to require Kathleen to pay her own fees is an **abuse** of the court's discretion.

A. The court failed to adequately consider the substantial difference in the parties's relative capacity to absorb the costs of litigation.

Standing alone, Kathleen's income consists only of her Maine PERS benefit, a net amount of $1,504.96 per month, or $18,059.52 per year after tax. Paul's income is $125,000 per year. He owed no tax for the year 2011 and was projected to owe no tax for the year 2012. (Divorce Judgment, Findings, ¶ 9, 14; Appendix, pp. 3, 4; Transcript, Oct. 30, 2012, pp. 87, 115.) Paul also receives bonuses from his veterinary practice. (Transcript, Oct. 30, 2012, p. 83.)

By agreement, Paul was awarded all of the real estate owned by the parties and his ownership of Kennebec Veterinary Service, Inc., although all of these assets were marital property. (Divorce Judgment, Orders, ¶¶ 9, 14; Appendix, pp. 21, 23.) The corporation had been previously appraised at $548,000 and was subject to a line of credit on which the balance due was $98,000 (Transcript, Oct. 30, 2012, pp. 63-64.) There is equity in the practice, of an uncertain amount, but apparently substantial. The ***34** professional building in which the practice is conducted is assessed by the Town of Oakland at $569,000, subject to two mortgages totaling a little over $400,000. (Transcript, Oct. 30, 2012, p. 63; Plaintiff's Financial Statement, Appendix, pp. 53.) There is equity in the professional building as well, of uncertain amount.

Paul holds an interest in The Smith Great Bay Farm Partnership, a family limited partnership, which is his non-marital property. This interest generated a payment to him of $100,000 in 2011, characterized as a loan, but granted "without any conditions or terms." (Transcript, Oct. 30, 2012, p. 50.) This Court has noted that:

> [I]t is proper for a trial court to consider not only the parties' income, but also their other assets when determining the relative financial ability of the parties to absorb the costs of litigation.

Ackerman v. Yates, 2004 ME 56, ¶ 19; 847 A.2d 418, 424.

Kathleen is permanently disabled and has only a fixed income from Maine PERS and spousal support that, in its judgment, the court recognized was inadequate for her needs. Paul holds a doctorate in veterinary medicine, owns his practice and the real estate in which it is located, receives an income that is nearly six times that of Kathleen, and did not describe any incapacitating health problems. He has access to significant amounts of money from his family limited partnership when needed. There can be no doubt that the relative capacity of the parties to absorb the costs of this case are very substantially unequal and that Paul's ability to do so is far superior to Kathleen's.

While the court was correct in observing that Paul had previously paid a portion of Kathleen's fees, it failed to take into account that he did so while receiving and controlling the Maine PERS payment that she received. From the time the divorce was filed in June 2010 until the end of January 2012, when Sherman & Sandy, LLC, assumed the responsibility for management of Kathleen's finances, approximately 19 months elapsed during which time Paul received and managed all of her benefits. At a net ***35** payment of $1,504.96 per month, Kathleen's benefits generated much more than the $12,701.96 provided towards her attorney's fees prior to hearing.

The court's award of Paul's 401(k) account to Kathleen was an inadequate substitute for an awarded of her professional fees:
- The court acknowledged that the funds from that account "may be necessary to bridge the gap between her current care plan and a care plan that she can afford with her own income and the spousal support awarded in this judgment." (Divorce Judgment, Order, ¶ 13(A); Appendix, p.23.) Obviously, that anticipated need eliminates the funds in that account from being used for the payment of fees.

-The court did not take into account the fact that the 401(k) account is tax-deferred and, therefore, would not generate the full amount of its apparent balance.

-Adjusting the face value of the 401(k) account of $70,076.15 for a reasonable percentage attributable to state and federal tax results in a net amount that approximates the $51,000 removed by Paul from joint accounts that were subject to the preliminary injunction and which were unavailable for disposition by the court.

Paul's income, assets, income potential, and health are so much greater than Kathleen's that the court's failure to provide her with assistance with her professional fees and costs is an **abuse** of the court's discretion.

B. The court overlooked the fact that the expenses incurred were not limited to the cost of litigation, but included other services required by Kathleen's unique circumstances.

The fees and expenses reflected in the billing from **Elder** Care Planning and Solutions and the Affidavit of Sherman & Sandy, LLC, were not limited to the costs of litigation:
- Through Counsel, Kathleen applied for and was approved for a disability determination through the Social Security Administration, which qualified her for ***36** Medicare coverage. (Transcript, Nov. 1, 2012, p. 44.) This allowed Paul to remove her from his health insurance coverage, at a savings of $500 per month. (Transcript, Oct. 30, 2012, pp. 121-22.)

- A plan of care for Kathleen had to be developed. Because of the lack of appropriate resources, this was a lengthy and difficult task, and nothing that Kathleen could do on her own. The costs incurred for this purpose were significant, but the work had to

be done. Paul's attempt at a plan of care consisted only of expecting her mother to take her back. Although the court alluded to the "substantial professional fees she has incurred in developing a care plan," it made no reference at all to the services provided by **Elder** Care Planning and Solutions in its Findings of Fact and Conclusions of Law and did not consider the importance to Paul and to Kyle of relocating Kathleen from the marital residence as soon as that could be accomplished safely.

-Beginning in the end of January 2012, Sherman & Sandy, LLC, began managing Kathleen's finances, through the services of Martha Phillips, PLS. This, too, is not a function that Kathleen is able to do, and assistance with financial management was recommended by Dr. Riley. Fees for these ongoing services were included in the affidavit of counsel fees, as well.

All of these functions were necessary and in addition to the litigation itself. All of these functions benefitted Paul as well as Kathleen, by taking over the responsibility for her long-term plan of care and taking steps to reduce or eliminate expenses he had previously paid. Only a portion of the billings were directly related to litigation, and considering all of the extra tasks that had to be accomplished, the total amounts involved were reasonable. It is worth noting that, in his closing argument, Paul did not object to the amount of the billings or the appropriateness of the services rendered.

***37 C. The court's conclusion in its Findings of Fact and Conclusions of Law applies an unreasonable and inappropriate standard on those responsible for the representation and protection of an incapacitated person who is incapable of making plans or decisions for herself and is unjust.**

In its Findings of Fact and Conclusions of Law, the court concluded:

> As to the conduct of a party contributing to the duration of the litigation, Kathleen and her agents made the strategic decision to put on an expensive and persuasive case for Kathleen's needs. However, they knew or should have known that it was a real long shot that the spousal support award would fund the care plan developed. Under such circumstances, the Court finds it fairest that responsibility for the fees lie with the side that made those strategic decisions.

(Findings of Fact and Conclusions of Law, ¶ 8; Appendix, p. 36.)

It should have been apparent to the court that Kathleen was not capable of making a strategic decision regarding the conduct of her case. Because of her brain injury, that responsibility necessarily fell on her attorney, her Guardian ad Litem, and the expert whose business it is to assess, recommend, and plan for the care of persons with dis-abilities. This conclusion imposes an unreasonable and inappropriate standard on those responsible for the representation and protection of Kathleen.

The court does not explain why it is addressing "the conduct of a party contributing to the duration of the litigation," and nothing in the evidence presented justifies the view that Kathleen or her representatives acted in such a way as to prolong the litigation. Kathleen's brain injury and the difficulty of finding a suitable long-term care plan for her did contribute to the length of this case, but a medical condition is not a basis for denying an award of professional fees.

The court made no finding that the case presented on Kathleen's behalf was inappropriate. To the contrary, the court said:

> This living arrangement [at Goudreau's] is suitable for her particularized needs, keeps her in the local area, and is ***38** appropriate for visits by Kyle. She is safe and as happy as possible in this setting.

(Divorce Judgment, Findings ¶ 20; Appendix, p. 15.)

> [T]he Court recognizes that Kathleen has unusually high needs, and the Court believes that her care plan was developed in good faith and with her best interest at heart[.]

(Divorce Judgment, Findings, ¶ 26; Appendix, p. 17.)

[The case for Kathleen's needs is] persuasive.

(Findings of Fact and Conclusions of Law, ¶ 8; Appendix, p.36.)

What the court does not explain, and what results in a finding that is clearly erroneous, is how those representing Kathleen "knew or should have known that it was a real long shot that the spousal support award would fund the care plan developed." What was known was:
- Paul raised no objection to the cost of the proposed plan of care before Kathleen relocated to Goudreau's. (Transcript, Oct. 30, 2012, p. 137 - Testimony of Norma Bickford; p. 224 - Testimony of Peg Soucy.)

- Even after Kathleen relocated, the only expense Paul specifically questioned was the charge for laundry. (Transcript, Nov. 1, 2012, p. 49 - Testimony of Martha Phillips.)

-The revenues generated by Paul's veterinary practice were in the range of nearly 1.3 million dollars per year to nearly 2 million dollars per year. (Transcript, Oct. 30, 2012, pp. 46-47.)

- All of Paul's spousal support payments would be deductible as alimony, whereas the health-related costs he had been paying for Kathleen's care were not. (Transcript, Oct. 30, 2012, p. 120 - Testimony of James Boulette.)

- Paul held an interest in his family's farm limited partnership, from which he could access funds if needed. (Transcript, Oct. 30, 2012, p. 50.)

***39** - The plan of care was as recommended in the neuropsychological evaluation of Kathleen by Dr. Robert Riley of The Brain Clinic of Central Maine and by Peg Soucy of **Elder** Care Planning and Solutions, licensed and certified to assess and prepare care plans for individuals with disabilities.

-Prior to his written closing argument, Paul did not present any specific proposal for an amount of spousal support that he was prepared to pay.

-There were no readily available resources in this area that could meet Kathleen's needs at any price, let alone a greatly reduced cost.

The court should also have been cognizant of the obligations of counsel:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.

Comment to Rule 1.3, Maine Rules of Professional Conduct.

The obligation is especially important when representing an incapacitated client who cannot participate in decisions regarding the conduct of her case. In fact, a strategic decision not to pursue the best outcome for Kathleen because of a concern that it might be too expensive for Paul would have been ethically suspect.

Kathleen's representatives were obligated to present the best case possible for a plan of care that was safe and suitable for her needs, and did so. To expect otherwise imposes an obligation to not pursue her best interests contrary to the obligations of the Rules of Professional Conduct. Absent a showing of bad faith or frivolousness, there is no basis for a rule that imposes the costs of litigation, together with the costs associated with developing and managing the plan of care, on Kathleen or her representatives without regard to the relative capacities of the parties' to absorb those costs.

***40 CONCLUSION**

The court's decision to award just half of the spousal support needed to fund Kathleen's plan of care was an **abuse** of discretion. The case should be returned to the District Court for further proceedings regarding spousal support. That court based its decision on certain key findings of fact that are, on examination, shown to be clearly erroneous.

The court recognized that the plan of care proposed for Kathleen is suitable, meets her needs, and keeps her safe and as happy as possible. Paul made no significant effort to find a placement for her and raised no question or objection regarding cost before the plan had been fully implemented and Kathleen had relocated out of the marital residence. His acquiescence to the plan was reason enough to expect him to support its funding, and he has resources available to do so. The status of the plan and its cost should be reviewed periodically to determine if the spousal support award can be modified without the need for a preliminary showing of a substantial change in circumstances. Such a provision would adequately protect Paul's financial interests in the long term.

The court's decision to require Kathleen to assume the expense of her professional fees was also an **abuse** of discretion. The case should be returned to the District Court for entry of an order awarding those fees to her.

The basis for the court's decision that Kathleen's team made a strategic decision to present a case that they “knew or should have known was a real long shot” imposes a standard for the award of professional fees that is inappropriate. Those responsible for her protection, and especially counsel, were obligated to pursue her best interests. Nothing in either the evidence presented or in the court's findings suggests that her case was presented in anything other than good faith and with care. The fact that the court did not adopt the position argued in her behalf should not alter the standards for an award of fees. Paul has assets available, and if need be, certainly the ability to make payments ***41** over a period of time, to assist with the expenses for services provided to Kathleen. In the unusual circumstances of this case, those services extended well beyond just the process of litigation.

This Appeal should be granted.

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