STATE OF NEW HAMPSHIRE

SUPREME COURT

CASE NO. 2020-0009

---

IN THE MATTER OF

JONATHAN MERRILL

AND

LEA MERRILL

---

RULE 7 APPEAL OF FINAL DECISION OF THE
7TH CIRCUIT FAMILY DIVISION AT DOVER
[COMPLEX DOCKET]

# BRIEF OF PETITIONER/APPELLANT, JONATHAN MERRILL

By: John A. Macoul, Esquire
373 Main Street, P.O. Box 673
Salem, New Hampshire 03079
603-893-5786
N H Bar #1584

macoullawoffice@aol.com

* To be argued by John A. Macoul, Esquire

## TABLE OF CONTENTS

## AUTHORITIES

**Cases:** Page

**Statues and Authorities**



**Other Authorities:**

## QUESTIONS PRESENTED

I. Whether the trial court erred, as a matter of law, by including the petitioner's interest in the spendthrift trust as a marital asset, contrary to RSA 564-b:5-502 [e] [1]; by including as a marital asset the value of the trust corpus versus the value of the petitioner's interest in the trust; and by including alleged benefits which would amount to a"mere expectancy".

Preserved by Petitioner's Requests For Findings and Rulings 214-218; 342, Apx. III at 21-22;34; Argument at Trial; Petitioner's Motion For Reconsideration And/or Relief And Request For Hearing [Apx. IV at 20]; Petitioner's Motion To Stay and Renewed Motion and Request For Hearing And Request For Further and/or Supplemental Reconsideration and Clarification. [Apx. IV at 30]; Plain Error, Rule 16-A.

II. Whether the trial court erred in finding the respondent's interest in a condominium unit with her mother was not a marital asset; and in not properly factoring the same in the property award and distribution.

Preserved by Petitioner's Requests For Findings and Rulings 310-317, Apx. III at 31-32; Argument at trial; Trial Court's Decision on Record [Apx. I at 3]; Petitioner's Motion For Reconsideration and/or Relief and Request For Hearing [Apx. IV at 20]; Petitioner's Motion To Stay and Renewed Motion and Request For Hearing and Request For Further and/or Supplemental Reconsideration and Clarification. (Apx. IV at 30]; Plain Error rule 16-A.

III. Whether the trial court erred in the amount ordered to be paid by the petitioner to purportedly equalize the property distribution; the manner and timing of payments required, and in entering an unsustainable payment order.

Preserved by Trial Court's decision on record [Apx . I at 3]; Petitioner's Motion For Reconsideration and/or Relief and Request For Hearing [Apx. IV at 20]; Petitioner's Motion To Stay and Renewed Motion And Request For Hearing and Request For Further and/or Supplemental

Reconsideration and Clarification [Apx. IV at 30]

IV. Whether the trial court erred and engaged in an unsustainable exercise of discretion in awarding to the respondent assets and payments to include 50% of the value of petitioner's minority interests in George E. Merrill and Son, Inc., and KEM Realty, Inc.

Preserved by Trial court's decision on record [Apx. I at 3];argument at trial; Petitioner's Requests For Findings and Rulings, 196-291; 341-351, Apx. III at 20-30; 34-35; Petitioner's Motion For Reconsideration and/or Relief and Request For Hearing [Apx. IV at 20]; Petitioner's Motion To Stay and Renewed Motion and Request For Hearing and Request For Further and/or Supplemental Reconsideration and Clarification [Apx. IV at 30];

V. Whether the court failed to properly consider the "marital" lifestyle, as well as the property awarded to the respondent in determining her needs, and failed to properly determine petitioner's ability to make payments. The court erred as to amount and duration of alimony.

Preserved by Petitioner's Requests For Findings and Rulings 112-163, Apx. III at 12-17; trial court's decision on record [Apx. I at 3]; argument at trial; Petitioner's Motion For Reconsideration and/or Relief And Request For Hearing [Apx. IV at 20]; Petitioner's Motion To Stay and Renewed Motion and Request For Hearing at Request For Further and/or Supplemental Reconsideration and Clarification [Apx. IV at 30]; Proposed Uniform Alimony Order.

VI. Whether the trial court erred by failing to revise the temporary orders and to provide relief to the petitioner, and by continuing orders found to be harsh and beyond the capabilities of the petitioner.

Preserved by Motion For Modification and/or Other Relief [Apx. IV at 35]; Objection To Motion For Contempt and Cross Motion [Apx. V at 3]; trial court's decision on record [Apx. I at 3]; argument at trial; Petitioner's Requests For Findings and Rulings 366-408, Apx. III at 36-41; Petitioner's Motion For Reconsideration and/or Relief and Request

For Hearing [Apx. IV att 20]; Petitioner's Motion To Stay and Renewed Motion And Request For Hearing and Request For Further and/or Supplemental Reconsideration and Clarification. [Apx.IV at 30]

TEXT OF STATUTES

New Hampshire Statutes
Title 43. DOMESTIC RELATIONS
Chapter 458. ANNULMENT, DIVORCE AND SEPARATION
Alimony, Allowances, Custody, etc.

*Current through Chapter 7 of the 2020 Legislative Session*

## § 458:16-a. Property Settlement

I. Property shall include all tangible and intangible property and assets, real or personal, belonging to either or both parties, whether tit name of either or both parties. Intangible property includes, but is not limited to, employment benefits, vested and non-vested pensi or savings plans. To the extent permitted by federal law, property shall include military retirement and veterans' disability benefits.

II. When a dissolution of a marriage is decreed, the court may order an equitable division of property between the parties. The court sha is an equitable distribution of property, unless the court establishes a trust fund under RSA 458:20 or unless the court decides that a appropriate or equitable after considering one or more of the following factors:

(a) The duration of the marriage.

(b) The age, health, social or economic status, occupation, vocational skills, employability, separate property, amount and sources c of each party.

(c) The opportunity of each party for future acquisition of capital assets and income.

(d) The ability of the custodial parent, if any, to engage in gainful employment without substantially interfering with the interests of custody of said party.

(e) The need of the custodial parent, if any, to occupy or own the marital residence and to use or own its household effects.

(f) The actions of either party during the marriage which contributed to the growth or diminution in value of property owned by eith

(g) Significant disparity between the parties in relation to contributions to the marriage, including contributions to the care and edu care and management of the home.

(h) Any direct or indirect contribution made by one party to help educate or develop the career or employability of the other party a party's educational or personal career opportunities for the benefit of the other's career or for the benefit of the parties' marriag

(i) The expectation of pension or retirement rights acquired prior to or during the marriage.

(j) The tax consequences for each party.

(k) The value of property that is allocated by a valid prenuptial contract made in good faith by the parties.

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

(1) Caused substantial physical or mental pain and suffering; or

(2) Resulted in substantial economic loss to the marital estate or the injured party.

(m) The value of any property acquired prior to the marriage and property acquired in exchange for property acquired prior to the n

(n) The value of any property acquired by gift, devise, or descent.

(o) Any other factor that the court deems relevant.

II-a. Tangible property shall include animals. In such cases, the property settlement shall address the care and ownership of the parties' consideration the animals' wellbeing.

III. If either or both parties retain an ownership interest in an education savings account held on behalf of a child of the marriage, includi under 26 U.S.C. Section 529, the court may, in its discretion, preserve the account for its original purpose or may treat the account as to equitable division under this section.

IV. The court shall specify written reasons for the division of property which it orders.

Cite as RSA 458:16-a

History. Amended by 2019, 130: 1, eff. 8/24/2019.

Note:

1987, 278:1. 2000, 178:1. 2004, 136:3, eff. May 19, 2004.

§ 458:19. Alimony.

**New Hampshire Statutes**

**Title 43. DOMESTIC RELATIONS**

**Chapter 458. ANNULMENT, DIVORCE AND SEPARATION**

**Alimony, Allowances, Custody, etc.**

*Current through Chapter 330 of the 2016 Legislative Session*

**§ 458:19. Alimony**

I. Upon motion of either party for alimony payments, the court shall make orders for the payment of alimony to the party in need of alimony, either temporary or permanent, for a definite or indefinite period of time, if the motion for alimony payments is made within 5 years of the decree of nullity or divorce and the court finds that:

(a) The party in need lacks sufficient income, property, or both, including property apportioned in accordance with RSA 458:16-a, to provide for such party's reasonable needs, taking into account the style of living to which the parties have become accustomed during the marriage; and

(b) The party from whom alimony is sought is able to meet reasonable needs while meeting those of the party seeking alimony, taking into account the style of living to which the parties have become accustomed during the marriage; and

(c) The party in need is unable to be self-supporting through appropriate employment at a standard of living that meets reasonable needs or is allocated parental rights and responsibilities under RSA 461-A for a child of the parties whose condition or circumstances make it appropriate that the parent not seek employment outside the home.

II. Upon motion of either party, the court may make orders for the payment of an alimony allowance when such orders would be just and equitable.

III. Upon a decree of nullity or divorce, or upon the renewal, modification, or extension of a prior order for alimony, the court may order alimony to be paid for such length of time as the parties may agree or the court orders.

IV. (a) The court may make orders for alimony in a lump sum, periodic payments, or both.

(b) In determining the amount of alimony, the court shall consider the length of the marriage; the age, health, social or economic status, occupation, amount and

sources of income, the property awarded under RSA 458:16-a, vocational skills, employability, estate, liabilities, and needs of each of the parties; the opportunity of each for future acquisition of capital assets and income; the fault of either party as defined in RSA 458:16-a, II(l); and the federal tax consequences of the order.

(c) In determining amount and sources of income, the court shall not consider a minor child's social security benefit payments or a second or subsequent spouse's income. The court may consider veterans' disability benefits collected by either or both parties to the extent permitted by federal law.

(d) The court may also consider the contribution of each of the parties in the acquisition, preservation, or appreciation in value of their respective estates and the noneconomic contribution of each of the parties to the family unit.

(e) In any proceeding for modification of an existing alimony order, the earned or unearned income and social security disability payments of a spouse of the obligor party shall not be considered a source of income to that obligor party for the purpose of modification, unless the obligor party resigns from or refuses employment or is voluntarily unemployed or underemployed, in which case the income of a subsequent spouse may be imputed to the obligor party only to the extent that such obligor party could have earned income in his or her usual employment. In such actions, the court may consider the veteran's disability benefits of a spouse of the obligor party to the extent permitted by federal law.

V. The unanticipated consequences of changes in federal tax legislation or regulations may be grounds to modify any alimony order or agreement.

VI. The court shall specify written reasons for the granting or denial of any motion for an alimony allowance.

VII. In cases where the court issues an order for permanent alimony for a definite period of time, such order may be renewed, upon the petition of either party, provided that such petition is made within 5 years of the termination date of the permanent alimony order. Nothing in this paragraph shall be construed to change or alter in any way the terms of the original alimony order.

Cite as **RSA 458:19**

Note:

148:13. CS 157:13. GS 163:12. GL 182:12. PS 175:14. PL 287:16. 1937, 154:1. RL 339:16. RSA 458:19. 1981, 1. 1985, 175:1. 1987, 278:2. 1991, 123:1. 1996, 32:4, 5. 2000, 178:2, 3. 2001, 246:2, 3, eff. Jan. 1, 2002. 2005, 3, eff. Oct. 1, 2005.

§ 458:19-a. Term and Reimbursement Alimony.

**New Hampshire Statutes**

**Title 43. DOMESTIC RELATIONS**

**Chapter 458. ANNULMENT, DIVORCE AND SEPARATION**

**Alimony, Allowances, Custody, etc.**

*Current through Chapter 7 of the 2020 Legislative Session*

**§ 458:19-a. Term and Reimbursement Alimony**

I. The court may order term alimony upon agreement of the parties or in the absence of an agreement, at the request of either party by petition or motion in a case for divorce, legal separation, or annulment. Any request for alimony shall be made either before the final decree is effective or not later than 5 years from the effective date. The purpose of term alimony is to allow both parties to maintain a reasonable standard of living. If the issue of term alimony is contested, the court may order term alimony only if it finds that:

(a) The party in need lacks sufficient income, property, or both, including property apportioned in accordance with RSA 458:16-a, to provide for his or her own reasonable needs, taking into account the marital lifestyle and the extent to which the parties must both fairly adjust their standards of living based on the creation and maintenance of separate households; or

(b) The party in need is unable to be self-supporting at a standard of living that meets reasonable needs through appropriate employment, or is allocated parental rights and responsibilities under RSA 461-A for a child of the parties whose condition or circumstances make it appropriate that the parent not seek employment outside the home or limit the hours of such employment; and

(c) The party from whom alimony is sought is able to meet his or her own reasonable needs, taking into account the marital lifestyle and the extent to which the parties must both fairly adjust their standards of living based on the creation and maintenance of separate households, while meeting the reasonable needs of the party seeking alimony.

II. (a) The amount of a term alimony order shall be the lesser of the payee's reasonable need, or a formula based on 30 percent of the difference between the parties' gross incomes at the time the order is created, unless the court finds that justice requires an adjustment. In making this calculation, gross income as defined in RSA

(1) Reduced by subtracting amounts that are ordered and actually paid for:

(A) Child support or alimony, including child support for the parties' joint children; and

(B) Costs for health insurance coverage or other specified expenses for the benefit of the other party; and

(2) As to the payee's income, adding the amount of child support ordered for the parties' joint children.

(b) The court may vary this formula when an equal or approximately equal parenting schedule has resulted in an adjustment to the child support guidelines under RSA 458-C:5. The court may make a step-down or step-up order that begins with the current reasonable need or the formula and decreases or increases over time. If child support is a factor in determining the amount of alimony, alimony may be recalculated when child support is modified or ended, without meeting the tests for modification in RSA a, I.

III. The maximum duration of term alimony shall be 50 percent of the length of the marriage, unless the parties agree otherwise or the court finds that justice requires an adjustment under paragraph IV. If justice requires, the court may use a different beginning or ending date in measuring the length of the marriage. Term alimony shall end on the remarriage of the payee, unless the order is based on an agreement of the parties that provides otherwise.

IV. In any term alimony order, the court may adjust the formula amounts, duration limitations, or both, if the parties agree or if the court finds that justice requires an adjustment. The party seeking an adjustment shall have the burden of proof. Special circumstances that may justify an adjustment include, but are not limited to, the following:

(a) Health, including disability, chronic or severe mental or physical illness, or other unusual health circumstances of either party.

(b) The degree and duration of any financial dependency of one party on the other.

(c) Vocational skills, occupation, benefits available from employment, and the present and future employability of both parties.

(d) Voluntary unemployment or underemployment of either party.

(e) The special needs of a minor or adult child of the parties.

(f) Property awarded under RSA 458:16-a.

(g) The conduct of either party during the marriage, including abuse as defined in RSA

(h) Differences in the parties' benefits under the federal Old Age, Survivors, and Disability Insurance Social Security program.

(i) Diminution of significant assets by a party, coupled with a lack of sufficient assets from which property can be equitably divided or recouped under RSA 458:16-a.

(j) Any other reason the court deems material and relevant.

V. The court may order reimbursement alimony upon agreement of the parties or in the absence of an agreement, at the request of either party by petition or motion in a case for divorce, legal separation, or annulment. The request for reimbursement alimony shall be made before the final decree is effective. The purpose of reimbursement alimony is to compensate the payee for economic or non-economic contribution to the financial resources of the payor, where the property subject to division under RSA 458:16-a is either inappropriate or inadequate to provide such compensation. The contribution to the payor's financial resources may include support of education or job training, or an investment of time or money. The following shall apply to reimbursement alimony orders:

(a) The court shall make a finding that the order is equitable;

(b) The maximum time period shall be 5 years from the final decree effective date, unless the parties agree otherwise; and

(c) It shall not be modified, except by agreement.

VI. Each order granting, denying, renewing, modifying, or refusing to renew or modify term or reimbursement alimony shall state:

(a) If alimony is awarded:

(1) The type or types of alimony;

(2) The duration or number of payments, the method or methods of payment, and any limitations imposed;

(3) Whether full retirement age or actual retirement will impact payments;

(4) Whether security under RSA a, VI is required; and

(5) Whether the order is based on an agreement of the parties.

(b) If the proceeding was contested, the order shall include:

(1) Findings supporting the court's decision to order or deny the requested alimony;

(2) Findings as to any special circumstances justifying an adjustment to either

(3) Findings supporting any award of reimbursement alimony.

**Cite as RSA 458:19-a**

**History.** Amended by 2018, 310: 2, eff. 1/1/2019.

**Related Legislative Provision:** *See 2018, 310, 6.*

**Note:**

1955, 262:4. 1979, 342:1. 2001, 222:3, eff. Sept. 9, 2001.

§ 458:19-aa. Alimony Modification or Termination.

**New Hampshire Statutes**

**Title 43. DOMESTIC RELATIONS**

**Chapter 458. ANNULMENT, DIVORCE AND SEPARATION**

**Alimony, Allowances, Custody, etc.**

*Current through Chapter 7 of the 2020 Legislative Session*

## § 458:19-aa. Alimony Modification or Termination

I. (a) The court may modify the amount or duration of a term alimony order upon agreement of the parties or, in the absence of an agreement, at the request of either party by petition or motion. If the proceeding for modification is contested, any modification shall be supported by findings of the following, based on clear and convincing evidence:

(1) There has been a substantial and unforeseeable change of circumstances since the effective date of the alimony order;

(2) There is no undue hardship on either party; and

(3) Justice requires a change in amount or duration.

(b) The party requesting a modification shall have the burden of proof. Additionally, the order shall include the information required under RSA 458:19-a, VI. If the prior alimony order has ended, reinstatement shall be requested within 5 years after the end of the order.

II. In any modification of an existing alimony order, the earned or unearned income and social security payments of a spouse of the payor shall not be considered a source of income to the payor, unless the payor resigns from or refuses employment or is voluntarily unemployed or underemployed, in which case the income of a subsequent spouse may be imputed to the payor only to the extent that such payor could have earned income in his or her usual employment. In such actions, the court may consider the veteran's disability benefits of a spouse of the payor to the extent permitted by federal law.

III. For the purpose of modification of an existing alimony order, any income from a second job or overtime shall be presumed to be irrelevant to an alimony modification, if the party works more than a single full time position, and the second job or overtime began after the entry of the initial order.

IV. Except as provided in paragraph V, term alimony orders shall end upon the payor reaching full retirement age or actual retirement by the payor, whichever is later, unless the parties agree otherwise or the court finds that justice requires a different termination date based on special circumstances under RSA 458:19-a, IV. The payor's ability to work beyond full retirement shall not of itself be a reason to extend alimony. The payor shall provide the payee reasonable notice in advance of retirement. Sixty days' notice shall be presumed to be reasonable.

V. If justice requires, the court may extend alimony past full retirement age or actual retirement up to an amount that equalizes the parties' gross benefits under the federal Old Age, Survivors, and Disability Insurance Social Security program. The requirements of paragraph I shall not apply.

VI. Unless otherwise ordered by the court, the obligation to pay alimony ends on the death of the payee and is a charge against the estate of the payor, except to the extent that it is covered by life insurance or other security. The court may require reasonable security for the payments due the payee in the event of the payor's death prior to the completion of payments.

VII. At the request of either party by petition or motion, the court may make orders for the modification or termination of term alimony upon a finding of the payee's cohabitation as described in paragraph VIII. The requirements of paragraph I shall not apply.

VIII. The court shall find that cohabitation exists, if there is a relationship between an alimony payee and another unrelated adult resembling that of a marriage, under such circumstances that it would be unjust to make an order for alimony, to continue any existing alimony order, or to continue the amount of an existing alimony order. In making this finding, the court shall consider evidence of any of the following concerning the payee and the other person:

(a) Living together on a continual basis in a primary residence;

(b) Sharing of expenses;

(c) The economic interdependence of the couple, or economic dependence of one upon the other;

(d) Joint ownership or use of real or personal property, including financial accounts;

(e) The existence of an intimate relationship between the persons;

(f) Holding themselves out to be a couple through statements or representations made to third parties or are generally reputed to be a couple; and

(g) Any other factors that the court finds material and relevant.

reinstate the original alimony award upon finding that the payee's cohabitation has ceased or that the marriage has ended in divorce, provided that the request is made within 5 years of the effective date of the termination order. If the alimony order being reinstated had a specific termination date, reinstatement shall not extend the termination date, however, if the order specified a number of payments, the reinstatement may be for up to the number of payments remaining in the order. If the order has both a specific termination date and a number of payments, the termination date shall control. The requirements of paragraph I shall not apply.

**Cite as RSA 458:19-aa**

**History.** Added by 2018, 310: 3, eff. 1/1/2019.

**Related Legislative Provision:** *See 2018, 310, 6.*

§ 564-B:5-502. Creditor's Claim Against a Beneficiary of a Trust Containing a Spendthrift Provision.

**New Hampshire Statutes**

**Title 56. PROBATE COURTS AND DECEDENTS' ESTATES**

**Chapter 564-B. NEW HAMPSHIRE TRUST CODE**

**Article 5. Creditor's Claims; Spendthrift and Discretionary Trusts**

*Current through Chapter 7 of the 2020 Legislative Session*

## § 564-B:5-502. Creditor's Claim Against a Beneficiary of a Trust Containing a Spendthrift Provision

(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision.

(d) To the extent that a beneficiary's interest in a trust is subject to a spendthrift provision, a creditor or assignee of the beneficiary may not reach:

(1) The beneficiary's interest in the trust; or

(2) A distribution from the trust before its receipt by the beneficiary.

(e) To the extent that a beneficiary's interest in a trust is subject to a spendthrift provision, the beneficiary's interest:

(1) Is not property for purposes of RSA 458:16-a, I; and

(2) Shall not be subject to any forced heirship, legitime, forced share, or any similar heirship rights under the laws of any jurisdiction.

(f) To the extent that a beneficiary's interest in a trust is subject to a spendthrift provision, a court may authorize an exception creditor of the beneficiary to attach present or future distributions to or for the benefit of the beneficiary.

(1) For purposes of this subsection (f), the following definitions shall apply:

(A) "Exception creditor" means, with respect to a beneficiary:

(i) An individual to the extent that there is a judgment or court order against the beneficiary for child support in this or any other state;

(ii) A spouse or former spouse to the extent that there is a judgment or court order against the beneficiary for basic alimony;

(iii) A judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; or

(iv) This state or the United States for a claim against the beneficiary to the extent that a statute of this state or federal law so provides.

(B) "Basic alimony" means the portion of alimony attributable to the most basic food, shelter, and medical needs of the spouse or former spouse if the judgment or court order expressly specifies that portion.

(2) Attachment of present or future distributions is the exception creditor's exclusive remedy against the beneficiary's interest in the trust.

(3) The court may limit the relief as is appropriate under the circumstances.

(4) Subsection (d)(2) shall not apply to an exception creditor.

**Cite as RSA 564-B:5-502**

**History.** Amended by 2017, 257: 18, eff. 9/16/2017.

**Note:**

2004, 130:1, eff. Oct. 1, 2004.

## STATEMENT OF THE CASE

This appeal arises out of a divorce tried before the Complex Docket over several days. The testimony and evidence was presented to address issues concerning the grounds, parenting plan, and financial issues concerning alimony, child support, the assets comprising the marital estate, as well as the valuation and distribution of the same.

The court also heard, at the time of trial, pending cross motions for contempt, as well as petitioner's motion for modification and request for revision of prior temporary orders.

The trial court issued its decrees, parenting plan, Uniform Support Order, and Uniform Alimony Orders, all dated November 11, 2019.

The petitioner thereafter timely filed a "Petitioner's Motion For Reconsideration and/or Other Relief and Request For Hearing" which was denied without further comment by the court. Petitioner thereafter filed "Petitioner's Motion To Stay and Renewed Motion And Request For Hearing And Request For Further and/or Supplemental Reconsideration And Clarification" which was denied again without further comment by the court, prior to the filing of the present appeal.

## STATEMENT OF FACTS

The parties were married on February 14, 2005 and took up residence at a Hampstead home owned by the petitioner.

At the time of the marriage, the petitioner owned a minority interest in a three generation excavating business commenced by his grandfather, known as George E. Merrill and Son, Inc. [hereinafter referred to as GEM] [P.Req.7*, Apx. III at 3]. The petitioner began working at GEM as an adolescent and his employment for the same continued, uninterrupted throughout his life to date. [P.Req.200, Apx. III at 20].

Horses were historically an important part of the Merrill family history. At the time of the marriage, the Merrills also owned another business commenced by his grandfather in 1965, known as KEM Realty, Inc. KEM ran a horse farm on the corporation's land known as "Shannon Trails". All shares or interest in KEM Realty, Inc. owned by the petitioner were again acquired by gift or inheritance from his grandfather and father. As was the case with GEM, the petitioner had worked at the horse farm since adolescence. [P.Req.266, Apx.III at 26]

---

*P.Req. references "Petitioner's Requests For Findings and Rulings", with court ruling

As of the time of the marriage, the respondent had graduated from high school and completed her intended educational pursuits. Her principal employment amounted to catalogue modeling, bartending, and waitressing. [P.Req. 113,114,130, Apx. III at 12,14]

The only child born of the marriage, Dustin, was born on December 29, 2005. Both parties have always had a warm and loving relationship with their son and both have been actively involved in all aspects of his life. [P.Req.11,12, Apx. III at 3-4]

In 2009, the respondent desired to have the family move to and reside at an old farmhouse located at "Shannon Trails". [P.Req.276, Apx.III at 27] Upon undertaking residency at the farm, the petitioner undertook the role of the previous caretaker who lived at the farmhouse. The benefit received by the parties as a result of fulfilling the caretaker functions, was free housing and a salary paid to the respondent, commensurate to that of the prior caretaker. [P.Req. 275,276-278, Apx.III at 27]

At various times issues arose during the marriage. The parties separated on more than one occasion. Respondent had, commencing in 2010, filed requests for restraining orders on several occasions which , in every instance, were dismissed, with the courts finding a failure to establish abuse.

[P.Req.77-79, Apx. III at 9]. Petitioner, in 2011, commenced divorce proceedings which were terminated when the parties attempted reconciliation.

Throughout the marriage, the petitioner continued to work for GEM, receiving his base salary. To maintain the business for themselves and the next generation, the petitioner, his brother and father, maintained numerous duties and responsibilities, and performed functions that no one employee would otherwise fulfill. [P.Req.239,242,243,244, Apx. III at 24]. The business historically maintained a "line of credit" with the Pentucket Bank which required annual renewal and was subject to specific financial conditions including, but not limited to, provisions relative to "minimum net income" and "minimum increase in tangible net worth". The same further placed restrictions on additional debt and asset sales. [Exhibit 29, Apx.V at 32; P.Req.228, Apx. III at 23] Over an extended period of time, GEM has been unable to meet the minimum requirements imposed by the line of credit conditions [P.Req.229, Apx.III at 23]. On various occasions, the bank required the infusion of further capital into the business to maintain the necessary line of credit. In 2012, based upon the demands of the bank, the petitioner's father and mother liquidated their only life insurance policy to obtain $327,857.45 to deposit into the business account to satisfy the bank's

requirements. [P.Req.226,227, Apx. III at 23]. As a result of the financial circumstances and the bank requirements, with the exception of their salaries, the principals have not been able to take any additional sums from the business, whether by bonus or otherwise for many years.

The parties continued to live at the farmhouse owned by KEM Realty and to fulfill the functions as caretakers. The management and financial matters concerning the farm were maintained solely by the petitioner, his father and brother, who were the only individuals authorized to deal with the business accounts. [P.Req.285, Apx. III at 28] Petitioner's father, who owns a majority interest in KEM testified that under no circumstances would the property be allowed to be anything other than a horse farm and maintained in its current use, with the same to be passed down through the family. [P.Req.273, Apx. III at 27]. As of the time of trial, KEM had operated at a net loss for at least six years and had not made any cash distributions to the principals over that period of time. [P.Req.288, Apx. III at 28]

In 2012, the petitioner's father created two identical trusts, one for each of his sons, which would provide them with benefits from trusts income only, if any. The same ultimately pass to the children of the brothers. Both trusts have "spendthrift" provisions. RSA 464-B:5-502 provides that a beneficiary's

interest in the same "[i]s not property for purposes of RSA 458:16-a,I". Petitioner's father thereafter transferred 41 shares in GEM to each of the trusts. As was the case with the other shares of GEM, the shares in the trusts did not receive any actual distributions to the principals, who received only their ongoing and standard salaries.

In December, 2016, at the request of the respondent, the parties, utilizing all of their savings and liquidating assets available to them, purchased Unit 19 at 943 Ocean Boulevard, Hampton, New Hampshire. [P.Req.293, Apx. III at 30]. Promptly following the purchase of the said property, various improvements and upgrades were made to the same, utilizing and depleting any additional sums the parties may have had available to them. [P.Req.295, Apx. III at 30]. The condominium had been purchased as a "get away" and never served as the primary residence of the parties. The same did not represent the lifestyle of the parties during the marriage. [P.Req.298-301, Apx. III at 30-31].

Subsequent to the parties' acquisition of the Hampton condominium, an additional unit at Unit 302, Ocean Club Condominium, was acquired in the names of the respondent and her mother as joint tenants.

Shortly after the Hampton condominium was purchased by the parties,

the respondent undertook employment in Hampton, New Hampshire and began spending most nights at the condominium.

In June, 2017, the present divorce proceedings were commenced by the petitioner on the grounds of irreconcilable differences. The petitioner continued to reside at the farmhouse with Dustin, and respondent continued to stay at the Hampton Beach condominium. Respondent cross-petitioned, seeking to raised fault grounds.

Temporary hearings were conducted and temporary orders issued. The temporary parenting plan provided the parties having approximately equal time with Dustin.

The court entered temporary financial orders which required the petitioner to make child support payments plus claimed arrearages totaling $2,405.00 per month, alimony plus claimed arrearages of $750.00 per month, the mortgage, taxes and insurance for the Hampton condominium totaling $1,858.00 a month, condominium fees of $456.00 per month, a truck payment relative to the respondent's truck in the amount of $947.00 per month and health and dental insurance costs totaling $710.00 per month for a total of $7,126.00 per month. The court further ordered the petitioner to make an advance payment to the respondent of $7,500.00, to be characterized at a later

date, to pay for carpeting in the condominium, and to pay the respondent's personal charge accounts. At the time, the petitioner did not have any liquid funds available to meet the obligations imposed by the court. His only source of income was his standard salary which, after deductions, netted petitioner $9,821.00 per month.

Petitioner sought reconsideration of the temporary orders maintaining the same were unsustainable. His request was denied.

At the time of the hearing for temporary relief, the court also heard petitioner's motion for contempt. The court found respondent in contempt for conveying to her mother her interest in the condominium for which they were joint tenants, in violation of the outstanding non-hypothecating order. The court awarded the petitioner his attorney fees, and ordered that further sanctions would potentially issue at the time of the final hearing, along with a determination at that time as to whether the interest conveyed was a marital asset subject to distribution.

Shortly thereafter, the case was transferred to the Complex Docket. The issues at trial were the grounds for divorce, child support, alimony, the determination of which assets constituted marital assets, along with the valuation and distribution of the same. At the same time, the court heard then-

pending cross motions for contempt, along with petitioner's request for modification of the financial obligations imposed upon him, and his request to revise the temporary orders.

The court's final orders and decree were all dated November 12, 2019. The parenting plan called for Dustin to reside with the petitioner during the school year, at all times with the exception of alternating weekends. The court found that the respondent had failed to meet her burden of proof with regards to fault grounds, and issued a decree based upon irreconcilable differences.

The court made its own determination of the value of petitioner's interests in GEM and KEM, after hearing from both parties' experts. The court thereafter included in the marital estate for distribution, all of the interests of the petitioner in GEM and KEM, along with the GEM stock forming the corpus of the trust established by petitioner's father. The court did not include as a marital asset the respondent's interest in Unit 302 which she conveyed to her mother finding that "[w]hile [respondent's mother] may have signaled with her first two deeds her intent to leave the condominium...to her daughter... upon her death; such an 'expectation' does not rise to the level of a marital asset". [Apx. I at 23]

The court, after combining all assets it determined were marital assets,

including the stock held by the trusts, set out a schedule representing a 50/50 distribution of assets and debt. The court awarded the Hampton Beach condominium to the respondent and further ordered the petitioner to pay to respondent $286,165.50 in two payments of $100,000.00 within 120 days and $186,165.50 within 16 months with interest at 3.9%.

The court found the respondent in contempt for failing to distribute funds from the sale of a truck as ordered. The court found that the respondent was not in contempt of the temporary orders. The court found the temporary orders to be somewhat "harsh" and found that the petitioner lacked an ability to comply with the same. Notwithstanding the court's findings relative to the said temporary orders, the court continued the same in its final order. The court continued to require the petitioner to pay $7,500.00 to the respondent [within 90 days], to require him to pay to install carpeting in the condominium, to require him to pay designated personal charge accounts of the respondent, as well as alleged arrearages.

The court did not award child support to either party and ordered the petitioner to pay eight more years of alimony to the respondent, who is 44 years of age [41 at commencement of the proceedings] in the amount of $3,524.00 per month.

Petitioner duly filed "Petitioner's Motion For Reconsideration and/or Other Relief And Request For Hearing" [Apx. IV at 20]which was denied without explanation by the court. Petitioner promptly thereafter filed "Petitioner's Motion To Stay And Renewed Motion And Request For Hearing and Request For Further and/or Supplemental Reconsideration and Clarification", which again was denied without explanation. [Apx. IV at 30] This appeal followed.

## SUMMARY OF ARGUMENT

1. The court improperly included as a marital asset a spendthrift trust in violation of the provisions of RSA 564-B:5-502 [e] [1] which specifically provides that a beneficiary's interest in a spendthrift trust "[i]s not property for purposes of RSA 458:16-a, I." Further, the court erred by utilizing the value of the trust corpus, rather than the value of the petitioner's interest, and by failing to factor limitations which rendered the petitioner's potential interest as a mere expectancy of de minimus value. The court further erroneously held that the same is a marital asset based upon the trust reporting for tax purposes as a grantor trust.

2. The court erred as a matter of law in determining that the respondent's interest, as a joint tenant of property with her mother, amounted to an "expectation [which] does not rise to the level of a marital asset" pursuant to RSA 458:16-a [I]. The court further erred by placing the burden of proof on the petitioner to include the condominium as a marital asset.

3. It was an unsustainable exercise of discretion for the court to order the petitioner to pay the sum of $286,165.50 within 16 months. There were

no liquid assets for any such payment, and the court's findings clearly established that the petitioner lacked the ability to borrow to make the payment.

4. It was an unsustainable exercise of discretion to effectively award to the respondent assets equaling a 50% interest in the petitioner's minority interest in his family's excavating business and horse farm, which have been in the Merrill family for centuries and were gifted to the petitioner by his grandfather and father as part of a succession plan and to which no marital assets were contributed.

5. The court erred in the amount and duration of alimony by utilizing a lifestyle different than the lifestyle during the marriage, and by failing to properly factor the $286,165.50 award in determining respondent's needs. The court failed to factor the additional obligations imposed upon petitioner in determining his ability to pay.

6. The court erred by failing to revise or provide relief from the original temporary orders despite finding the same "harsh" and beyond the petitioner's ability to meet.

## I. THE TRIAL COURT ERRED, AS A MATTER OF LAW, BY INCLUDING THE PETITIONER'S INTEREST IN THE SPENDTHRIFT TRUST AS A MARITAL ASSET, CONTRARY TO RSA 564-B:5-502 [e] [1]; BY INCLUDING AS A MARITAL ASSET THE VALUE OF THE TRUST CORPUS VERSUS THE VALUE OF THE PETITIONER'S INTEREST IN THE TRUST; AND BY INCLUDING ALLEGED BENEFITS WHICH WOULD AMOUNT TO A"MERE EXPECTANCY".

The property issues required the valuation and disposition of stock in the George E. Merrill and Son, Inc. [hereinafter GEM], a company commenced by the petitioner's grandfather in the 1950's. [P.Req.196&199, Apx. III at 20] Since adolescence and prior to the marriage of the parties in 2005, the petitioner worked at the said business and acquired shares of stock. As the court found, "[a]t least by 2003, Jon Merrill and his brother, Gary Merrill, had each acquired 49 shares of GEM or 24.5%". Petitioner acquired all of his interest by way of gift from his grandfather and his father.

In November of 2012, for tax and estate planning purposes, and approximately four [4] years prior to the parties' separation [P.Req.216, Apx. III at 22], the petitioner's father created two [2] identical, spendthrift trusts, one referencing the petitioner and the party's son Dustin, known as the JGM 2012 Trust [Apx. VI at 3], and the other referencing the petitioner's brother and his brother's son. Petitioner's father, as was his right, established the terms

and conditions of the said trusts.

Subsequent to the creation of the JGM 2012 Trust, petitioner's father transferred to each trust forty-one [41] shares, or a twenty and one-half [20.5%] percent interest in George E. Merrill and Son, Inc. All such shares had been the sole property of petitioner's father and constituted the total trust corpus. No marital assets were ever used to acquire or maintain the said stock and no marital funds were ever contributed to the trust corpus. The provisions of the JGM 2012 Trust provided for the trust and its corpus to ultimately pass for the benefit of the parties' son Dustin.

This was consistent with the intention of the petitioner's grandfather and father that any interest in the business would ultimately be left initially to petitioner and his brother and eventually pass to their children.

As of the commencement of the divorce proceedings, the petitioner continued to own 49 shares of GEM [24.5%], and the JGM 2012 Trust continued to own the 41 shares [20.5%] conveyed to it by petitioner's father.

Each party presented expert testimony as to the value of the shares in GEM. Petitioner's expert presented a value for the 49 shares in petitioner's name , and then provided a separate value for the shares held by the trust corpus. As the court noted, petitioner's expert opined that the shares held by

the JGM 2012 Trust should not be included in the marital estate.

Respondent's expert combined the shares in petitioner's name with those held by the trust. The court thereafter conducted its own analysis to determine the value of GEM stock. The court combined the 49 shares in petitioner's name individually, with the 41 shares held in the trust, treating and valuing all such stock the same, and valuing the same at $641,125.80, or $7,123.62 per share.

The justification provided by the trial court for including the stock held by the trust as a marital asset was as follows:

"I agree with Mr. Maloney, ... that the GEM stock, held in that trust, is a marital asset. The ... trust is reported for tax purposes as a grantor trust... "...ie owned by Jonathan Merrill. Therefore, Jonathan Merrill reports the 45% of the company." [Apx. I at 18]

The court thereafter included, as a marital asset, "...Mr. Merrill's 45% interest in GEM stock" utilizing the said value of $641,125.80 in "Appendix A" to the decree. The court then afforded the respondent assets and/or sums equal to 50% of the combined 45% interest. In so doing, the court did not determine a value for petitioner's interest in the Trust, if any. Rather, the court valued the 41 shares comprising the corpus of the JGM 2012 Trust at

$292,068.42, and found the same to be a marital asset. The court awarded to the respondent a sum equal to 50% of the said sum, to wit: $146,034.20.

A "two-step analysis" is applied in examining the trial court's division of the marital estate. "[T]he trial court first determines, as a matter of law, what assets are marital property under RSA 458:16-a, I, and thus subject to equitable distribution, and then exercises its discretion in making an equitable distribution of those assets. Trial court determinations under RSA 458:16-a, I, are reviewed de novo, while equitable divisions of property pursuant to RSA 458:16-a, II are reviewed for an unsustainable exercise of discretion." In The Matter of Chamberlin and Chamberlin, 155 N.H. 13, 16 [2007]; In The Matter of Goodlander and Tamposi, 161 N.H. 490, 495 [2011].

Petitioner maintains that the trial court erred as a matter of law in including the JGM 2012 Trust and the corpus of the same as a marital asset.

The JGM 2012 Trust has a "spendthrift provision" [Apx.VI at 5] which is identical to that referenced in Goodlander, 161 N.H. 990, at 493. See also, by way of example, Form 44, C. DeGrandpre, New Hampshire Practice, Vol. 7, Wills, Trusts and Gifts at 735. As such, neither the petitioner's interest in the trust, nor the trust corpus, are marital assets.

Paragraph [b] of the FIFTH paragraph at page 3 of the trust provides as

follows:

> "The interest of each beneficiary and all payments of income or principal to be made to or for any beneficiary, shall be free from interference or control by any creditor or spouse [or divorced former spouse] of the beneficiary and shall not be capable of anticipation or assignment by the beneficiary." [Apx. VI at 5]

The Trust further provides that "[t]his trust instrument and trusts hereunder shall be governed, construed and administered in accordance with the laws of the State of New Hampshire from time to time in force." [Apx. VI at 10]

While New Hampshire has adopted various aspects of the Uniform Trust Code, various provisions remain unique to New Hampshire. RSA 564-B:5-502 provides, inter alia, as follows:

> "[b]A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust", or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.
>
> [c] A beneficiary ***may not*** transfer an interest in trust in violation of a valid spendthrift provision.

[d] To the extent that a beneficiary's interest in a trust is subject to a spendthrift provision, a creditor or assignee of the beneficiary

***may not*** reach:

[1.] The beneficiary's interest in the trust; or

[2.] A distribution from the trust before its receipt by the beneficiary.

[e] To the extent that a beneficiary's interest in a trust is subject to a spendthrift provision, the beneficiary's interest:

***[1] Is not property for purposes of RSA 458:16-a, I;***

and

[2] Shall not be subject to any forced heirship, legitime, forced share, or any similar heirship rights under the laws of any jurisdiction." [emphasis added]

"The court's authority in matters of marriage and divorce is strictly statutory...Because divorce is statutory, the court has only such power in that field as is granted by statute". Daine v Daine, 157 N H 426 [2009] [citations omitted]. As such, the trial court exceeded its subject matter jurisdiction and

erred by including the trust as a marital asset, contrary to the statutory provision and clear legislative narrate that the same "[i]s not property for purposes of RSA 458:16-a, I."

Even if, for argument sake alone, it were determined that the spendthrift provision does not remove petitioner's potential interest in the trust from the marital estate, the other trust provisions and restrictions do. While the petitioner may be entitled to "net income", if any, he does not have the same right to invade principal. Any interest petitioner may have in potential future distributions, constitutes a mere expectancy. Compare, In The Matter of Goodlander and Tamposi, 161 N.H. 490 [2011]; In The Matter of Chamberlin and Chamberlin, 155 N.H. 13 [2007] "A perfect vested right can be no other than such is not doubtful, or depending on any contingency, but absolute, fixed and certain". In The Matter of Goodlander and Tamposi, at 495 [quoting In The Matter of Goldman and Elliott, 151 N.H. 770,774 [2005]

Additionally, even if the court could include the petitioner' interest in the trust as part of the marital estate, the court erroneously valued the same by utilizing the value of the GEM shares owned by the trust. If the petitioner's interest in the trust was to be included in the marital estate for any purpose, the proper value to be considered would be the value of petitioner's interest

and not the value of the trust corpus. Compare, Goodlander 161 N.H. at 495; Chamberlin 155 N.H. at 18.

Further, even if the petitioner's interest in the trust income were to be included in the marital estate, the evidence was clear that this provided no benefit to the petitioner and was, at best, of de minimus value. As the court noted, "... for years ... GEM has not been able to ... make further distributions or pay bonuses to its owners/managers". [Apx. I at 18] Especially with the requirements and conditions of the bank financial agreement, other than the principal's salaries, no other "net income" has been, or is likely to be, disbursed to the shareholders of GEM, including the trust. Any interest petitioner may have is at best "negligible". See for example, In The Matter of Chamberlin and Chamberlin, 151 N.H. 13,18 [2007]

The trial court's finding and conclusion " ...that the GEM stock, held in trust, is a marital asset", based upon the fact that "...JGM 2012 Trust is reported for tax purposes as a grantor trust", is also error. [Apx. I at 18] Tax reporting requirements do not define marital assets. The tax code does not alter the impact and legal effect of the spendthrift provision, and does not change the reality that petitioner had not received distribution from the trust and that the likelihood of receiving any in the future were speculative and at

best a mere expectancy. The court's reliance upon the tax treatment is not premised upon the actual availability of and receipt of funds or benefits from the trust by petitioner now or in the future. See for example In Re: Doherty and Doherty, 168 N.H. 694 [2016]; In Re: Hampers and Hampers, 166 BH. 422 [2014]; In Re: Woosley and Woosley, 164 N.H. 301 [2012]; In Re: Albert and McRay, 155 N.H. 259 [2007].

Petitioner maintains that the court's inclusion of the trust assets as marital assets should be vacated, reversed, and remanded for recalculation of any sums due to respondent.

## II. THE TRIAL COURT ERRED IN FINDING THE RESPONDENT'S INTEREST IN A CONDOMINIUM UNIT WITH HER MOTHER WAS NOT A MARITAL ASSET; AND IN NOT PROPERLY FACTORING THE SAME IN THE PROPERTY AWARD AND DISTRIBUTION

At the time of the commencement of the present proceedings, the respondent owned, as joint tenants with her mother, a Hampton Beach condominium known as Unit 302 of the Ocean Club Condominium. [P. Req 310, Apx. III at 31] The same was acquired by warranty deed dated May 5, 2017 [Apx. V at 9] and a "Corrective Warranty Deed" dated June 21, 2017. [Apx. V at 11]

Subsequent to being served process in the divorce proceedings, respondent, who was aware of the outstanding non-hypothecating orders of the court [Tr.1452-1453;1457 ], without the prior knowledge or consent of the petitioner or prior leave of court, conveyed her interest in the unencumbered unit to her mother by warranty deed dated August 23, 2017. [Apx. V at 13]; [P.Req. 313, Apx. III at 32]. Respondent did not receive any consideration for the said deed. [Tr.1577]

A prior hearing was conducted relative to petitioner's motion for contempt. Per the court's order of May 17, 2018, as a result of her said actions,

the respondent was found in contempt and ordered to pay petitioner's attorney fees. The court ordered that, inter alia, "[f]urther sanctions and orders will issue at the time of the final hearing including the potential of any offset if deemed a marital asset subject to equitable distribution". [P.Req. 315-316, Apx. III at 32].

Subsequent to the said order, the case was transferred to the complex docket. At the time of trial, the said unencumbered unit had a fair market value of $165,000.00. [ P. Req. 317, Apx. III at 32]

The trial court addressed Unit 302 at pages 20 and 21 of the Final Divorce Decree [Apx. I at 22-23 ] under the heading "ASSETS NOT PART OF THE MARITAL ESTATE". The same was not included in the assets distributed or factored in the final property award [See "Appendix A" to Final Decree, Apx. I at 37]

Unit 302 is only briefly addressed in the divorce decree. The court noted, "...that no marital funds were utilized by Lea Merrill to acquire an interest..." in the same and that "Lea Merrill did not know about her name being on the deed until around the time the Divorce Petition was filed. " [Apx.I at 23] The court concluded that "[w]hile Ms. Pinaud **may** have **signaled** with her first two deeds her intent to leave the condominium...to her daughter, Lea,

upon Ms. Pinaud's death, **such an "expectation" does not rise to the level of a marital asset."** [emphasis added] [Apx. I at 23] The court, citing no authority for its conclusion, determined that Lea's interest in the same was not a marital asset subject to distribution or consideration.

The first task of the trial court was to "...determine as a matter of law, what assets constitute marital property under RSA 458:16-a, I". In Re: Cohen and Richards, 172 N.H. 78, 83 [2019] [citation omitted]. "Once the trial court determines the parties' marital property, it then exercises its discretion to equitably distribute those assets." Id. This court reviews "...de novo [the] trial court's determination of what assets constitute marital property..." Id. [citations omitted]

Marital property includes "...all tangible and intangible property and assets, real or personal, belonging to either or both parties, whether title to the property is held in the name of either or both parties". RSA 458:16-a. "Regardless of the source, all property owned by each spouse at the time of divorce is to be included in the marital estate." In The Matter of Sarvela and Sarvela, 154 N.H. 426, 431 [2006]; [RSA 458:16-a.] When and how an asset was acquired does not determine whether or not the same is included in the marital estate. Id.

The trial court stated, inter alia, that "Mr. Merrill produced no other evidence that the condominium...should be characterized as a marital asset." [Apx. I at 23]. Petitioner maintains that the court erroneously placed a burden of proof on the petitioner to include Unit 302 in the marital estate. The respondent's interest in the said unit was clearly a marital asset as defined by RSA 458:16-a [I] and subject to the presumption that an equal distribution of the same is equitable. Accordingly, any burden of proof to remove the same from inclusion in the marital estate should rest upon the respondent.

Further, it was error of law for the trial court to find that the respondent's interest in the unit was "an 'expectation' [that] does not rise to the level of a marital asset." "A joint tenancy with rights of survivorship is a unique type of property ownership. Joint tenants are said to have a unity of title and of interest, as well as of possession. ...Each joint tenant has ***full ownership rights***." Hayes v Southern New Hampshire Medical Center, 162 N.H. 756, 759 [2001] [citations omitted] [emphasis added] "[A] joint tenant may alienate or convey her interest in the property, and thereby defeat the right of survivorship". Such a conveyance and/or alienation results in a "tenancy in common". Id. See also Mamalis v. Bornovas, 112 H.H. 423, 426 [1972].

The respondent possessed a present one-half undivided interest in Unit

302. She had the right and power to convey her interest in the same. She could unilaterally sever the joint tenancy right of survivorship". "[She] had the power to secure a loan with a mortgage...on [her] undivided one-half interest in the property without the other tenant's consent or knowledge. Land America Commonwealth Title Insurance Co. v. Kolozetski, 159 N.H. 689, 692 [2010] [citation omitted]

Twice the property was deeded to the respondent and her mother as joint tenants. Neither deed contained any restrictions, conditions or limitations upon the respondent or her ability to sell, convey, mortgage, or pledge her interest. Respondent's interest in the Unit 302 was "...not doubtful, or dependent on any contingency, but absolute, fixed and certain". In Re: Goodlander and Tamposi, 161 N.H. 490, 495 [2011] [quoting In Re: Goldman & Elliott, 151 N.H. 770 at 774 (2005)]

The statement by the court that "...Ms. Pinaud **may have** signaled with her first two deeds her intent to leave the condominium...to her daughter...upon Ms. Pinaud's death..." is unsupported by the record and speculative at best. [emphasis added] Ms. Pinaud did not testify. No testimony, exhibit or evidence was presented regarding Ms. Pinaud's intentions, which would not have, in any event, removed the wife's interest in the unit as a marital asset.

Additionally, with such a transfer from a parent to a child in joint tenancy, there is a "rebuttable presumption" of an intended gift. See Cohen v Raymond, 168 N.H. 366 [2015]; Murano v Murano, 122 N.H. 223 [1982]; Chamberlin v Chamberlin, 116 N.H. 368 [1976]. Respondent presented no competent evidence to rebut the said presumption.

Respondent acknowledged that she was aware of the purchase of Unit 302 at the time of purchase. [Tr.1575] The only basis advanced by her to exclude the same from the marital estate was her claim that she was not present at the closing for the purchase of the unit and that she allegedly was unaware her name was on the deed. Even if true, these assertions would not remove the interest from the marital estate, nor would they excuse her contemptuous conveyance of the same.

The court's reference to the fact "...that no marital funds were utilized by Lea Merrill to acquire an equitable interest..." in the unit, would not remove the interest from the marital estate. The court's decree, in awarding respondent a 50% interest in petitioner's GEM and KEM stock, specifically referenced that gifts are also included in the marital estate. Further, it was without dispute that no marital assets were utilized to obtain any interest petitioner acquired in George E. Merrill & Son, Inc. and KEM Realty, Inc.

The court failed to render sufficient findings that would provide an objective basis to sustain the disparate considerations and treatment of the assets acquired by the petitioner, versus the one asset acquired by the respondent. Petitioner maintains that there is no reasonable objective basis to exclude Unit 302 as a marital asset, while effectively awarding the respondent fifty [50%] percent of petitioner's interest in the decades-old family businesses.

The record does not establish an appropriate objective basis sufficient to sustain any discretionary actions of the court or the removal of the said unit from the marital estate. In Re: Heinrich and Heinrich, 164 N.H. 357 [2012]; In Re: Miller and Todd, 161 N.H. 630 [2011]; In Re: Martel and Martel, 157 N.H., 53 [2008]; In Re: Choy and Choy, 154 N.H. 707 [2007].

Petitioner maintains that the court's determination that Unit 302 was not a marital asset was an error of law and that the removal of the same from consideration would otherwise constitute an unsustainable exercise of discretion. Petitioner maintains that the court's findings and decree in this regard should be vacated and the matter remanded for inclusion of Unit 302 in the marital estate, subject to appropriate consideration and distribution.

## III. THE TRIAL COURT ERRED IN THE AMOUNT ORDERED TO BE PAID BY THE PETITIONER TO PURPORTEDLY EQUALIZE THE PROPERTY DISTRIBUTION; THE MANNER AND TIMING OF PAYMENTS REQUIRED, AND IN ENTERING AN UNSUSTAINABLE PAYMENT ORDER.

The divorce decree and findings delineate the assets which the court determined constituted the marital estate, along with the outstanding debts of the parties. The court's determinations as to the assets comprising the marital estate and the valuations of the same, are addressed elsewhere in this Brief. The court, combining all assets and factoring debt, ordered an equal distribution as more specifically outlined in "Appendix A" to the divorce decree. [Apx. I at 37]

The parties' Hampton Beach condominium, the only major asset acquired by the parties themselves [other than by gift or inheritance] during the marriage, was awarded to the wife subject to the outstanding mortgage [resulting in an equity credit of $184,978.00]. The major assets awarded to the petitioner were his minority interest in GEM and KEM, to which the court included the stock owned by the JGM 2012 Trust. [Addressed in Argument 1]. Petitioner did not have and did not receive any liquid assets.

To effectuate an equal distribution, the court concluded that the respondent was owed the sum of $286,165.50. The court's findings and rulings clearly demonstrated that a lump-sum payment by the petitioner was not practical or

possible. The court ordered the petitioner to pay the said sum to respondent within 16 months of the clerk's notice of the decree, as follows:

a. A first payment of $100,000.00 within 120 days of the clerk's notice; and

b. The balance [186,165.50], with interest at the rate of 3.9% due and payable within 16 months of the clerk's notice of the decree.

The evidence, and the court's own findings, demonstrate that the petitioner lacks the ability to comply with the re-payment schedule ordered. The record does not establish an "...objective basis sufficient to sustain the discretionary judgment made" in this regard. In Re: Heinrich and Heinrich, 164 N.H. 357, 365 [2012] [citation omitted]; In Re: Miller and Todd, 161 N.H.630 [2011]; In Re: Choy and Choy, 154 N.H. 707 [2007].

Where, as in this case, a lump-sum payment to the respondent is not practical, the court "...should consider deferred installment payments over a reasonable period of time...". In RE: Harvey and Harvey, 153 N.H. 425,436 [2006] {overruled on other grounds by In Re: Chamberlin and Chamberlin, 155 N.H. 13 [2007} ]. "In the event there is no other recourse than to order a property settlement to be paid by installment, the trial court should consider when fashioning the duration of such distribution, among other things, the liquidity of marital assets, the obligor's ability

to borrow and the threat of serious financial hardship to the obligor". Id.

As to "the liquidity of marital assets", the court's findings and rulings clearly demonstrate the petitioner lacked access to liquid assets which could be utilized to make such a payment to the respondent, or in the time frame provided. The trial court specifically found that "[t]he parties' savings were all gone by the time of the divorce filing. To acquire and purchase Unit 19, only months prior to the separation of the parties and commencement of the divorce proceedings, ..."the parties used all savings and liquid assets available to them, including proceeds received from the sale of the petitioner's pre-marital Chevelle automobile and boat... [as well as] $15,000.00 which was gifted to the parties by the respondent's mother to allow for the said purchase". [P. Req. 293, Apx.III at 30]

The petitioner's financial affidavit [Apx. V at 15], demonstrates that the petitioner has no savings or other liquid assets. He is subject to personal debt, exclusive of the condominium mortgage, in excess of $193,000.00, plus the debt imposed upon him by the temporary orders of the court and continued in the final decree. As is demonstrated by the court's own narrative and analysis, after the court unilaterally reduced some of petitioner's stated expenses as he "...may need to cut down a little", petitioner was still found to have reasonable and necessary monthly expenses, before alimony, of approximately $12,150.00. With the alimony ordered,

petitioner's total ongoing and necessary expenses, as determined by the court, totaled $15,674.00 per month, the exact amount that the court found to be his "available income... a month". By the court's own analysis and specific findings, the petitioner was left with no liquid funds, no surplus income, and no other source to sustain any additional debt or other payments.

Petitioner has no ability to obtain other employment or earnings. As the court noted "...Jon Merrill in particular, has assumed very hands on responsibilities; and he is on the job sites, in the field, day after long day". [Apx. I at 19] The petitioner wears "several hats" and devotes virtually all of his time to maintaining his position at GEM, running the farm owned by KEM, and caring for Dustin, who resides primarily with him. Further, as the court specifically found, "...GEM has not been able to ... make further distributions or pay bonuses to its owners/managers". [Apx. I at 18] The company was in default of its bank covenants which require it to have tangible net worth and net income of at least $100,000.00 per year and had seen income drop 89% in 2018 over 2017 sales. [P.Req.221, Apx. III at 20]

With regards to "...the obligor's ability to borrow", again the record does not demonstrate any objective basis to sustain a finding that the petitioner would have such an ability. Petitioner lacks any liquid assets and owns but a minority interest in GEM and KEM. His father continues to be a minority owner in GEM and owns the

majority interest in KEM. Petitioner lacks any authority or ability to manipulate the stock owned by the JGM 2012 Trust. The GEM stock are subject to restrictions and a "cross purchase agreement" [P. Req. Apx. III at 213-214; Apx. VI at 13; Apx. VII at 3]. Additionally, the divorce decree provides that the obligation to pay the said sum of $186,165.50 "shall be secured by an attachment on Mr. Merrill's stock in KEM", further hindering any ability, as remote as it may have been, to utilize the same for security to borrow any funds for either of the payments ordered.

Further hampering and rendering impossible obligor's ability to borrow money, are his other ongoing liabilities and debts. In addition to those previously referenced, the petitioner is a personal guarantor to approximately $3,000,000.00 of GEM debt [Tr.452-453] and remains liable on the mortgage secured by Unit 19 in Hampton Beach, which mortgage does not have to be refinanced by the respondent until "[a]fter or at the same time that Mr. Merrill completes her "buy out" of the marital assets..." [Apx. II at 8].

As to "...the threat of serious financial hardship for the obligor", the same is readily apparent. Even if, for argument sake, the petitioner were ever capable of forcing his father and brother into liquidating the businesses, the same would have an inequitable and devastating impact, not only for the petitioner, but for his brother and father who are also dependent upon the same for their livelihoods. The court

repeatedly relied upon the continued receipt by the petitioner of his salary from the family business. Based upon the same, the petitioner receives no child support, and pays alimony to the limit of his capabilities. The court's own analysis of the petitioner's earnings and expenses demonstrates that there is no safety net or other protection for the necessities and maintenance of the petitioner, the respondent, or the child Dustin.

The serious financial hardship envisioned by this court in Harvey is all the more apparent when a generational family business is threatened. George E. Merrill and Son, Inc. was commenced by petitioner's grandfather in the 1950. As the court duly noted, "[i]t was and is the intention, since inception, that the business now known as George E. Merrill and Son, Inc. would pass by succession to the petitioner's father, the petitioner and his brother, and the children of the petitioner and the petitioner's brother". [P.Req.197, Apx. III at 20] The said business has been the life blood and support of generations of the Merrill family. Petitioner has worked his entire life at and for the same.

To keep the family business afloat, the petitioner's father has continued to actively assist in the operation of the business [P. Req. 238, Apx. III at 24] and, in 2012, liquidated his only life insurance policy to deposit the proceeds of $327,857.45 into the business as required by the bank to maintain the line of credit [P.Req.225,

226 and 227, Apx. III at 23]. Additionally, the business currently owes the petitioner's brother an additional $18,000.00, contributed by his brother for short-term funding. [P.Req.222, Apx. III at 22]

To maintain the family businesses for themselves and their heirs, the Merrills have historically assumed multiple responsibilities, duties and functions beyond what any individual employee would otherwise perform [P.Req. 239, 242, 243, 244, Apx. III at 24]. The petitioner, his brother and his father have worked diligently to continue to maintain the businesses started by his grandfather almost 70 years ago. They have continued to take any and all action necessary to keep the same viable, even during tough economic times. The businesses will hopefully pass to the children of the petitioner and to his brother's children as always intended.

RSA 458:16-a [IV] requires that "[t]he court shall specify written reasons for the division of property which it orders". The trial court's decree and rulings are silent as to how and why the seemingly arbitrary method and time frame for payment was determined to be equitable or achievable. The same provide no insight as to how the court envisioned that the petitioner would have the ability to comply with the same.

Petitioner further maintains that with whatever manner or method of payment is ordered, the amount ordered by the court is otherwise excessive in light of the

inclusion of the value of the stock held in trust, the exclusion of the respondent's interest in the Hampton Beach condominium with her mother, and the other factors and arguments presented in this Brief.

Subsequent to receipt of the divorce decree, petitioner filed "Petitioner's Motion For Reconsideration and Other Relief And Request For Hearing" seeking, inter alia, a further hearing and further reconsideration of the equalization payment provision of the divorce decree. [Apx. IV at 20]. Petitioner raised the issues addressed herein, and requesting, inter alia, that the trial court provide further findings and rulings as to the amount, manner, method and timing of the payment ordered, and requesting a further hearing to address the same. Petitioner sought "... a reasonable and sustainable monthly payment by the petitioner, amortized over a number of years to render an achievable monthly payment by the petitioner, with a balloon payment ...". The said motion was denied without explanation or comment.

Petitioner thereafter filed "Petitioner's Motion To Stay And Renewed Motion And Request For Hearing And Request For Further and/or Supplemental Reconsideration And Clarification", [Apx. IV at 30]. The same was denied by the trial court, again without explanation, prior to the filing of the present appeal.

Petitioner requests that the said payment schedule be vacated, and the matter be remanded for further hearing and findings, to establish an appropriate amount, duration, and method of the payment due by the petitioner, if any.

## IV. THE TRIAL COURT ERRED AND ENGAGED IN AN UNSUSTAINABLE EXERCISE OF DISCRETION IN AWARDING TO THE RESPONDENT ASSETS AND PAYMENTS TO INCLUDE 50% OF THE VALUE OF PETITIONER'S MINORITY INTERESTS IN GEORGE E. MERRILL AND SON, INC., AND KEM REALTY, INC.

As previously referenced, the court valued the respondent's shares in George E. Merrill and Son, Inc. [GEM], at $7,121.62 per share. [Argument I]. By so doing, the court valued the 49 shares in GEM owned by petitioner at $349,057.38. The court valued the petitioner's 23.75% interest in KEM at $190,000.00. The court thereafter included the same [totaling $539,058.38] as marital assets in "Appendix A", and awarded to the respondent a sum equal of 50% of the same.

GEM is an excavating company commenced by the petitioner's grandfather with the undisputed intention, since inception, that the business would pass by succession to petitioner's father, petitioner and his brother, and their children. [P. Req.196,197,198, Apx. III at 18]. For almost 70 years GEM has provided the livelihood for no less than three generations of the Merrills with the full intention that it would continue on, in the same fashion, for the next generation, including Dustin. Petitioner's brother's son already works for the company. [Tr.883].

Petitioner's father commenced working for the company upon graduating from high school in 1958 [Tr.862]. Both Jon and his brother commenced working at GEM when they were each approximately 14 years old. [Tr. 862].

The petitioner, his brother and father continue to devote themselves to the maintenance and survival of GEM for the next generation. They maintain numerous responsibilities, duties and functions, wear "several hats" and each perform functions beyond what one individual or employee would otherwise perform. [P. Req.238,239,242,243,244,248,249,250, Apx. III at 24-25]. "Both Jon and Gary Merrill work extremely hard for Merrill and Son, Inc. Jon Merrill, in particular, has assumed very hands on responsibilities and he is on job sites, in the field, day after long day". [Apx. I at 19] As the court noted, "...Jon, Gary, and George E. Merrill earn every penny which they are paid..." [Apx. I at 20]

The business has endured hard economic times. The parties are required to meet with the bank at least annually and are supposed to maintain a balance due on the line of credit of zero [0] at least 30 consecutive days each year. [Tr.224]. The loan commitment further requires annual increases in GEM's net profit, and other conditions which the business has not been able

to meet for years. [Tr.865] [See also Apx. V at 32]. Even during the period of trial, the bank required a meeting in that GEM had "insufficient tangible net worth to cover present liabilities plus personal debt". Tr.232; Apx. V at 34]. Less than four years prior to the commencement of the divorce proceedings, the petitioner's father and mother, to meet the demands of the bank, liquidated their only life insurance policy, obtaining $327,857.45 which was deposited to the business. [P. Req. 226, 227, Apx. IV at 23]. Petitioner's brother is owed $18,000.00 after accessing a home equity line to contribute to GEM for necessary short-term funding. [P.Req.222, Apx. III at 22].

"Regardless of the date of their stock acquisition in GEM, it is undisputed that the transfers to Jon and Gary Merrill were gifts from Jon and Gary's father and/or grandfather". [Apx. I at 18] All GEM stock is "subject to a 'cross purchase agreement' and an "amended and restated cross purchase agreement' " [P.Req.213- 214, Apx. III at 21]. The petitioner's interest in GEM was "never pledged or utilized as security to obtain funds or any other consideration or benefit during the marriage of the parties". [P.Req.209,210, Apx. III at 21]

No interest in George E. Merrill and Son, Inc. has ever conveyed to, or intended to pass to, the respondent" nor did respondent ever "...contribute

to the acquisition by the petitioner of his shares and interests". [P.Req.204,205, Apx.III at 21] "The respondent did not contribute to the management, operation or maintenance" of GEM. [P.Req.206, Apx. III at 21]

KEM Realty, Inc. is a horse farm and business commenced by petitioner's grandfather in 1965. The entity's initials are the initials of the petitioner's grandmother, now deceased. [P.Req. 264, Apx. III at 26].

The Merrill family has a long equestrian history and are "horse people". [Tr.208,884]. The petitioner has worked at the horse farm since childhood. As with GEM, it was the grandfather's intention that the horse farm would always stay in the Merrill family and pass by succession. [P. Req.264, Apx. III at 26]. Petitioner's father, who owns the majority interest in KEM, testified that, consistent with the grandfather's wishes, he will never allow the property to be other than a horse farm. [Tr.885].

As was the case with GEM, the petitioner's interest in KEM was never sold, pledged, or utilized to secure funds or other consideration. [P.Req. 279,280, Apx. III at 27]. No marital funds were ever contributed to KEM. [P. Req. 281, Apx. III at 27].

In 2009, at the request of the respondent, the parties undertook residence at the horse farm utilizing the home which was previously and

historically utilized by an on-site care taker who worked at the farm in exchange for rent-free living." [P.Req.275,276, Apx. III at 27] Thereafter, the respondent assisted in certain non-managerial activities at the farm, receiving the salary paid the former care taker. Only the petitioner, his father and brother managed the farm and the three were the only individuals authorized to write checks or take any action with the accounts for KEM Realty, Inc. [P.Req.285, Apx. III at 28]

The court's analysis for the "equitable allocation of assets and debts" is found at pages 26 through 29 of the divorce decree. [Apx. I at 28-31]. The court addressed at length the statute and case law which affords the court broad discretion relative to the ultimate distribution of the marital assets. The court's analysis in this regard relates more to what the court "can" do and not the basis for the ultimate distribution. No reference is made to the history of the entities, or to the sacrifices made by the principals, all of whom have worked their entire lives for the same. No reference is made to the substantial ongoing debt of the same or the personal liabilities incurred by the principals to maintain and preserve the business for the next generation which includes the parties' son, Dustin.

There was no evidence that the respondent sacrificed any employment

or earning potential to further petitioner's efforts towards the businesses. The respondent did not directly or indirectly contribute to GEM or provide any ongoing function for the business. Her involvement at KEM was minimal, non-managerial, and commenced in 2009 with respondent receiving the same salary and housing opportunities as the prior care taker of the farm.

RSA 458:16-a requires the court to "...specify written reasons for the division of property which it orders". "In a divorce proceeding, marital property is not to be divided by some mechanical formula but in a manner deemed "just" based upon the evidence presented and the equities of the case". In The Matter of Letendre and Letendre, 149 N.H. 31,35 [2002] [citation omitted].

From the outset, petitioner asserted at trial and by way of his filings that his interest in the family businesses should not be distributed equally amongst the parties.

The actual reasoning provided by the court for inclusion and distribution of the same was substantially premised on the length of marriage. Rahn v Rahn, 123 N.H. 222 [1983]. This court noted that "[a] marriage of only one or two years may be considered differently than a long-term marriage of 10, 20, or 30 years. In a short-term marriage, it is easier to give back

property brought into the marriage and still leave the parties in no worse position than they were in prior to it." Id. At 225. While the present case presents a marriage of 12 years, there is nothing in Rahn to suggest that the same needs to be treated in the same manner as a longer marriage such as the 41 year marriage in Rahn.

The respondent was 41 years old as of the date of commencement of the divorce and 44 years of age as of the issuance of the decree. Awarding to the petitioner his interest in the family businesses, leaves respondent in no worse position than prior to her marriage to the petitioner.

A 12 year marriage is on the lower end of the "long-term" spectrum. Additionally, the marriage was on "shaky' grounds since early on. The parties separated on numerous occasions. Although the respondent filed multiple domestic violation petitions commencing in 2010, all such petitions were dismissed with the court noting that, with each trial, the court dismissed the same having not found abuse as alleged. In 2011, prior divorce proceedings were commenced but ultimately dismissed upon the parties' attempted reconciliation. [Apx. I at 7; P.Req.77-79, Apx. III at 9]

The trial court also notes that "...Mr. Merrill is far more capable than Ms. Merrill of earning income and acquiring assets moving forward. ...Mr.

Merrill makes over $188,000.00 a year". [Apx. I at 31]. The court fails, however, to consider the financial circumstances of the petitioner and his capabilities going forwarded. It was undisputed that the petitioner has no liquid assets, and is subject to substantial debt. The court's own analysis demonstrated that with the payment of alimony, and factoring in petitioner's expenses, there would be no additional sums by which to acquire future assets. The court further failed to factor the additional financial obligations imposed upon the petitioner by the divorce decree including the substantial payment ordered within 16 months. Petitioner maintains that there is no objective basis to reasonably conclude that the petitioner is "far more capable...[of] acquiring assets moving forward".

While the court concluded that the petitioner's interest in both GEM and KEM "...became integrally woven into the marital lifestyle" and that "GEM has paid Mr. Merrill well...", the decree fails to expound upon how or to what extent the same were so "integrally woven". The history of the entities demonstrates that, with the exception of their base salaries, none of the principals have received any other additional consideration and have been required to insert additional capital, to meet the requirements of their lending institution.

Petitioner maintains that the court has not adequately considered the totality of the circumstances relating to petitioner's interest in GEM and KEM . RSA 458:16-a, [II] [m] and [n] clearly provide that it is appropriate for the court, under the circumstances of the particular case, to factor the value of property owned and acquired by the petitioner, pre-marriage, as well as the property acquired by petitioner by gift, devise, or descent. As was the case in Henderson, without the generosity and gifting of petitioner's father and grandfather, the marital assets would have effectively been limited to the Hampton Beach condominium wherein the respondent resides. Henderson v. Henderson, 121 NH 807 [1981]

The property distribution leaves respondent with the ocean front condominium, $7,500.00 within 90 days, plus $100,000.00 within 120 days, plus $186,165.00 with 3.9% interest within 16 months. Petitioner is essentially left with the minority interests he owned and owns in his family's businesses, which have not grown during the marriage and into which no marital assets have been contributed. He is left with virtually all pre-filing marital debt, and further obligated to pay to the respondent $293,665.50 and interest.

Petitioner maintains that considering the totality of the circumstances, the distribution was "improper and unfair". See Henderson at 809. The

distribution is otherwise not supported by sufficient findings relating to the specific circumstances of this action and does not amount to a sustainable exercise of judicial discretion.

## V. THE COURT FAILED TO PROPERLY CONSIDER THE "MARITAL" LIFESTYLE, AS WELL AS THE PROPERTY AWARDED TO THE RESPONDENT IN DETERMINING HER NEEDS, AND FAILED TO PROPERLY DETERMINE PETITIONER'S ABILITY TO MAKE PAYMENTS, THE COURT ERRED AS TO AMOUNT AND DURATION OF ALIMONY.

The present action was commenced on June 19, 2017 and, as the court found, "...is guided by RSA 458:19, prior to its amendment" and the enactment of RSA 458:19-a and RSA 458:19-aa. Additionally, "[a]limony payments resulting from [the] divorce ... instrument executed after December 31, 2018, are not deductible to the payor and are not taxable to the recipient". C. Douglas, New Hampshire Practice, Vol. 3A, Sec. 21.12 [2019 Supplement].

The first analysis under RSA 458:19 is the assessment of the would-be recipient's "need". In determining the recipient's needs, as well as the paying party's ability to pay, the statute requires "...taking into account the style of living to which the parties **have become accustomed during the marriage".** [emphasis added]

The court, in establishing the amount and duration of alimony, erred in relying upon respondent's new lifestyle [not the marital lifestyle], and by failing to properly factor the property awarded to her.

The court reviewed respondent's financial affidavit and, with the

exception of her inflated alleged medical expenses, accepted and premised her other expenses based upon her continuing to reside at the condominium purchased by the parties only months prior to the commencement of the divorce. In so doing, the court allowed for the wife's expenses relative to the mortgage, taxes and condo fees "to the tune of $2,404.00 a month" plus her stated utilities totaling an additional $534.00 per month , totaling $2,938.00 monthly , a sum which unquestionably did not reflect the marital lifestyle. Additionally, the court failed to adjust her expense relative to her claimed pet-related expenses and expenses associated with the son, totaling $580.00 monthly, which the court found to be excessive and unsubstantiated. [P.Req. 145,146, Apx. III at 15]

It was always petitioner's position that the condominium could not be financially maintained and should be sold. Neither party had ever lived in Hampton, New Hampshire. [Tr.1462,1477], and the condominium did not "...represent the lifestyle enjoyed by the parties during the marriage" [P.Req301, Apx. III at 31].

Additionally, RSA 458:19 mandates that the court consider all of the factors enumerated including "the property awarded under RSA 458:16-a". See In The Matter of Munson and Beal, 169 NH 274 [2016]; In The Matter of

Nassar and Nassar, 156 NH 769,776 [2008]; In The Matter of Crowe and Crowe, 148 NH 218,225 [2002]. In response to this requirement, the trial court ruled that "[i]t would be incredibly inequitable for me to enter an alimony order, which effectively expects her to spend her one time buy out of the marital estate in the amount of $286,165.50 to meet even some of her regular monthly expenses". [Apx. I at 33] The court's action in this regard constitutes error of law and at the very least an unsustainable exercise of discretion. While petitioner does not believe the $286,165.50 payment should stand [see Arguments III and IV], if respondent receives the same, or any other monetary buy-out, the statute clearly requires that the same be considered in determining her needs.

The court deemed it appropriate to assess interest at the statutory rate of 3.9% with regards to petitioner's obligation for payment. Certainly, a reasonable return can be realized by the respondent relative to such a large sum, if received, which would reduce her needs. At the rate of 3.9% interest, the respondent would have available to her, an additional $11,160.45 per year or $930.00 per month, which has not been appropriately factored.

The next analysis would be to determine whether or not the petitioner had the ability to meet his own needs for himself and Dustin while also contributing to the respondent's needs. The court determined that it would not award child support to the petitioner, with whom Dustin primarily resides. The

court thereafter determined that petitioner's "reasonable monthly expenses before alimony are closer to $12,150.00". Accordingly, the total of his said expenses [including tax liability] plus the alimony ordered equals his gross monthly income as determined by the court. The court did not, however, factor in to petitioner's expenses the additional ongoing obligations originally imposed upon the him pursuant to the temporary orders, nor did it factor the substantial payment and/or debt to be incurred by the petitioner, to satisfy the property distribution. The court's own findings clearly establish that the petitioner did not have the ability to meet an alimony obligation of $3,524.00.

The court further found that the respondent had not taken any meaningful action to explore or seek employment or opportunities in her prior vocations, had no plans to seek any further educational opportunities or vocational training, and no plans to change her current employment and earning capacity with the exception of potentially additional hours. [P.Req.131-134, Apx. III at 14]. Notwithstanding these findings, and notwithstanding the fact that the respondent had been receiving alimony throughout the proceedings, the court awarded the respondent, who was 44 years of age and of good health, an additional eight years of alimony. The duration of alimony in this regard is excessive, unwarranted and unjustifiable.

The court indicated that it was precluded from adopting or utilizing any portion of the new amended alimony statute which would have, even if no

credit was received for prior payments, limited the alimony to a maximum of six years. RSA:19-a [III]. While the court could not apply the new statute, there is nothing precluding the court from considering the guidance provided by the same in determining the actual appropriate duration of alimony in the present proceedings. The new statute clearly demonstrates the legislative desire and intent in this regard.

## VI. THE TRIAL COURT ERRED BY FAILING TO REVISE THE TEMPORARY ORDERS AND TO PROVIDE RELIEF TO THE PETITIONER, AND BY CONTINUING ORDERS FOUND TO BE HARSH AND BEYOND THE CAPABILITIES OF THE PETITIONER.

At the time of trial, the court also heard and considered cross motions for contempt, along with a motion to modify and request for revision of the temporary orders. The temporary orders had been issued by the Salem Family Division, based upon offers of proof, prior to the action being transferred to the Complex Docket. [Apx. VII at 22-30]

The original temporary orders obligated the petitioner to pay guidelines child support, along with alimony, and payments towards retroactive arrearages. The same further required the petitioner to maintain the mortgage, taxes, insurance, and condo fees on the Hampton property, along with a truck payment and the maintenance of health and dental insurance, totaling an additional $3,971.00 per month. The temporary orders also required a lump-sum payment of $7,500.00 to the respondent, and required petitioner to pay respondent's outstanding credit card debt which included thousands of dollars for surfing equipment and the like, as well as the payment of carpeting for the condominium. [P.Req.373 Apx. III at 37].

The petitioner did not make the $7,500.00 advance payment to the

respondent, nor did he make payments on the respondent's personal credit cards or carpeting. Testimony and exhibits were presented relative to the financial circumstances of the petitioner at the time of the temporary hearing and thereafter.

The trial court found that the temporary orders effectively required the petitioner to pay $7,126.00 per month exclusive of the wife's charge accounts, the $7,500.00 advance and the carpeting expense. The court determined that those payments alone obliged Mr. Merrill to devote nearly 73% of his monthly net pay of $9,821.00.

The court, in denying respondent's motion for contempt, noted that " Mr. Merrill had no savings and no other assets to tap. While I can quickly find that these Temporary Orders were not clearly erroneous, I cannot find that Mr. Merrill's inability to comply with all of them constituted willful contempt". [Apx. I at 26]

The court, however, failed to revise the temporary decrees or provide any relief to the petitioner. The court continued to order the petitioner to pay the sum of $7,500.00 within 90 days, to pay for the carpeting, to pay $13,964.43 towards the respondent's personal credit card debt, as well as the alleged arearages, all premised upon the said temporary orders.

The court noted that the temporary decree was entered on offers of proof and that the court at the temporary hearing was not presented with credit card statements evidencing the specific charges. [P.Req. 368,372, Apx. III at 36-37] The court specifically found that the petitioner lacked the ability to pay the credit cards referenced or the carpeting for the condominium. [P.Req. 375,376, Apx. III at 37]

The court, while acknowledging that passive income, unavailable to the petitioner, could not be used for child support payments, indicated that the temporary orders did not rely on such passive income. Petitioner maintains that this finding is clearly erroneous. The Salem Family Division ruled, inter alia, on petitioner's motion for reconsideration that "[t]he fact that the rental income is captured by the bank due to bank covenants does not change the fact that it is earnings that ultimately inure to Petitioner's benefit by way of reduced debt of a company in which he has equity." [Apx. VIII at 15] The court, while mis-characterizing K-1 income which, due to banking requirements, was not available to the petitioner as allegedly "rental income", clearly factored funds that were not available to the petitioner. See for example In The Matter of Woolsey and Woosley, 164 NH 301 [2012].

The trial court noted that the temporary obligations imposed upon the

petitioner were perhaps "...taken in the context of everything else Mr. Merrill was obliged to do, ... harsh. Temporary Orders sometimes are." [Apx. I at 26]

Clearly, the court has the inherent authority to revise its own temporary orders to prevent injustice. See In Re: Stapleton and Stapleton, 159 NH 694,696-697 [2010]. See also generally, Douglas, Family Law, New Hampshire Practice, Vol. 3, Sec. 13.68

Despite the undisputed lack of any liquid assets available to the petitioner at the time of the temporary hearing or thereafter, despite the court's findings as to the limited funds available to the petitioner and the substantial obligations imposed upon him, and despite the court's determination that he was clearly incapable of meeting the obligations, the court failed to provide any relief to the petitioner, continuing to leave him responsible for payments the court found he was never capable of maintaining. The court's failure to provide any relief in this regard amounted to an unsustainable exercise of judicial discretion. The prior orders which the court found to be "harsh" and beyond the ability of the petitioner, now became the orders of the trial court.

## CONCLUSION

For the reasons stated herein, the petitioner maintains that the orders of the lower court should be vacated, reversed and remanded. The property distribution should, on remand, exclude the petitioner's minority interest in GEM and KEM and should further exclude the JMG 2012 Trust and the assets or benefits associated with the same, and should include or otherwise factor the respondent's joint tenancy in the condominium with her mother.

On remand, the alimony award should be reduced in amount and duration, properly factoring the actual marital lifestyle, as well as the property division awarded to the respondent, and petitioner's limited ability to meet the financial obligation.

On remand, should the petitioner be required to make any property distribution payment to the respondent, that the same be in an amount, duration and terms which are equitable, appropriate, within the petitioner's reasonable capabilities.

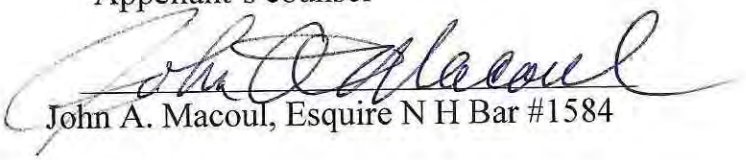
On remand, the final orders, and the prior temporary orders, should be revised so as to eliminate the obligation imposed upon the petitioner to pay the respondent's credit card debt, to pay the $7,500.00 advance, to pay for the condominium carpeting, and to pay any arrearages alleged to be due as a result

of the said temporary orders.

## RULE 16 CERTIFICATION

I hereby certify that the appealed decision is in writing and reproduced in Appendix I at page 3.

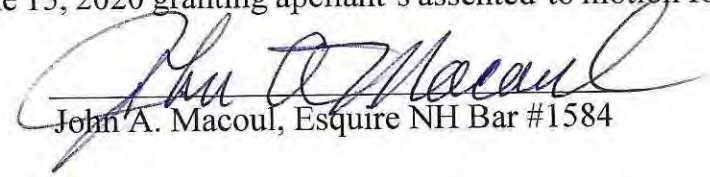
Respectfully submitted,
Appellant's counsel



John A. Macoul, Esquire N H Bar #1584

## RULE 16 CERTIFICATION [RE: WORD LIMITATION]

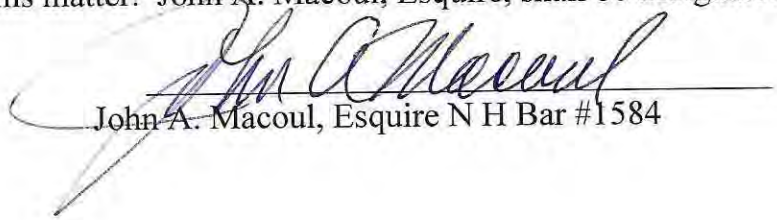
I hereby certify that this brief exceeds 9500 words as authorized by this Honorable Court's order of June 15, 2020 granting apellant's assented-to motion for leave to exceed 9,500 words.



John A. Macoul, Esquire NH Bar #1584

## REQUEST FOR ORAL ARGUMENT

The Appellant, Jonathan Merrill, respectfully requests to be heard on oral argument before the full court in this matter. John A. Macoul, Esquire, shall be designated to be heard.



John A. Macoul, Esquire N H Bar #1584

## CERTIFICATE OF SERVICE

I, John A. Macoul, Esquire, hereby certify that a copy of the within Brief on behalf of the Appellant has been this date e-served upon counsel for Appelle, Thomas K. MacMillan, Esquire, and the guardian ad litem, Timothy S. Wheelock, Esquire, and mailed to the Complex Docket, Dover Family Division, this date.

John A. Macoul, Esquire N H Bar #1584
373 Main Street, P O Box 673
Salem, New Hampshire 03079
603-893-5786

Dated: June 23, 2020