STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2020-0009

IN THE MATTER OF

JONATHAN MERILL

AND

LEA MERRILL

BRIEF OF RESPONDENT/APPELLEE, LEA MERRILL

RULE 7 APPEAL OF FINAL DECISION OF THE ORDERS OF THE 7th CIRCUIT COURT – FAMILY DIVISION - DOVER [COMPLEX DOCKET]

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458:16. Temporary Relief and Permanent Restraining Orders.

I. After the filing of a petition for divorce, annulment, separation or a decree of nullity, the superior court may issue orders with such conditions and limitations as the court deems just which may, at the discretion of the court, be made on a temporary or permanent basis. Temporary orders may be issued ex parte. Said orders may be to the following effect:
(a) Directing any party to refrain from abusing or interfering in any way with the person or liberty of the other party.
(b) Enjoining any party from entering the premises wherein the other party resides upon a showing that physical or emotional harm would otherwise result.
(c) Enjoining any party from contacting the other party at, or entering, the other party's place of employment or school.
(d) Enjoining any party from harassing, intimidating or threatening the other party, other party's relatives regardless of their place of residences, or the other party's household members in any way.
(e) Determining the temporary custody and maintenance of any minor children as shall be deemed expedient for the benefit of the children; provided, however, that no preference shall be given to either parent in awarding such custody because of the parent's sex.
(f) Ordering a temporary allowance to be paid for the support of the other.
(g) Enjoining any party from transferring, encumbering, hypothecating, concealing or in any way disposing of any property, real or personal, except in the usual course of business or for the necessities of life, and if such order is directed against a party, it may require such party to notify the other party of any proposed extraordinary expenditures and to account to the court for all such extraordinary expenditures.
(h) Ordering the sale of the marital residence provided that both parties have previously filed a written stipulation with the clerk of the court explicitly agreeing to the sale of the property prior to the final hearing on the merits. If the parties have not so stipulated, the sale of the marital residence shall not be ordered prior to the final hearing as long as the court deems the party residing within the marital residence to have sufficient financial resources to pay the debts or obligations generated by the property, including mortgage payments, taxes, insurance, and ordinary maintenance, as those debts and obligations come due.

II.
(a) Ex parte orders may be granted without written or oral notice to the adverse party only if the court finds from specific facts shown by affidavit or by the verified petition, that immediate and irreparable injury, loss, or damage will result to the applicant, the children, or property before the adverse party or attorney can be heard in opposition.
(b) No ex parte order shall be granted without:
(1) An affidavit from the moving party verifying the notice given to the other party or verifying the attempt to notify the other party.
(2) A determination by the court that such notice or attempt at notice was timely so as to afford the other party an opportunity to be present.
(c) If temporary orders are made ex parte, the party against whom the orders are issued may file a written request with the clerk of the superior court and request a hearing thereon. Such a hearing shall be held no later than 5 days after the request is received by the clerk for the county in which the petition for divorce, annulment, separation or decree of nullity is filed.
III. When a party violates a restraining order issued under this section by committing assault, criminal trespass, criminal mischief, stalking, or another criminal act, that party shall be guilty of a misdemeanor, and peace officers shall arrest the party, detain the party pursuant to RSA 594:19-a and refer the party for prosecution. Such arrests may be made within 12 hours after a violation without a warrant upon probable cause whether or not the violation is committed in the presence of a peace officer.

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 title to the property is held in the name of either or both parties. Intangible property includes, but is not limited to, employment benefits, vested and non-vested pension or other retirement benefits, 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 shall presume that an equal division is an equitable distribution of property, unless the court establishes a trust fund under RSA 458:20 or unless the court decides that an equal division would not be appropriate or equitable after considering one or more of the following factors:

(a) The duration of the marriage.

(b) The age, health, social or economic status, occupation, vocational skills, employability, separate property, amount and sources of income, needs and liabilities 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 any minor children in the 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 either or both of the parties.

(g) Significant disparity between the parties in relation to contributions to the marriage, including contributions to the care and education of the children and the 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 and any interruption of either party's educational or personal career opportunities for the benefit of the other's career or for the benefit of the parties' marriage or children.

(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 marriage.
(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' animals, taking into 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, including a qualified tuition program 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 property of the marriage subject to equitable division under this section.
IV. The court shall specify written reasons for the division of property which it orders.

458:19. Alimony (2017)

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-Afor 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.

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 458:19, V shall be:

(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 458:19-aa, 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 173-B:1, I or fault as described in RSA 458:16-a, II(l).

(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 458:19-aa, 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 the formula amounts or durational limitations; and
(3) Findings supporting any award of reimbursement alimony.

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.

STATEMENT OF THE CASE

Appellant/Petitioner Jonathan Merrill ("Jonathan") appeals the parties' Final Divorce Decree from the Family Court Complex Docket issued by Judge Foley and dated November 11, 2019. Apx. I at 3.[1] Jonathan filed the Petition for Divorce on June 19, 2017. Appellee/Respondent Lea Merrill ("Lea") filed a Motion for Immediate Relief, opposed by Jonathan, and an Answer and Cross-Petition for Divorce. Supp. Apx. I at 4.[2] Jonathan filed an Answer to the Cross-Petition. Supp. Apx. I at 5.

The trial court held the first temporary hearing limited to parenting issues and the appointment of a Guardian ad Litem (GAL) and issued a Temporary Parenting Plan. Supp. Apx. I at 6. A further temporary hearing was held related to child support, alimony, and occupancy of marital residences and payment therefor. App. VII at 23. Jonathan filed a motion to reconsider the temporary orders, opposed by Lea, which the court denied. App. VIII at 9; 15. Thereafter, the case was transferred to the Complex Docket. Supp. Apx. I at 9.

Jonathan filed a motion to disqualify Lea's counsel, which was granted, and necessitated the continuance of the trial. Supp. Apx. I at 12. The Final Hearing was conducted over four days in June 2019 and continued for another four days in October 2019. Supp. Apx. I at 16-18.

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[1] References to the Appellant's Appendix are in the form of "Apx." followed by the volume and page number. References to the Trial Transcript are in the form of "TT" followed by the volume and page number and line reference.

[2] References to the Appellee's Supplemental Appendix are in the form of "Supp. Apx." followed by the volume and page number.

The Final Divorce Decree issued on November 11, 2019. Apx. I at 3. Jonathan filed a Motion to Reconsider on November 22, 2019, which was opposed by Lea, and denied. Apx. IV at 20; Supp. Apx. I at 18-19. Jonathan then filed a Motion to Stay and Renewed Motion and Request for Hearing and Request for Further and/or Supplemental Reconsideration and Clarification on December 12, 2019, which was opposed by Lea, and denied. Apx. IV at 30; Supp. Apx. I at 19. The Notice of Appeal was filed thereafter.

STATEMENT OF FACTS

A. The parties' marriage and lifestyle.

Jonathan and Lea were married on February 14, 2005. Apx. I at 3. Together they have one child, Dustin, born on December 29, 2005. Apx. I at 3. Jonathan has always worked in his family's excavation business and on their horse farm. Apx. I at 30-31; TT Vol II at 205/3-7. He has an ownership interest in his family's business and their real estate. Apx. I at 29. During the marriage, Lea was a homemaker by agreement of the parties. Apx. I at 28.

In 2009, the parties moved from a house in Hampstead to live in the house that is part of the Merrill family horse farm in Salem. Apx. I at 28, 30. They lived a comfortable lifestyle. Apx. I at 33.

B. Breakdown of the marriage and filing for divorce.

Jonathan had an affair with another woman he met in or around July 2017. Apx. I at 7; TT Vol 891/23-892/5. The marriage broke down and Jonathan filed the Petition for Divorce. Jonathan maintained his work as a self-employed excavating contractor. Apx. I at 11. Lea found work at the

front desk of a fitness facility. Apx. I at 11. She does not have training or certification in a profession to earn more money. Apx. I at 13.

C. Pre-trial litigation background.

The parties litigated for over 26 months before reaching the final hearing that spanned over eight days. Supp. Apx. I at 3-18. A temporary hearing was held on January 25, 2018, from which a Temporary Parenting Plan was issued. Apx. 7 at 23. A further temporary hearing occurred on May 16, 2018, after which further temporary orders issued keeping the temporary parenting plan in place, and ordering Jonathan to pay child support to Lea in the amount of $2,155 per month with a retroactive arrearage of $9,600. Apx. 7 at 23. Jonathan was also ordered to pay $500 per month in alimony, with a retroactive arrearage of $6,000. Apx. 7 at 24. Lea was awarded occupancy of the Hampton Beach condominium and Jonathan was ordered to pay the mortgage, taxes, insurance, and condo fees. Jonathan was awarded occupancy of the Salem home subject to pay for any related expenses. Jonathan was also ordered to pay Lea $7,500 for attorney's fees and living expenses, which the court found after trial was a property advance, but was never paid. Apx. 7 at 26; Apx. I at 4.

On May 17, 2018, the court found Lea in contempt of the pretrial non-hypothecation order for taking her name off the deed on a condominium determined not to be marital property. Apx. I at 4. On September 11, 2018, the case was transferred to the Family Division Complex Docket. Apx. I at 4. The original April 2019 trial date was continued after the court granted Jonathan's motion to disqualify Lea's counsel. Apx. I at 4.

D. The Final Hearing and Final Divorce Decree.

The trial was conducted over four days in June 2019 and continued for another four days in October 2019, all before Judge Foley. Supp. Apx. I at 16-18. The trial court heard testimony from eleven witnesses: the GAL, Jonathan's brother Gary Merrill, Jonathan, each party's business appraisal experts, each party's real estate appraisal experts, Jonathan's father George Merrill, Jonathan's girlfriend Kylie Delauren, Jonathan's friend Matt Wheeler, and Lea. TT Vols 1 through VIII.

After trial, Judge Foley issued a 38 page decision and reviewed and ruled the parties' combined over 500 requests for findings of facts. Apx. I at 3, 36.

1. Valuation of marital assets.

The trial court determined the value of each asset of marital property and what assets were not marital assets. Apx. I at 14-23. The trial court engaged in a lengthy and detailed analysis of the parties' condominium at Hampton Beach, located at 943 Ocean Boulevard, No. 19 (the "Hampton Beach Condo"), the GEM sandpit, Merrill & Son, Inc. ("GEM"), and KEM Realty, Inc. ("KEM").

a. The Hampton Beach Condominium.

Regarding the Hampton Beach Condo, the trial court heard testimony from experts for each party regarding the appraisals of the property, which consists of 1,676 square feet and two "official" bedrooms. Apx. I at 15. The trial court weighed the opinions of the two appraisers and found that the fair market value of the Hampton Beach Condo was $450,000, consistent with Jonathan's expert. Apx. I at 17.

b. GEM Sandpit.

The GEM Sandpit is property that consists of an 18.10 acre parcel which had been part of the Merrill & Son, Inc., operations since 1971. Apx. I at 17. The trial court found that it was originally a gravel pit that became a holding or staging area for aggregates either coming from GEM's jobs or emanating from other sources and used on the GEM jobs. Apx. I at 1. The trial court found that the GEM sandpit sells approximately $2,000,000 worth of product each year. Apx. I at 17. Jonathan's expert testified that the parcel's highest and best use was its current use and provided an opinion of fair market value of $285,000. Apx. I at 17. In stark contrast, Lea's expert testified that its highest and best use was to be developed into a 10 lot subdivision and offered an opinion of fair market value of $1,060,000. Apx. I at 17. The trial court weighed the testimony and adopted Jonathan's analysis and found that the fair market value of the sandpit was $285,000. Apx. I at 18.

c. GEM

The trial court also valued Merrill & Son, Inc. ("GEM"). GEM is an excavating company started in 1953 by Jonathan's grandfather. The company and its ownership passed to Jonathan's father, and in 2003, he gave 49 shares (24.5%) each to Jonathan and his brother, Gary Merrill. Apx. I at 18. Then in 2012, Jonathan and Gary received another 41 shares (20.5%) of GEM stock into separate irrevocable trusts. Apx. I at 18. Jonathan's additional 41 shares went into the JGM 2012 Trust, of which Jonathan is both a trustee and beneficiary. Apx. I at 18.

During the trial, Lea submitted a Memorandum of Law In Support of Including the Trust Assets as Marital Property. Supp. Apx. I at 17, 31; TT Vol V at 627/-15628/5. No response was submitted by Jonathan.

The court found that the JGM 2012 Trust and the stock held therein is a marital asset. Apx. I at 18. In support, the trial court stated that the JGM 2012 Trust is reported for tax purposes as a grantor trust "...i.e. owned by Jonathan Merrill" and that Jonathan reports the income for 45% of the company. Apx. I at 18. The trial court rejected Jonathan's expert's attempt to persuade the court to ignore the 20% interest held in trust due to "restrictions placed on principal distribution." Apx. I at 18.

The trial court also acknowledged that GEM has not been able to make further distributions for years, that the bank carrying GEM's line of credit required Jonathan's father to infuse his own money into Gem, and that Jonathan and Gary Merrill were denied a separate bank loan to buy an expensive new truck for the company. Apx. I at 18.

The trial court heard testimony from the expert for each party. Jonathan's expert valued the GEM stock in the marital estate at $493,180. Apx. I at 19. Lea's expert value it at $959,000. Apx. I at 19. The trial court calculated its value of the GEM stock using Lea's expert's model with the exception of the value of two pieces of property to which the parties had stipulated. Apx. I at 20. The trial court deducted 10% for a lack of control discount and calculated Jonathan's 45% interest in GEM at $641,125.80. Apx. I at 20. The trial court set forth its calculations in Appendix B attached to the Final Decree. Apx. I at 40.

d. KEM

The trial court also examined the value of KEM Realty, Inc. ("KEM") which the parties described as "the Farm" and operates the horse farm business. Apx. I at 20. The Farm covers 96.5 acres, with a single family home, at least one barn with 23 horse stalls, an enclosed riding arena with another 23 stalls, and many riding trails. Apx. I at 20-21. The parties stipulated that the value of the Farm property is $1,000,000. Apx. I at 21. The land was acquired by, and the business started by, Jonathan's father in the 1950s. Apx. I at 21.

Jonathan and his brother Gary Merrill both own 47.5 shares, 23.75%, of KEM's stock. Their father owns 105 shares, 52.5% of the KEM stock. Apx. I at 21. Jonathan's expert valued his 23.75% share at $70,000. Lea's expert valued it at $190,000. Apx. I at 21. The major factors in the business evaluation experts' divergent opinions was the application of discount rates to the business value of KEM. Apx. I at 21. The trial court noted that Lea's expert used marketability and lack of control discounts of 15% and 10% respectively. Apx. I at 21. Jonathan's expert used 35% and 30.6% respectively. Apx. I at 21. The trial court stated that it was difficult to follow Jonathan's expert reported analysis as there was little narrative explanation and the few attached schedules for KEM were hardly self-explanatory. Apx. I at 21. After weighing the different analyses, the trial court agreed with Lea's expert, that the value of Jonathan's interest in KEM is $190,000. Apx. I at 22.

2. Non-marital assets.

The trial court considered four other assets and found that they were not part of the marital estate:

1. Unit 302, 703 Ocean Boulevard, Hampton Beach
2. 38 School Street, Salem
3. 40 School Street, Salem
4. 107 Bedde Hill Road, Fremont. Apx. I at 22-23.

Unit 302 is the condominium that is owned by Lea's mother. The trial court found that it was not purchased using any marital funds. Apx. I at 23. A deed was conveyed on May 5, 2017 for this unit to Lea and her mother, Joyce Pinaud. Lea testified at trial that she was not aware if she was going to be inheriting anything from her parents upon their death. TT Vol V at 1450/6-8. She also testified that she did not know that her name was on the deed and did not participate at all in connection with the closing of her mother's condominium. TT Vol V at 1575/11-25.

The court found that Lea acquired an equitable interest in the property but 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 also stated that "[w]hile Ms. Pinaud may have signaled with her first two deeds her intent to leave the condominium at 703 Ocean Boulevard to her daughter, Lea, upon Ms. Pinaud's death; such an 'expectation' does not rise to the level of a marital asset." Apx. I at 23.

The other three parcels referenced above are owned by Jonathan's father, George D. Merrill. Apx. I at 23.

3. Pending Motions for Contempt and Motion to Modify.

The trial court also addressed three still pending motions addressed to the Temporary Orders issued by Judge Stephens on May 16, 2018: (1) Lea's Motion for Contempt seeking enforcement of the June 2018 Temporary Order regarding old credit card bills, payment for the condominium carpet and the $7,500 advance; (2) Jonathan's Cross Motion for Contempt seeking a contempt finding related to Lea's sale of the truck; and (3) Jonathan's Motion for Modification seeking a modification of the temporary orders regarding child support, alimony, payment of the Hampton Beach condominium expenses, and the $7,500 advance. Apx. I at 25.

Pursuant to the Temporary Order, Jonathan was ordered to pay $2,155 per month in child support. App. I at 25. The trial court noted that this was "precisely the amount proposed by Mr. Merrill's counsel on his 4/30/18 Child Support Worksheet. That Child Support Worksheet also listed Mr. Merrill's income for child support purposes at $15,674.00 a month or $188,088.00 a year. Mr. Merrill's Financial Affidavit, dated 5/1/18, listed his base pay as $15,674.00 a month or $188,088.00 a year." The trial court further acknowledged that "Mr. Merrill's 2017 joint individual income tax return listed his 2017 wages and salary as $191,887.00. There was also approximately $125,000.00 of K-1 passive income, included on that 2017 tax return; but there was absolutely no indication in this file that Judge Stephen erroneously relied on the K-1 passive income in imposing Mr. Merrill's temporary child support obligation." Apx. I at 25.

The Temporary Order of May 16, 2019 also ordered Jonathan to pay "all outstanding credit card debt incurred before the date of the filing of the Petition for Divorce." Apx. I at 25. The trial court acknowledged that although the Temporary Order did not identify the name of the credit cards or amount owed thereon, the test is whether the judge committed obvious error, and the trial court found he did not. Apx. I at 25. The trial court identified the pre-filing credit card debts totaling $13,964.4. Apx. I at 26. The trial court further acknowledged that the parties' savings were all gone by the time of the divorce filing, Lea was not working, and Jonathan's salary was approximately $190,000. Apx. I at 26. The trial court then considered whether Jonathan's inability to comply with the temporary orders and found that while the "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 trial court also addressed Jonathan's motion for contempt based on Lea's sale of the truck and her failure to pay half to Jonathan as required by the temporary orders. Apx. I at 26-27. The trial court found Lea's allocation of the proceeds from the sale to herself and use thereof for a down payment on a new vehicle was willful contempt. Apx. I at 27. Thus, the trial court placed as an asset on Lea's side of the asset division, half the value of the truck sale proceeds, which was Jonathan's share. Apx. I at 27.

4. Equitable Allocation of Assets and Debts.

The trial court set forth an equitable allocation of assets and debts and prepared a table listing those of each party. Apx. I at 23, 37-39. The trial court analyzed the parties' income and contributions during the marriage as well as their assets. The trial court found that after Dustin was

born, Lea was home with Dustin by agreement of the parties and that Jonathan is an extremely hard worker and good provider. Apx. I at 28. The parties both contributed their savings to the purchase of their Hampton Beach condominium. Apx. I at 28-29.

Jonathan acquired a minority interest in two family businesses—GEM and KEM, by gift. Apx. I at 29. The court noted that a small percentage of GEM was acquired by Jonathan prior to the 2005 marriage. Apx. I at 29. The trial court found that Jonathan's minority interest in GEM and KEM have been in the marital estate for most of the 12 year marriage. Apx. I at 30.

The trial court also found that Lea did not contribute much to the operation of the excavation company, only having cleaned their offices for a very short period of time. Apx. I at 30. The trial court found that Lea's contribution to the marriage had not been financial, but contributed an enormous amount of work to the family farm. Apx. I at 28, 30.

The trial court weighed the testimony from Lea, Jonathan, and Jonathan's father with respect to Lea's contribution to KEM (The Farm) and found that Lea's "daily involvement on The Farm lays somewhere in between her testimony and that of father-in-law." Apx. I at 31. Notwithstanding the dispute of facts, the trial court found that Jonathan's minority interests in both GEM and KEM have been part of the marital estate for most, if not all, of the marriage. Apx. I at 31. "GEM has paid Mr. Merrill well, and Mr. Merrill has generously supported his wife and son in a very comfortable lifestyle." Apx. I at 31. Furthermore, the court stated "[w]hether Ms. Merrill was managing The Farm or mucking its stalls for her own horse, by at least 2009, she lived on The Farm and became

involved on a day to day basis with events occurring there. The Farm actually came to define the family's lifestyle beginning in 2009." Apx. I at 31. Thus, the trial court properly found that the statutory presumption of equality applies to both Jonathan's interests in GEM and KEM, citing RSA 458:16-a (II). Apx. I at 31.

The court also found that Jonathan is far more capable than Lea of earning income and acquiring assets moving forward. RSA 458:16-a, II(b)(c). Jonathan makes over $188,000 a year. Lea works for $13.00 an hour, has a high school education, and has been home with Dustin or relatively modest employment such as bartending since 1994. Apx. I at 31.

Thus, the trial court divided the net marital estate by awarding Lea the Hampton Beach condominium and Jonathan his interests in GEM and KEM. Apx. I at 31, 37-39. In order to equalize the shares of the marital estate on a net basis, the trial court ordered Jonathan to pay Lea the sum of $286,165.50. Apx. I at 31.

5. Child Support and Alimony.

The court also addressed child support and alimony. The trial court found that the parties equally contributed to their 12 year marriage. Apx. I at 33.

The decree awarded residential responsibility for Dustin to Jonathan for the majority of the school year, but weighed the options for child support and found that Lea has "significantly low" income and Jonathan has "significantly high" income. Apx. I at 32. The court found that the "best possible outcome for Dustin is not to order his father to pay child support to his mother, but rather the conserve that income of his father for

the support for Dustin." Apx. I at 32. Also, the court found that ordering Lea to pay child support to Jonathan, which child support she cannot afford, and then simply ordering Jonathan to effectively reimburse Lea with alimony is "nonsensical and not in Dustin's best interests." Apx. I at 32. Thus, the court found that "Dustin's best possible outcome is for [the court] not to order either parent to pay child support to the other. Apx. I at 32. The court noted that Lea is going to need to "marshal her income and resources just to pay the mortgage, taxes, insurance and condo fees" while Jonathan can live at The Farm rent free. Apx. I at. 32.

The trial court found that alimony is guided by RSA 458:19 prior to its amendment. Because the case was filed on June 19, 2017 and in the absence of the parties' agreement, the court is precluded by the enabling statute from adopting or utilizing any portion of the amended alimony statute. Apx. I at 32.

The trial court found that Lea works for $13 an hour at the front desk of Seacoast Sports Club and is trying to move from 33 hours to 40 hours per week. Apx. I at 33. The trial court found that until Lea "gets her 40 hours or finds additional part-time employment, she is underemployed" and the trial court imputed $520 a week income." Apx. I at 33. The court then compared her imputed income to her reasonable needs, taking into consideration the approximate marital lifestyle. Apx. I at 33. The court noted that it was also statutorily mandated to consider the property awarded pursuant to the terms of the decree. Apx. I at 33.

The trial court reasoned that "[i]t would be incredibly inequitable...to enter an alimony order, which effectively expects [Lea] to spend her one time buyout 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 found that Lea has reasonable monthly expenses of $6,747 and imputed income of $2,251.60, thus demonstrates a need for alimony in the amount of $4,495.40. Apx. I at 33. The trial court specifically noted that the marital lifestyle was not as "amazing" as Lea attempted to describe it, citing that she and Jonathan were never on a plane together, were never on an island together, never on a cruise together, drove to Disney World once with Dustin, and took nice three day weekends on the lakes or in the mountains. Apx. I at 33. The trial court characterized it as a "good life, with a comfortable lifestyle." Apx. I at 33.

During the trial, Jonathan testified to his income. Jonathan submitted a Financial Affidavit dated October 21, 2019 listing monthly income of $15,674. Apx. V at 15. At trial on October 22, 2019, Jonathan testified to his 2018 income. TT Vol. V at 1052., Ex. WW (2018 US Individual Income Tax, amended tax return). Jonathan testified that his income tax return for 2018 shows $262,461 of income attributed to him. TT Vol. V at 1056/11-16. In contrast, he testified that the financial affidavit he filled out on October 22, 2019 listed his income as $15,674 per month, which was his income from George Merrill. TT Vol V at 1058/20-22.

The trial court also analyzed whether Jonathan could afford to meet that alimony need, while still supporting himself and Dustin. Apx. I at 33. The trial court found that his available income was $15,674 per month, which is $188,088 per year. Apx. I at 33. The trial court examined his recent Financial Affidavit and found his reasonable monthly expenses before alimony to be closer to $12,150. Apx. I at 34. During the trial, Jonathan's brother confirmed that Jonathan lives at the farm rent free. TT

Vol II at 263/11-16. He also confirmed that he receives many other free benefits, including health insurance, 401K, free gas in the car, cell phones, two company vehicles. TT Vol II at 263/17-267/6.

Thus, the trial court found that Jonathan can afford to pay alimony in the amount of $3,524 a month. Apx. I at 34. The trial court also found that 8 more years of alimony struck a balance between a 12 year marriage and an alimony candidate, not likely to grow her earned income substantially. Apx. I at 34.

As part of the property division, the trial court ordered Jonathan to buy out Lea's remaining interest in the marital estate paying to her $286,165.60. Apx. I at 35. The trial court ordered the payment to be made in installments, with the first payment in the amount of $100,000 within 120 days of the Clerk's notice of the Decree, and the remaining balance, plus 3.9% statutory interest due within 16 months of the Clerk's notice of the Decree. Apx. I at 35. The trial court secured the order by an attachment on Jonathan's stock in KEM. Apx. I at 35.

E. Post-Order Motions.

Jonathan filed a Motion for Reconsideration on November 22, 2019, which was opposed by Lea, and denied. App. IV at 20; Supp. Apx. I at 18-19; 21. In this Motion for Reconsideration, Jonathan raised the following issues relevant to this Appeal: (1) the equalization payment and the amount, timing and method of payments, Apx. IV at 20-22; (2) the value of the JGM 2012 Trust and whether it is a marital asset; Apx IV at 22-23; (3) the exclusion of Unit 302, 703 Ocean Boulevard as a marital asset, Apx. IV at 23-24; (4) distribution and valuation of GEM and KEM, Apx. IV at 24-25;

(5) the alimony order, Apx. IV at 26; and (6) revision of the temporary orders, Apx. IV at 27. The trial court denied the motion on December 4, 2019. Apx. IV at 29.

Jonathan then filed a second motion to reconsider titled a Motion to Stay and Renewed Motion and Request for Hearing and Request for Further and/or Supplemental Reconsideration and Clarification on December 9, 2019, which was opposed by Lea, and denied. App. IV at 31, Supp. Apx. I at 19; 23. In this Motion, Jonathan raises for the first time the argument that the JGM 2012 Trust is a spendthrift trust. The trial court denied the motion on December 19, 2019. Apx. IV at 30. The Notice of Appeal was filed thereafter.

SUMMARY OF ARGUMENT

1. The trial court properly issued the Final Decree and this Court should affirm it. This Court reviews the trial court's determination of what constitutes marital property de novo. The trial court's property distribution is reviewed under an unsustainable exercise of discretion standard.

2. Jonathan's argument that the JMG 2012 Trust is a "spendthrift" trust was not properly preserved for appeal because it was raised for the first time in Jonathan's second motion to reconsider, after the trial court already denied the first request for reconsideration. Issues raised for the first time in a second motion to reconsider have been forfeited.

3. The trial court properly excluded Lea's mother's condominium from the marital estate. The trial court properly found that Lea did not know about her name being on the deed until around the time of the divorce petition being and filed and did not contribute to, nor

participate in, the closing or purchase of, the condominium. Thus, Lea's mother's condominium was properly excluded as a non-marital asset.

4. The payment from Jonathan to Lea to equalize the property division is not an unsustainable exercise of discretion. The trial court considered expert testimony on the value of all assets and calculated the assets awarded to Jonathan and those awarded to Lea and equalized the distribution by way of a payment from Jonathan to Lea. The court properly exercised its discretion in fashioning a property distribution.

5. Jonathan's interests in the family business and trust were properly included in the marital estate and properly divided between the parties, by awarding Jonathan's interests in GEM and KEM to Jonathan. The trial court properly found that GEM and KEM has been part of the family lifestyle for almost the entire marriage and properly exercised its discretion to equitably divide Jonathan's interest in each as part of the property division.

6. The alimony award is not an unsustainable exercise of the court's discretion where the trial court properly balanced Jonathan's income, assets, and ability to pay against Lea's income, assets, and need for support.

7. The trial court properly upheld the temporary orders after reviewing the orders and ensuring that the trial judge who entered the temporary orders did not commit obvious error. The trial court properly reaffirmed the temporary orders in the Final Decree.

ARGUMENT

A. The standard of review for trial court determinations for what constitutes marital property is reviewed de novo and determining property distribution is subject to an unsustainable exercise of discretion.

It is well established that the trial court is afforded broad discretion in determining property distribution when fashioning a final divorce decree. *In re Chamberlin*, 155 N.H. 13, 15 (2007) citing *In the Matter of Harvey & Harvey*, 153 N.H. 425, 430 (2006). A trial court's decision on property distribution will not be overturned absent an unsustainable exercise of discretion. *Id*.

The New Hampshire Supreme Court has adopted a two-step analysis as outlined in *In the Matter of Valence and Valence*, 147 N.H. 663, 666 (2002), under which the 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 to make an equitable distribution of those assets. *In re Chamberlin*, 155 N.H. at 16.

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. *Id*. Finally, while determining whether or not a particular asset is marital property under the statute is normally a question of law, determining the value of any given asset is left to the sound discretion of the trial court. *Id.* citing *Hoffman v. Hoffman*, 143 N.H. 514, 521 (1999) (reviewing trial court's valuation of marital assets for unsustainable exercise of discretion); *cf In the Matter of Nyhan and Nyhan*, 147 N.H. 768, 771 (2002) ("We reiterate the rule that

trial courts are free to exercise their sound discretion in establishing an appropriate valuation date for the equitable distribution of marital assets.").

Here, the trial court properly determined that the assets set forth in the asset division were all martial assets, including the JGM 2012 Trust, and properly valued and made an equitable division of all such assets.

B. Jonathan's late raised argument that the JGM 2012 Trust is a "spendthrift" trust was not properly preserved for appeal.

Jonathan's argument that the trial court erred by including the JGM 2012 Trust as a marital asset on the basis that the trust is a "spendthrift" trust was not properly raised before the trial court. The first time the argument is addressed, indeed the first time the word "spendthrift" is even used, is in Jonathan's second motion to reconsider. Nowhere during the trial did Jonathan raise the defense that the trust was a spendthrift trust or that it was subject to RSA 564-B:5-502(e). The word "spendthrift" was not uttered during the eight day trial, despite the fact that both parties' experts were questioned about the JGM 2012 Trust, whether the trust was a grantor trust, and whether it was subject to any restrictions. Vol III at 484/21-487/16.

Subsequent to this questioning, Lea's counsel inquired whether the court would receive a memorandum on the issue of whether the trust was a marital asset and submitted a memorandum of law in support of its inclusion. TT Vol III at 627/15. Jonathan did not provide any response.

The trial court issued the divorce decree dated November 12, 2019, including the JGM 2012 Trust as a marital asset and assigning its value to Jonathan, after which Jonathan filed a motion to reconsider the November 12, 2019 Order, which was denied by decision dated December 5, 2019.

Then, on December 9, 2019, Jonathan filed a second motion raising for the first time the claim that the JGM 2012 Trust has spendthrift provisions and is allegedly beyond the jurisdiction of this Court.

Jonathan had at least three prior, timely opportunities to raise this alleged defense and failed to do so. First, Lea filed a memorandum of law addressing the inclusion of the Trust as marital property and its division, which is part of the trial court record, but Jonathan failed to file any responsive pleading in opposition thereto. Second, Jonathan's argument that the JGM 2012 Trust was a spendthrift trust was neither raised during trial nor in Petitioner's Requested Findings of Fact. Third, Jonathan's allegation that the JGM 2012 Trust is a spendthrift trust was not made in his first motion for reconsideration, despite making several other arguments as to why the division of the JGM 2012 Trust was improper. *See* Petitioner's Motion to Reconsider, ¶¶ 20-31, dated November 22, 2019, Apx. Vol IV at 20. Jonathan never requested that the trial court take judicial notice of the spendthrift trust statute, 564-B:5-502. Jonathan had three opportunities to raise the issue and failed to do so until almost two months after the trial concluded and only after the court denied the Jonathan's motion to reconsider. When Jonathan finally addressed the issue, the trial court properly declined to reconsider its appropriate property division. *See Riso v. Riso,* 172 N.H. 173, 183 (2019) (trial court did not clearly err in finding that the respondent had forfeited his statute of limitations defense where respondent raised the issue in its Answer but failed to raise it again until the second motion to reconsider). Thus, the issue is not properly before this court.

Even if this court were to address Jonathan's dilatory argument, the claim that the JGM 2012 Trust is a spendthrift trust is unsupported, and the trial court properly divided the Trust as marital property. The language within the trust is insufficient to confer on it the protection of RSA 564-B:5-502. The statute provides that "[a] spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest." RSA 564-B:5-502(a). The language within the Trust falls short of the statutory requirements in that it does not prohibit a beneficiary transfer. Moreover, whether or not the trust qualifies for the protection of a spendthrift trust and given the vague language within the Trust, such determination is subject to expert testimony, which was not presented at trial. Thus, the issue of whether the trust is a spendthrift trust is not appropriate to be raised at this time.

C. The trial court properly excluded Lea's mother's condominium from the marital estate.

The court found that Lea acquired an equitable interest in the property but did not know about her name being on the deed until around the time the Divorce Petition was filed. Apx. I at 23. Lea's testimony supported that she did not know she was on the deed and had no part in the purchase or closing of the condominium. TT Vol. V at 1575/11-25. The trial court found that it was not purchased using any marital funds. Apx. I at 23. The condominium was used solely by Lea's mother and was never intended to be part of the marital estate.

Although not controlling, cases addressing ownership of joint bank accounts are instructive. When an account carries a second name solely for

the convenience of the other accountholder and the facts clearly demonstrate that the second party was never intended as an owner of the funds in the account, the presumption of joint ownership is rebutted. In *In re Wszolek Estate*, 112 N.H. 310, 315 (1972), the depositor intended the account to be for convenience only and the court held that the facts did not prove the required donative intent and delivery which are essential to the establishment of a gift inter vivos. The facts adduced at trial show that the Lea's mother never intended to give the condominium to Lea during her lifetime and was titled jointly for convenience only. The trial court properly reviewed the testimony and determined that the condominium was not a marital asset.

D. The trial court properly ordered Jonathan to pay Lea to equalize the property distribution and properly ordered an installment payment plan.

The trial court properly exercised its discretion in dividing the marital assets and thus requiring Jonathan to pay the sum of $286,165.60 to Lea to equalize the property distribution. Apx. I at 31. The trial court weighed the parties' respective expert opinions and established a value for each marital asset. Apx. I at 37. The trial court then calculated a mathematical equation totaling up the assets awarded to Jonathan and those awarded to Lea, net of liabilities on each. The difference between the assets awarded Jonathan and those awarded Lea was $286,165.50. The trial court divided the net marital estate by awarding Lea the Hampton Beach condominium and Jonathan his interests in GEM and KEM. Apx. I at 31, 37-39. In order to equalize the shares of the marital estate on a net basis, the

trial court ordered Jonathan to pay Lea the sum of $286,165.50. Apx. I at 31.

The trial court also properly exercised its discretion in ordering Jonathan to pay the $286,165.50 in installments. Indeed, the trial court recognized that Jonathan could not make the payment at once. Instead, the trial court ordered the first $100,000 be paid within 120 days of the Clerks notice of the Decree, and then the remaining balance, plus 3.9% statutory interest be paid within 16 months. Apx. I at 35.

Although the trial court acknowledged that Jonathan does not have cash or savings in hand, it also analyzed his *reasonable* expenses and noted that he may need to "cut down a little on meals out, vacations, and gifts." Apx. I at 34. Thus, the trial court found his reasonable monthly expenses to be "closer to $12,150." Apx. I at 34. The trial court also recognized that Jonathan lives in a million dollar property, rent free, and makes at least $188,000. Apx. I at 21; 33. Trial courts have broad discretion in determining matters of property distribution and alimony in fashioning a final divorce decree. *In re Sutton*, 148 N.H. 676, 679 (2002). "If the court's findings can reasonably be made on the evidence presented, they will stand." *In the Matter of Letendre & Letendre*, 149 N.H. 31, 36 (2002). The trial court's order of installment payments over 16 months with a low rate of interest based on a salary of over $188,000 and receipt of other benefits from the family business, including free rent in a million dollar property is not an unsustainable exercise of discretion. Thus, the trial court properly used its discretion and deferred the installment payments over a reasonable period of time.

The argument that Jonathan's income is wrapped up in family businesses would allow anyone to avoid a divorce settlement using a properly drafted estate and family business succession plan.

The trial court gave Jonathan additional time to make the equalization payment, and even provided him a roadmap as to how to achieve that payment in installments. Finally, pursuant to RSA 458:16-a, IV, the trial court specified written reasons for the division of property. Indeed, the trial court spent twenty pages in its Order painstakingly detailing each marital asset, how it arrived at the valuation based on weighing expert testimony from the trial, reviewing eight parcels of real estate, evaluating a family business and trust, and considering the income and expenses of each party on a granular level. *See* Apx. I at 14-34. The trial court also reviewed each requested finding of fact and individually granted or denied each one. The trial court specifically denied Jonathan's requested findings that Jonathan's ownership in GEM did not contribute to the lifestyle of the parties (¶ 207), the only financial benefit received by Jonathan as a result of his interest in GEM was his salary and health insurance benefits (¶ 208), the business operations and earnings of GEM has remained stagnant throughout the marriage (¶ 212). Apx. III at 3-41. Accordingly, the trial court properly exercised its discretion in fashioning the property division and requiring Jonathan to make an equalization payment in installments to Lea.

E. The trial court properly used its discretion to equitably divide Jonathan's interest in the family business and trust.

Jonathan owns 45% of GEM and 45% of KEM. Again, the trial court has broad discretion to fashion the property division. The trial court properly exercised its discretion to equitably divide Jonathan's interest in GEM and KEM.

With the exception of a small percentage of GEM, Jonathan acquired his minority interest in GEM and KEM by gift during their marriage. Apx. I at 29. New Hampshire law is clear that gifts become part of the marital estate, and the court has significant discretion on how to allocate the gifted property. The general rule of law is that regardless of the source, all assets owned by each spouse at the time of the divorce is to be included in the marital estate. *Sarvela and Sarvela*, 154 N.H. 426, 431 (2006). Pursuant to RSA 458:16-a,II(m), the court has discretion to consider the value of property acquired before the marriage. Moreover, RSA 458:16-a,II(n) gives the Court discretion to consider the value of property acquired by gift and through inheritance. Using premarital funds to purchase assets during the marriage does not exempt the acquired asset from inclusion in the marital estate or its distribution upon divorce. *Hoffman*, 143 N.H. at 522.

RSA 458:16-a, I does not exclude property gifted to one spouse during the course of the marriage. *Harvey*, 153 N.H. at 438. Even if an inherited asset is set aside to the inheriting spouse or there is a "waiver" in that inheritance by the other spouse, the inherited property is "nonetheless a factor to be considered when the judge recommends the property settlement..." *Weeks and Weeks,* 124 N.H. 252, 256 (1983).

The trial court took great care in establishing this point and cited to *Henderson v. Henderson,* 121 N.H. 807 (1981) and *Harvey*, 153 N.H. 425 (2006). The trial court reasoned its "generalized treatment of the financial helpfulness of families of divorcing parties considers, among other things, the timing of the helpfulness and the extent to which it has become woven into the fabric of the divorcing family's lifestyle. The older the helpfulness and the greater the extent, to which it has become part of the divorcing family's lifestyle, the more likely it is that that asset will be divided more equally." Apx. I at 30.

The trial court recognized the scope of the court's discretion in dividing marital assets which are in whole or in part the product of gifts and inheritances and assets held before the marriage, so long as the evidence supports the division, by comparing *Henderson* and *Harvey*, 153 N.H. 425 (2006). In *Henderson*, 121 N.H. 807, the Supreme Court affirmed an award to petitioner of virtually all assets acquired by the petitioner through her parents' generosity. In contrast, in *Harvey*, 153 N.H. 425, the court awarded the wife $1.6 million of the marital estate valued at $2.9 million while finding that the husband and his family owned a lot of property prior to the marriage and his parents offered significant financial helpfulness during the marriage. "The essential question is whether there is evidence to support the trial court's decree with reference to the division of property." *Henderson*, 121 N.H. at 810. Here, the evidence at trial supports the trial court's division of the marital property.

The trial court found that Jonathan's minority interest in GEM and KEM have been in the marital estate for most of the 12 year marriage. Apx. I at 30. The trial court also found that Lea did not contribute much to the

operation of the excavation company, only having cleaned their offices for a very short period of time. Apx. I at 30.

The trial court weighed the testimony from Lea, Jonathan, and Jonathan's father with respect to Lea's contribution to KEM (The Farm) and found that Lea's "daily involvement on The Farm lays somewhere in between her testimony and that of father-in-law." Apx. I at 31. Notwithstanding the dispute of facts, the trial court found that Jonathan's minority interests in both GEM and KEM have been part of the marital estate for most, if not all, of the marriage. Apx. I at 31. "GEM has paid Mr. Merrill well, and Mr. Merrill has generously supported his wife and sone in a very comfortable lifestyle." Apx. I at 31. Furthermore, the court stated "[w]hether Ms. Merrill was managing The Farm or mucking its stalls for her own horse, by at least 2009, she lived on The Farm and became involved on a day to day basis with events occurring there. The Farm actually came to define the family's lifestyle beginning in 2009." Apx. I at 31. Thus, the trial court properly found that the statutory presumption of equality applies to both Jonathan's interests in GEM and KEM, citing RSA 458:16-a (II). Apx. I at 31.

F. The trial court properly weighed Lea's needs and Jonathan's ability to pay when ordering alimony.

The trial court properly exercised its discretion, which will not be overturned except upon a finding of abuse, in awarding alimony to Lea. *See Hoffman*, 143 N.H. at 517. The trial court assessed Lea's needs, properly considered the lifestyle during the marriage, considered the total property division, and analyzed Jonathan's ability to pay.

The trial court found that Lea works for $13 an hour at the front desk of Seacoast Sports Club and is trying to move from 33 hours to 40 hours per week. Apx. I at 33. She has a high school education and has been home with Dustin or engaged in relatively modest employment such as bartending since 1994. Apx. I at 31. Indeed, the trial court even imputed income to Lea finding that until Lea "gets her 40 hours or finds additional part-time employment, she is underemployed" and the trial court imputed $520 a week income." Apx. I at 33. The court compared her imputed income to her reasonable needs, taking into consideration the approximate marital lifestyle. Apx. I at 33. The court noted that it was also statutorily mandated to consider the property awarded pursuant to the terms of the decree. Apx. I at 33. The court also found that Jonathan is far more capable than Lea of earning income and acquiring assets moving forward. Apx. I at 33.

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I at 33. The trial court characterized it as a "good life, with a comfortable lifestyle.' Apx. I at 33.

During the trial, Jonathan testified to his income. Jonathan submitted a Financial Affidavit dated October 21, 2019 listing monthly income of $15,674. Apx. V at 15. At trial on October 22, 2019, Jonathan testified to his 2018 income. TT Vol. V at 1052., Ex. WW (2018 US Individual Income Tax, amended tax return). Jonathan testified that his income tax return for 2018 shows $262,461 of income attributed to him. TT Vol. V at 1056/11-16. In contrast, he testified that the financial affidavit he filled out on October 22, 2019 listed his income as $15,674 per month, which was his income from George Merrill. TT Vol V at 1058/20-22.

The trial court analyzed whether Jonathan could afford to meet that alimony need, while still supporting himself and Dustin. Apx. I at 33. The trial court used his available income as represented on his financial affidavit of $15,674 per month, which is $188,088 per year, rather than the substantially greater amount on his tax return, Apx. I at 33. The trial court examined his recent Financial Affidavit and found his reasonable monthly expenses before alimony to be closer to $12,150. Apx. I at 34. During the trial, Jonathan's brother confirmed that Jonathan lives at the farm rent free. TT Vol II at 263/11-16. He also confirmed that he receives many other free benefits, including health insurance, 401K, free gas in the car, cell phones, two company vehicles. TT Vol II at 263/17-267/6.

Thus, the trial court found that Jonathan can afford to pay alimony in the amount of $3,524 a month. Apx. I at 34. This amount is <u>less</u> than Lea's reasonable needs, as determined by the trial court. Nonetheless, the trial court only ordered the amount Jonathan could reasonably pay. The trial

court also found that 8 more years of alimony struck a balance between a 12 year marriage and an alimony candidate, not likely to grow her earned income substantially. Apx. I at 34.

As part of the property division, the trial court ordered Jonathan to buy out Lea's remaining interest in the marital estate paying to her $286,165.60. Apx. I at 35. The trial court ordered the payment to be made in installments, with the first payment in the amount of $100,000 within 120 days of the Clerk's notice of the Decree, and the remaining balance, plus 3.9% statutory interest due within 16 months of the Clerk's notice of the Decree. Apx. I at 35. The trial court secured the order by an attachment on Jonathan's stock in KEM. Apx. I at 35.

The trial court found that alimony is guided by RSA 458:19 prior to its amendment. Because the case was filed on June 19, 2017 and in the absence of the parties' agreement, the court is precluded by the enabling statute from adopting or utilizing any portion of the amended alimony statute. Apx. I at 32. Notwithstanding, if this court were to analyze the alimony award under the current statute, the amount Jonathan would be ordered to pay is more than what the trial court ordered.[3] Accordingly, the trial court did not abuse its discretion in making its alimony award.

[3] Pursuant to RSA 458:19-a(a), the formula would be 30% of the difference between Jonathan's gross income of $15,674 and Lea's gross income, including the amount imputed by the court, or $2,251.60, for an award of $4,026.

G. <u>The trial court properly upheld the temporary orders.</u>

Jonathan continues to contest the temporary orders entered at the beginning of this case. This appeal is the third attempt to overturn the temporary orders. Pursuant to the Temporary Order, Jonathan was ordered to pay $2,155 per month in child support, with a retroactive arrearage of $9,600, $500 per month in alimony, with a retroactive arrearage of $6,000, and the mortgage, taxes, insurance, and condo fees for the Hampton Beach condo which temporary occupancy was awarded to Lea. Apx. VII at 23-26. Jonathan was also ordered to pay Lea $7,500 for attorney's fees and living expenses, which the court found after trial was a property advance, but was never paid. Apx. 7 at 26; Apx. I at 4. App. I at 25. Jonathan filed a Motion for Reconsideration of these orders, which was denied on July 9, 2018. Apx. VIII at 15. In that order, the trial court (Stephens, J.) stated that

> ...the Court considered the discrepancy in earnings between the Petitioner and Respondent, as well as rental income the Petitioner earns. The 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. In addition, the Court considered all arguments made at the hearing, including the Respondent's ability to work.
>
> It appears that the Motion to Reconsider is based on a respectful disagreement in the Court's decision. However, the Court's decision was reached after careful consideration of all arguments made at the Temporary Hearing. It was reached under a totality of the circumstances."

Apx. VIII at 15.

Jonathan then filed a Motion for Modification seeking a modification of these temporary orders. Apx. VI at 35. The trial court addressed the Motion for Modification as part of its Final Decree, in essence upholding the temporary orders. Apx. I at 25. Regarding the temporary child support, the trial court noted that this was "precisely the amount proposed by Mr. Merrill's counsel on his 4/30/18 Child Support Worksheet" and specifically reviewed the passive income issue and found that Judge Stephens did not include passive income in his child support calculation ("...there was absolutely no indication in this file that Judge Stephen erroneously relied on the K-1 passive income in imposing Mr. Merrill's temporary child support obligation"). Apx. I at 25.

The trial court acknowledged that Judge Stephens did not identify each credit card by name, but correctly identified that the standard of his review of the temporary order was whether the judge committed obvious error, and the trial court found he did not. Apx. I at 25. The trial court then considered Jonathan's inability to comply with the temporary orders and found that while the "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. Despite stating that the temporary orders were perhaps "harsh," the trial court specifically also found that they were not clearly erroneous. Apx. I at 25. The statutory scheme implicitly contemplates that a court may issue a permanent order that differs from any temporary order it may have issued. *In re Stapleton & Stapleto*n, 159 N.H. 694, 697 (2010). RSA 458:16 (2004) authorizes a trial court to issue any temporary order it deems just upon the filing of a divorce petition and even allows such orders to be issued ex parte. *Id.* It is not until

the court conducts a full hearing on the merits, however, that the court actually equitably divides the parties' property. *Id.* citing RSA 458:16.

Accordingly, the trial court properly denied the request to reconsider or modify the temporary orders. Sometimes temporary orders are harsh, that does not make them erroneous.

CONCLUSION

The trial court properly issued its Final Decree and this Court should affirm the Final Decree. The trial court carefully and meticulously reviewed eight days of trial, volumes of pleadings and myriad valuations and expert opinions. The trial court properly weighed the evidence and crafted a property division based on the equitable distribution of the marital assets. The trial court properly considered the incomes, marital lifestyle, and prospective abilities to pay, as well as the parties' respective expenses, in formulating an alimony award. The Final Decree should be upheld in its entirety.

RESPONDENT/APPELLEE REQUESTS ORAL ARGUMENT.

To be argued by Thomas K. MacMillan, Esq.

Attorney for Respondent/Appellee Lea Merrill

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ADDENDUM

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

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NOTICE OF DECISION

THOMAS KIRWAN MACMILLAN, ESQ
MACMILLAN LAW OFFICES
145 SOUTH MAIN STREET
PO BOX 5279
BRADFORD MA 01835-0279

Case Name: **In the Matter of Jonathan Merrill and Lea Merrill**
Case Number: **673-2017-DM-00122**

Enclosed please find a copy of the Court's Order dated November 11, 2019 relative to:

Final Divorce Decree
Final Decree on Petition for Divorce, Legal Separation or Civil Union Dissolution
Parenting Plan
Uniform Support Order
Uniform Alimony Order

It will cost $40.00 for a certified copy of your decree.

This matter will become final on 12/12/2019 known as the Judgment Day, if no objections or appeals are filed. Objections must be filed with this court within 10 days of the date of the Notice of Decision, appeals to the Supreme Court within 30 days.

November 12, 2019

Cheryll-Ann Andrews
Clerk of Court

(207)
C: John Arthur Macoul, ESQ; Timothy S. Wheelock; Kylie De Lauren

THE STATE OF NEW HAMPSHIRE

JUDICIAL BRANCH

NH CIRCUIT COURT

STRAFFORD COUNTY

7TH CIRCUIT – FAMILY DIVISION – ROCHESTER

In the Matter of:

Jonathan Merrill, Petitioner and Lea Merrill, Respondent

Case No. 673-2017-DM-00122

FINAL DIVORCE DECREE

On 6/3/19, the parties appeared with counsel and the GAL for what was supposed to be a four day trial. The need for another four days became clear, which occurred on October 22, 23, 24, and 25, 2019.

This is a long-term marriage, as defined by *Rahn v. Rahn*, 123 N.H. 222, 225 (1983). The parties were married on 2/14/05. Twelve years later, on 6/19/17, Mr. Merrill filed his Petition for Divorce.

The parties have a wonderful child, Dustin, who will be 14 on 12/29/19.

The contested issues presented for my resolution included the following:

Fault Grounds specified by Ms. Merrill of adultery, extreme cruelty, and treatment as to seriously injure or endanger pursuant to the provisions of RSA 458:7, II, 458:7, III, and 458:7, V, respectively. Also before the Court as contested issues were the allocation of parental rights and responsibilities for Dustin, child support, alimony, and the allocation of assets and debts.

Also pending before me were the following:

Ms. Merrill's 5/29/19 Motion for Contempt, found at Court Doc. #143, seeking the enforcement of the Temporary Order of 5/16/18 regarding old credit card bills, the condominium carpet, and a $7,500.00 "advance"; Mr. Merrill's 6/3/19 Cross Motion, found at Court Doc. #165, seeking a contempt finding and the enforcement of the 7/9/18 Reconsideration Order, obligating the parties to equally split the proceeds of sale of Ms. Merrill's truck; and Mr. Merrill's 12/26/18 Motion for Modification, found at Court Doc. #105, seeking a modification of Temporary Orders regarding child support, alimony, arrearages created by the 5/16/18 Temporary Order, payment of the Hampton Beach condominium expenses, the $7,500.00 advance, and the reallocation of the GAL fees.

I. PROCEDURAL HISTORY

A Temporary Hearing was conducted on 1/25/18, from which a Temporary Parenting Plan was issued on 1/29/18, placing Dustin in his parents' shared residential responsibility on a schedule based on two days each week plus every other weekend. A GAL was appointed at that time. No narrative explanation was offered by the Court for that Order.

Further Temporary Orders were issued on 5/16/18, but again no narrative explanation was provided. The 1/29/18 Parenting Plan remained in full force and effect. Mr. Merrill was ordered to pay child support of $2,155.00 a month with a retroactive arrearage of $9,600.00. Mr. Merrill was also ordered to pay $500.00 a month alimony, with a retroactive arrearage of $6,000.00. Ms. Merrill was awarded occupancy of the Hampton Beach condominium, and Mr. Merrill was ordered to pay the mortgage, taxes, insurance, and condo fees. Mr. Merrill was awarded occupancy of the Salem home subject to the responsibility to also pay for any related expenses. Mr. Merrill was ordered to pay Ms. Merrill $7,500.00 for attorney's fees and living expenses. The Temporary Order purported to defer the characterization of that award of fees, but I find here that, in the absence of a *Gosselin* reasonableness review process, the $7,500.00 was a property advance. *Gosselin v. Gosselin*, 136 N.H. 350 (1992) and *Hampers & Hampers*, 154 N.H. 275, 291 (2006). The characterization issue became rather academic because the $7,500.00 was never paid.

On 5/17/18, Ms. Merrill was found in contempt of the Pretrial Non-Hypothecation Order for attempting to place her condominium in her mother's name and potentially outside of the marital estate.

The case was transferred to the Family Division Complex Docket on 9/11/18. The April 2019 trial date was pushed back, following my Order that then counsel for Ms. Merrill appeared to have a conflict with Mr. Merrill.

On 5/15/19, I denied Mr. Merrill's request to dismiss Ms. Merrill's fault grounds on the basis of inadequate answers to interrogatories. However, in light of her answers to that point, I did order that Ms. Merrill "...will be strictly held and limited to the facts disclosed in discovery, in her presentation of evidence on fault grounds."

II. FAULT

As recited on the introductory page of this Decree, Ms. Merrill asserted three fault grounds against Mr. Merrill. Ms. Merrill joined and served Kylie DeLauren, as required by RSA 458:11.

In order to sustain an action of adultery, Ms. Merrill had to prove, at least circumstantially, that the relationship between Mr. Merrill and Ms. De Lauren included sexual intercourse at a time when this unfaithful behavior constituted the primary cause of the breakdown of the marriage. *Yergeau v. Yergeau*, 132 N.H. 659 (1990); 3 *New Hampshire Practice*, Douglas, *Family Law*, 3d Ed., §13.20.

Sexual infidelity occurring after separation is generally not "adultery" as grounds for divorce. *Murano v. Murano*, 122 N.H. 223 (1982). However, sexual infidelity committed after the parties' separation can constitute "adultery," as grounds for divorce, "...when there still existed the possibility of reconciliation, but for the husband's behavior." 3 *New Hampshire Practice*, Douglas, *Family Law, supra*, at pg. 397.

In *Yergeau v. Yergeau, supra*, at 662, The New Hampshire Supreme Court stated that where there were two or more potential causes for "primary causation," the Court's obligation to find primary cause can "...never be discharged by mechanically determining which occurred first in time." The Supreme Court further stated that a period of separation is "...strong evidence of irremediable breakdown...," even in the face of one party's desire to continue the marriage. *Yergeau v. Yergeau, supra*, at 662.

"It is likewise true that the facts in any given case may indicate that the primary cause of the breakdown was incompatibility manifested by separation occurring prior to any infidelity..." Supra. However, the New Hampshire Supreme Court went on to say: "But it is equally within the ambit of factual possibility in such a case that 'the desire of one spouse to continue the marriage is evidence of a reasonable possibility of reconciliation, ..., which is only eliminated by the other spouse's subsequent fault.'" *Yergeau v. Yergeau, supra.*

Thus, this fault issue does not lend itself to simple or mechanical analysis. Chronology is factually important, but not controlling. It is important to find what the parties might have been thinking and feeling. It is very important to find what they were communicating to one another. Of course, it is important to place thoughts, feelings, and communications in chronological context. The Court's analysis must consider what was going on with both parties, as they struggled with the difficulties and ultimate demise of their marriage.

As *Yergeau v. Yergeau* also reminds us, even if I find that Mr. Merrill's unfaithful, sexual behavior with Ms. De Lauren was the primary cause of the breakdown of the marriage, I cannot consider it in evaluating Ms. Merrill's claim for alimony or a disproportional allocation of assets and debts unless Ms. Merrill also established that the adulterous behavior "caused substantial physical or mental pain and suffering...or resulted in substantial economic loss to the marital estate..." RSA 458:16-a, II (I)(1) and RSA 458:19, IV. *Yergeau v. Yergeau, supra* at 663. The Court, in *Yergeau v. Yergeau*, went on to say: "Substantial pain and suffering...requires proof of more than the emotional dislocation and stress that any injured party can be expected to feel at such a time." *Supra*, at 663.

Under New Hampshire law, the ground of extreme cruelty must be based on proof of direct bodily injury, actual or threatened. A single act is typically not enough. *Tibbetts v. Tibbetts*, 109 N.H. 239 (1968). It can be based on the course of conduct and most often is. Several instances of such conduct may be sufficient. It is a mixed determination of law and fact. 3 *NH Practice, Family Law*, 3d Ed., Douglas, at Section 13.21.

The infliction of mere mental pain, however seriously it might injure health or endanger reason, is not enough for a finding of extreme cruelty. *Guy & Guy*, 158 N.H. 411, 412 (2009).

Regarding treatment as to seriously injure health or endanger reason, proof by expert testimony is not required. *Gronvaldt & Gronvaldt*, 150 N.H. 551 (2004). However, the party asserting this fault ground has to prove the associated facts. In order for this fault ground to be established, the injury or endangerment has to be "serious." *Guy & Guy, supra*, at pg. 413.

"Any behavior of one party which affects the other physically or mentally is treatment within the meaning of this statute. It does not matter whether the conduct was directed toward the innocent spouse, or whether the guilty spouse engaged in conduct with malevolent intent." Id. At 609 to 610.

While the statute does not require proof of conduct that would have affected an average or reasonable person, it does require proof that the health or reason of the complaining spouse was actually affected. See both *Gronvaldt & Gronvaldt* and *Guy & Guy*, as set out above.

Just feeling angry, upset, and distraught is insufficient as a matter of law. *Guy & Guy*, at 413, 414.

As reflected on the last page of Section 1 above, Mr. Merrill had sought to dismiss Ms. Merrill's fault claims on the basis of inadequate related factual allegations and inadequate support of disclosures in discovery. On 5/15/19, I denied Mr. Merrill's Motion to Dismiss. However, I also ordered that, in light of her inadequate disclosures in discovery up to that point, Ms. Merrill would be strictly held and limited to the facts disclosed in discovery in her presentation of evidence on fault grounds. In that regard, counsel for Mr. Merrill had propounded a third set of interrogatories on 4/26/19, which also included a request for the production of all documents, including "notes" and memos, relating to her anticipated fault testimony. On 5/15/19, Ms. Merrill produced over 15 pages of very detailed information, relating to her fault claims, spanning many years, including up to 7 years before the parties were ever married in 2005.

In accordance with my Order of 5/15/19, the fault testimony of Ms. Merrill was carefully compared and limited to her detailed disclosures made on 5/15/19. During Ms. Merrill's direct testimony on 10/24/19, she got to an incident, allegedly occurring in 2015; and she said that she did not remember what her husband had said about getting a video game for their son, Dustin, in 2015. When Ms. Merrill said that, I asked her from the bench how she could have such a detailed memory of much older events on 5/15/19, when she filed her third set of answers to interrogatories, but then not remember an included event five months later? Ms. Merrill answered as follows:

"...I kept a diary...I recalled everything from the diary..."

Ms. Merrill added that she was exhausted from her testimonial experience that morning.

After a routine morning break, Ms. Merrill testified that she didn't really keep a "diary." Ms. Merrill said instead that over the years, when things happened, she made a "compilation of notes," contemporaneously with the events recorded therein. She said she started taking notes in 1998. Later in her testimony she said she did not start taking notes until 2010. Ms. Merrill added that the compilation of notes were strewn all over her house, but she still had them.

It was undisputed that Ms. Merrill did not produce her "diary" or the "compilation of notes" in discovery, with her third set of answers or otherwise.

Counsel for Mr. Merrill moved to strike her fault grounds in their entirety. Counsel for Ms. Merrill argued gallantly that his client's fault testimony was also based on her memory, old photos, old text messages, and other documents; some of which were in evidence or at least produced in discovery.

I declined to strike her fault grounds in their entirety, but I did strike her fault testimony from 2010 to the present. Not producing her notes was probably not premeditated, but it was extremely prejudicial to Mr. Merrill and his counsel.

Regarding the fault claim of adultery, the only pertinent evidence offered by Ms. Merrill at trial was the testimony of the Co-Respondent, who said that she and Mr. Merrill had not had sexual intercourse until late August or early September of 2017. Mr. Merrill's testimony was very similar. The Divorce Petition was filed on 6/19/17, and Mr. Merrill is not subject to the *Ross v. Ross*, 169 N.H. 299 (2016) innocence requirements, as he has not filed any request for a fault based divorce.

Additionally, even though it is undisputed that the parties had physically and emotionally separated approximately a dozen times over their 12 year marriage, or perhaps because of that, I find

that in 2017, it was profoundly unlikely that they were going to reconcile again. Both parties agreed in their testimony that their marriage by that point had at least been battered and badly damaged over the years.

Thus, Ms. Merrill's fault claim of adultery is dismissed. I also note that on the eighth day of trial, in the context of a renewed oral motion to dismiss all fault grounds, counsel for Ms. Merrill also conceded that he and his client had not proven adultery.

Even while Ms. Merrill claimed in her 3/30/18 Motion, found at Court Doc. #50, seeking to clarify and specify her adultery claim, that Mr. Merrill's 2017 "affair" caused the breakdown of their marriage; Ms. Merrill otherwise testified at the Final Divorce Hearing that Mr. Merrill had been physically and verbally abusive to her since before the marriage and that he had abused steroids, drugs, and alcohol for years.

While the vast majority of Ms. Merrill's fault testimony was stricken, her testimony about an incident, allegedly occurring in April 2005 survived the Motion to Strike. Ms. Merrill said that in 2005 she wanted to celebrate her new pregnancy, but Mr. Merrill was angry and pushed her down. Ms. Merrill alleged that Mr. Merrill then said: "I wish I never got you pregnant." Ms. Merrill said Mr. Merrill also feigned a punch to her stomach. Ms. Merrill testified that her husband calmed down, apologized, and she went on in the marriage.

Mr. Merrill denied most of these alleged events in 2005. He testified and/or offered through counsel that he was overjoyed with the news of the pregnancy. He added emphatically that he would never strike his wife, especially his pregnant wife in the stomach or pretend that he was about to do so. Mr. Merrill testified or offered that he wanted to celebrate with his wife, but when he got home, he saw that Ms. Merrill was drinking wine and was drunk. Mr. Merrill became upset that she was drinking wine with a new pregnancy. Mr. Merrill asked his wife why she was drinking, and added that Ms. Merrill did not like that question. Mr. Merrill then said something to the effect of: "Maybe we should have discussed this further."

Ms. Merrill later offered that she was not drinking wine and was not drunk.

While I struck Ms. Merrill's testimony with respect to all the subsequent alleged incidents and events following that April 2005 event, I specifically did not strike her remaining fault claims, and I did not strike the related exhibits, which had been admitted into evidence, finding that at least to some extent that the exhibits could stand on their own.

Mr. Merrill's Exhibit 49 illustrated the dismissal on 2/23/11 of a 2011 Domestic Violence Petition, brought against him by Ms. Merrill. The Court found after receiving evidence that Ms. Merrill failed to sustain her burden of proof. Exhibit 50 reflected that in an apparently related criminal complaint against Mr. Merrill was also dismissed.

Exhibits 52, 53, and 54 chronicled the dismissal of criminal charges and a Domestic Violence Restraining Order, which apparently arose from events, allegedly occurring on 8/24/13.

Exhibit 71 evidenced the 12/28/10 dismissal of a 2010 Domestic Violence Petition, filed against Mr. Merrill by Ms. Merrill. The Court found after trial that Ms. Merrill had not met her burden of proof. Exhibit 70 also demonstrated that on 2/23/11, the 2011 Domestic Violence Petition was dismissed.

None of those exhibits supported Ms. Merrill's burden of proof of either of her two remaining fault grounds, particularly in the face of the surviving testimony of Mr. Merrill that he has never been physically aggressive towards his wife and that he had only defended himself against her aggression.

At Ms. Merrill's exhibit MM, I carefully reviewed two color photographs of Ms. Merrill's face, apparently taken by a police officer on 8/24/13. One photo illustrated a cut on the inside of the right side of her mouth or lip. The other illustrated her red face. I saw no specific injuries on her face, and Ms. Merrill had otherwise testified that she had struggled for years with her skin and complexion. I could not otherwise infer from those photographs why her face was red.

Mr. Merrill's prior testimony about the events of 8/24/13 were not stricken. He said the parties had been separated for some time. They went out to eat. Mr. Merrill said Ms. Merrill admitted to a sexual affair with Jon Dimauro, and Mr. Merrill became very upset. They argued. Mr. Merrill was driving, and Ms. Merrill grabbed the steering wheel, nearly causing a motor vehicle accident. When Mr. Merrill tried to correct her pulling on the steering wheel, Mr. Merrill testified that Ms. Merrill hit her head/face on the glass of the passenger side door. Mr. Merrill said Ms. Merrill got out and threw her phone at him. This cummulative evidence did not support either of Ms. Merrill's two remaining asserted grounds of fault.

As to the alleged steroid, drug, and alcohol abuse by Mr. Merrill, the GAL had effectively dismissed those allegations as having no bearing on the parties' respective current abilities to provide safe and loving care for Dustin. In that regard, attention is directed to Section III.

Ms. Merrill testified that in 2007, Mr. Merrill came home late to a steak dinner. He was drunk and had chunks of cocaine on his nose. She said that she knew what those white chunks were because she had taken cocaine, but she stopped using cocaine when Dustin was born. Ms. Merrill added that she continued to smoke "weed." Ms. Merrill said that Mr. Merrill had admitted to cocaine use in 2007. He was an "excessive pot smoker." Mr. Merrill later denied that the 2007 event ever occurred.

As to the steroid accusation, Mr. Merrill said that he used steroids before the marriage and in his 20's. He lifted a lot of weights and experimented. Mr. Merrill said that he has not used steroids since the beginning of the marriage.

As to the other drugs, Mr. Merrill testified that he used marijuana when he was younger.

I effectively adopt the GAL's finding that the parties' historical use of drugs, alcohol, and steroids is not a current parenting concern. I also find that even excessive use of drugs and/or steroids is not a standalone grounds for a fault divorce. Drug and steroid use clearly does not support Ms. Merrill's fault claim of extreme cruelty. Even without deciding which of these two good people is telling the truth about usage, but assuming for the moment that it is Ms. Merrill who is telling the truth; then as to treatment as to seriously injure health or endanger reason, Ms. Merrill did not testify or offer documentary evidence about any actual related "serious" injury or endangerment to her. Ms. Merrill was certainly emotional. She felt wronged and "abandoned", but that is not sufficient. There is no resulting need, therefore, for me to find whether Ms. Merrill is or is not an "innocent spouse," which Mr. Merrill claimed she was not.

Thus, I find and conclude that Ms. Merrill failed to meet her burden of proof on any of her fault claims and the remaining fault claims of extreme cruelty and treatment as to seriously endanger and injure are dismissed. The parties shall be divorced on the basis of irreconcilable differences.

III. PARENTAL RIGHTS AND RESPONSIBILITIES

The GAL submitted three reports, and his testimony during the Divorce Hearing consumed the entire first day of trial. The GAL is a very experienced GAL, and he appeared to conduct a very thorough investigation, including interviewing Dustin at least five times. The GAL investigated allegations of drug, alcohol, and steroid abuse. He investigated old claims of domestic violence against Mr. Merrill. Regarding the latter, he simply put that over several years from 2010 to 2015, numerous domestic violence incidents were reported to have occurred; but there had never been a finding or an adjudication of abuse, civil or criminal against Mr. Merrill. The Salem Police Department had twice refused to even charge him.

As to substance abuse, Mr. Merrill subjected himself to an impressive array of tests and evaluations over years, and there was never a positive test result for drug or steroid use. The last negative test occurred on 1/18/19.

Ms. Merrill underwent hair follicle drug tests as well in 2018. Both of her tests were negative.

The GAL suggested the parties historically may have made some bad choices regarding drugs and alcohol; but, for the GAL, substance abuse was no longer an issue impacting the parties' ability to safely parent Dustin.

Otherwise, the GAL treaded very softly and assiduously tried to avoid favoring one parent over another. Not so ironically, treading softly was also Dustin's approach in this case, apparently in order to carefully avoid making a choice between his much cherished mother and father. The GAL found Dustin was probably mature enough to make such a choice, but Dustin simply did not want to. Dustin loves and is bonded to both parents. Dustin thinks they are "awesome." Dustin does not want to change the existing parenting schedule, with the possible exception of some "tweaks," one of which would be to let him sleep a little longer on Sunday mornings. The GAL found the parties to be poor co-parenting communicators in at least the last 12 months. He, nevertheless, recommended joint decision-making, in significant part because he knew that the parties had previously demonstrated that capability.

The GAL also found Dustin's schedule to be very full, with school, basketball, and living in both Hampton Beach with his mom and Salem with his dad. I inferred that the GAL felt that the hectic schedule wears Dustin out at times. However, overall, the GAL found Dustin to be "thriving" in school and sports. More importantly, the GAL found Dustin to be a talented, smart, thoughtful, and empathetic young man; who likes school, teachers, classes, and classmates. Dustin does not get in trouble. The GAL credits Dustin's parents for raising this remarkable young man. So do I.

The GAL did express concern about Dustin's parents doing some lobbying with Dustin about where he will go to high school, Winnacunnet in Hampton where his mom lives, or Salem High School where his father lives. The GAL reported that Dustin consistently had expressed to the GAL a preference for Salem, where he has all his friends and familiar supports. However, more recently, apparently having figured out that school choice may be too closely connected to choosing one parent over another, Dustin's responses about where he wants to go to school became more "nuanced."

Notwithstanding Dustin's more recent cautious verbal signals, the GAL continued to feel that Dustin's best interests are served by his continuing to go to school in Salem and that they would be served by him attending high school at Salem High School. The GAL relied on Dustin's previously consistent expressions of that preference. The GAL also relied on Dustin's success in that Salem environment. The GAL reported and testified that Dustin is "vested" in the Salem community, schools, and people.

While Mr. Merrill was always very devoted to and involved in his son's activities, sports, and events; it is undisputed that Ms. Merrill was always Dustin's primary care provider prior to the parties' 2017 separation. The GAL found Dustin has two good parents, who have both evolved into assuming primary responsibility roles for Dustin when he is in their care. Since RSA 461-A is forward looking legislation, void of even any reference to historical parenting roles, the historical status of Ms. Merrill as a primary care provider for Dustin is at best marginalized.

The GAL was concerned about all the time Dustin spends in a car, moving between the homes of his parents during a typical busy school week. The GAL implied some minor adjustments might make all of that easier for Dustin, like giving him more time with his mom on her every other weekend and giving more time to his dad during the school week. However, the GAL retained his laser focus on what this mature almost 14 year old wants and needs; and that is approximately equal time with his parents. The GAL, presumably in deference to RSA 461-A:18 as amended, did not recommend a specific parenting schedule. I had no problem, however, inferring that the GAL felt strongly that some form of sharing residential responsibility continued to be best for Dustin. The GAL concluded that Dustin needs some more time to rest or even sleep. But what he needs most is to have plenty of time with both of his parents.

The GAL also alluded to what the parents' very different environments offered to Dustin's growth and happiness as a young man. Dustin's father has a horse farm with a half-court basketball gym in the garage. Dustin's mom has the ocean and the allure to a teenage boy of the hustle and bustle of Hampton Beach in the summer time.

I inferred from the GAL's testimony and his three reports that he is concerned about school tardiness on his dad's time and school absenteeism on his mom's time. The GAL was also very concerned about unilateral decision making by both parents: Ms. Merrill regarding medical and dental appointments and Mr. Merrill with respect to basketball signups. The GAL was bothered by Ms. Merrill's recent lack of response to Mr. Merrill's efforts to co-parent electronically. The GAL did not like the degree, to which the parties each have involved Dustin in this proceeding. However, in the end, the GAL returned to the hope and implied recommendation that Dustin's parents come together to give Dustin what he wants and deserves: approximately equal time with two equally qualified, loving and deserving parents.

Despite their differences, discomfort with one another, and distance between their homes; the documentary and testimonial evidence offered by the parents did not move me off the early sense that I had from the GAL that Dustin has two very good parents; and what Dustin wants and deserves is approximately equal time with both.

Then, on the seventh day of the eight day trial, Ms. Merrill, to her great credit, testified that she was "torn" about continuing to even ask that Dustin go to high school in Hampton. "I don't want to do that to him...to lose his friends or teammates...I worry about his grades..., but I want what is best for him...I don't want to take him from his friends and teams..."

Then, on the eighth and final day of trial, Ms. Merrill went a little further. When asked on cross if she could accept in the name of what is best for Dustin, a school year schedule which placed Dustin entirely with his father in Salem during the school week, but with more time with her on every other weekend? Ms. Merrill testified that she would consider such a school year schedule. However, she quickly added that her every other weekend would have to begin after school on Fridays and run until Monday mornings, when she would drive Dustin back to school in Salem. Ms. Merrill also wanted another day, "here or there," to make her school year schedule more equal. In essence, Ms. Merrill testified that in the context discussed above, she "trusted" the judge to do what is best for Dustin.

I certainly have tried very hard to do what is best for Dustin, but Ms. Merrill may very well be upset for having trusted me. All that I can offer her now is that it is my sense that the parenting schedule that I am adopting herein was going to be utilized whether she chose to trust me or not.

Ms. Merrill's new work schedule at the front desk of Seacoast Sports Club in Seabrook is as follows:

Mondays 3:00 to 9:00. Tuesdays 2:00 to 9:00. Wednesdays 3:00 to 9:00. Thursdays 1:00 to 9:00. Fridays 2:00 to 8:00.

Ms. Merrill also said she is trying to get the gym to add seven more hours to her current work schedule, without touching her weekends.

Obviously, during the school year, Dustin is in class all morning, Monday through Friday. To get her weekends free, Ms. Merrill works quite late every evening from Monday through Friday.

On the other hand, Mr. Merrill, as a self-employed excavating contractor, has a lot more flexibility, and he testified that he wraps his long work hours around times when he does not have responsibility for Dustin. For example, Mr. Merrill may work all day on Saturday and Sunday, when Dustin is in his mother's care. Mr. Merrill also testified, however, that he also cherishes his weekends with Dustin and that he did not want to give away any of it to Ms. Merrill. Mr. Merrill testified that with Dustin's hectic school and sport schedule Monday through Friday, there is very little time Monday through Friday to just enjoy one another and their common interests. On weekends, Mr. Merrill testified that he and Dustin like to go camping, go on ATV trips, go to horse pulls, go to basketball games or just do a little work around the farm.

Particularly at nearly 14 years of age, Dustin has a lot in common with his father, and I am disinclined, in the name of what is best for Dustin, to disturb his every other weekend with his father.

The school year parenting schedule, which places Dustin with his mother every other weekend from Friday after school until Monday morning, when she takes him to school, and which places Dustin with his father weekdays and every other weekend; is far from approximately equal. It gives Ms. Merrill "frequent and continuing" contact with Dustin, but it does not meet one of Dustin's preferred criteria of having approximately equal time with both parents.

Wanting to do what is best for Dustin, while also respecting his preference, I looked hard for more parenting time for Dustin with his mother. It was easy for me to order, for example, that the parties will alternate both February and April school vacations. It was easy for me to order that the parties will

equally share Dustin's December school vacation. Awarding Ms. Merrill any three day holidays, appended to her regular weekends, was also an easy call. However, the associated alternatives to grow Ms. Merrill's school year parenting time with Dustin otherwise became very difficult.

In the summer, the parties had already agreed that they would alternate the care of Dustin on a week on week off basis. That was before Ms. Merrill selflessly and courageously decided to give up her claim to most of Dustin's midweek time during the school year. Hampton Beach, where Ms. Merrill resides, is a magical place for teenagers in the summer. Summers also have to be incredibly busy for Mr. Merrill in his excavation business. Consequently, one of the ways that I became inclined to make the parties' year-long parenting schedules more equal was to flip their parenting schedules for eight weeks each summer. More specifically, for the eight weeks of summer, Dustin will be with his mother each Monday through Friday, plus every other weekend from Friday at noon until Monday at noon. For those eight weeks, Dustin will be with his father every other weekend from Friday at noon until Monday at noon.

Finding that these parenting schedules as adjusted better met Dustin's interests, I next charted those tentative schedules on a 28 day cycle. I could clearly see from that demonstrative exercise that even the parenting schedule as adjusted still did not come close to being approximately equal, which again was something that Dustin had told the GAL he wanted and something that I hoped to achieve.

Consequently, I considered awarding Ms. Merrill one midweek night each school week, thinking that ideally Dustin should not go all school year without seeing either parent for at least one day each week. What I found, however, was that on the basis of Ms. Merrill's current work schedule, there were no midweek evenings during the school year, when she was actually available for Dustin. Ms. Merrill is at work Monday through Thursday until 9:00 p.m. and until 8:00 p.m. on Fridays.

Then, it dawned on me why Ms. Merrill had no specific answer or proposal, when I encouraged Ms. Merrill from the bench to tell me specifically what her preferred parenting schedule would be during the school year, after she had bravely agreed that it was probably best for Dustin to go to high school in Salem. I realized there is simply no good answer. Ms. Merrill is currently unavailable for Dustin during the school year midweek.

Ms. Merrill's midweek unavailability is based, at least in some part, on decisions, which were made by her. For example, the parties disputed why Ms. Merrill ended up residing alone in Hampton Beach at their condominium. Ms. Merrill said it was Mr. Merrill who abandoned the marriage and put her out of her home and forced her to live full time at Hampton Beach. "I was kicked out of my home to go to Hampton...Our marriage was still intact....We bought a condo together in December of 2016...He left me in June 2017." Of course, Mr. Merrill saw things differently. He said the family had stretched its finances to the max and used all of their savings to buy a second home on the beach, which Lea very much wanted "...We could not afford it, but Lea said she would work. It was never supposed to be a year round home..." Mr. Merrill basically implied that after Lea started living at the condominium in order to work at the Beach, she just stopped coming home. He essentially agreed that was his wife's way of saying that they could not live together any more. By Memorial Day 2017, Mr. Merrill agreed and planned to file his divorce. Mr. Merrill also implied that the Hampton Beach purchase was a premeditated plan by Lea to leave him.

Once again, I don't have to resolve this factual dispute because on the seventh or eighth day of trial, on cross examination, counsel for Mr. Merrill essentially proposed to her that she sell the

condominium and then live back at The Farm in Salem. If she was willing to do that, the parties would be able to share residential responsibility for Dustin. She flatly refused for a host of reasons, some of which were good.

Ms. Merrill's evening work hours and associated school week unavailability are the product of her decision making. Certainly, those hours are better than the bartending hours, which she was getting prior to taking the health club job. However, neither is conducive to caring regularly for an almost 14 year old during the school year.

Ms. Merrill has never attempted to obtain training or certification in a profession, which profession might allow her to work better parenting hours or earn the same money for fewer hours.

This result of Dustin residing with his father for much more of the school year than his mother, is arguably inconsistent with Ms. Merrill's undisputed role as Dustin's historical primary care provider until 2017. However, as previously indicated, RSA 461-A does not recognize the importance of historical parenting roles, and Mr. Merrill has essentially been thrust into a much larger parenting role by Dustin's busy schedule, his aggressive participation in basketball, and his mother's choice to remain in Hampton Beach while Dustin goes to high school in Salem. For example, when Dustin wanted to participate in the Salem town travel team, which practices for several weeks in the fall on Wednesday and Thursday nights, it was Mr. Merrill who made that happen, including driving Dustin after practice on Wednesdays and Thursdays back to Hampton Beach for his mother. They would arrive in Hampton Beach as late as 9:45 or 10:00 p.m. Mr. Merrill also had his regular parenting time on Mondays and Tuesdays, which were also very busy.

As Mr. Merrill put it during his trial testimony:

"After the 2010 domestic violence case was dismissed, I put forth a great second effort with Dustin."

Again to her credit, Ms. Merrill acknowledged Mr. Merrill is a very good father: "Dustin loves his dad more than anything." Ms. Merrill appropriately added: "Dustin is my whole world."

The parenting schedules for the parties with Dustin, as set out on the attached and incorporated Final Parenting Plan, and as I attempted to describe herein, were significantly impacted by the distance between the homes of the parties of a very busy teenager. RSA 461-A:11, I(g). The current schedule was also significantly impacted by Ms. Merrill's current work schedule. RSA 461-A:11, I(h). Thus, changes in those circumstances, if any, could lead to a parenting modification on a "best interest" standard.

Regarding decision making authority for Dustin, Mr. Merrill requested sole decision making. Particularly based on my allocation of residential responsibility; I am not going to completely disenfranchise Ms. Merrill as a joint decision maker. It is statutorily presumed that joint decision making is in Dustin's best interests. RSA 461-A:5. There is no dispute that the parties are challenged communicators. But I agree with the GAL, that they can do better in that regard. It is undisputed that they used to be able to co-parent. In that regard, the parties need to immediately stop making unilateral decisions and then just "informing" the other party what had already been decided. Mr. Merrill is guilty of this with basketball. Ms. Merrill is guilty of this with doctor and dentist appointments. Consent needs to

be requested respectfully; and in the absence of agreement, no important decision can be made without compromise or resort to the courts.

Consequently, it more specifically ordered as follows:

1. The attached Parenting Plan is incorporated herein.

2. As the Parenting Plan states, the parties are awarded joint decision making authority. Neither party shall make important decisions for Dustin unilaterally. The failure of either party to communicate about important child related decisions and/or to refrain from making unilateral decisions, shall cause that parent to face the potential consequence of losing decision making authority.

3. Mr. Merrill is awarded legal residence of Dustin for school attendance purposes.

4. Regarding residential responsibility, during the school year, Dustin shall reside with his father in Salem from each Monday morning until each Friday afterschool and every other weekend. During the school year, Dustin will reside with his mother in Hampton Beach every other weekend from Friday after school until Monday morning, when she shall deliver Dustin to school in Salem.

5. The parties will alternate February and April school vacations and equally split each December school vacation. Ms. Merrill is awarded all three day weekends, which are appended to her regular every other weekend schedule, upon which she will deliver Dustin to school on Tuesday mornings.

6. For eight weeks each summer, these residential schedules will flip, as more specifically described within this section.

IV. MARITAL PROPERTY VALUES

To their credit, the parties stipulated to the values of three pieces of real estate:

$165,000.00 for 703 Ocean Boulevard, a condominium occupied by Ms. Merrill's mother, which I found elsewhere in this Decree not to be part of the marital estate;

$267,500.00 for Highland Avenue, the office building for Merrill & Son, Inc. in Salem;

$1,000,000.00 for the Shannon Trails Farm, 96 acres and a farmhouse plus barns and outbuildings owned by KEM Realty.

However, the parties disagreed as to the value of the GEM "sandpit" and the Hampton Beach condominium, occupied by Ms. Merrill at 943 Ocean Boulevard, No. 19.

Both parties utilized very experienced appraisers.

IV. (A.) 943 OCEAN BOULEVARD, NO. 19

This condominium unit has a view of the Atlantic Ocean from both its second and third levels. One of the other sides of the condominium looks at a large marsh. It is an end unit, with one less neighbor than most condominiums. It is part of the Saint Magnus Condominium Complex, which also consists of a pool and onsite parking. The building is well maintained. The unit in No. 19 consists of 1,676 square feet, including two "official" bedrooms and 1.5 baths.

Mr. Brooks did the appraisal for Mr. Merrill. His opinion of value was $450,000.00. Mr. Stanhope did the appraisal for Ms. Merrill. His opinion of value was $364,000.00.

The property was purchased on 12/16/16 for $355,000.00. Its current taxed assessed value is $339,600.00.

In anticipation of the purchase, the property was appraised on 9/8/16 for the mortgage holding bank by Langley Appraisals in the amount of $360,000.00.

It was undisputed that after its purchase and before the parties' separation, substantive renovations were made to the condominium at 943 Ocean Boulevard. In his trial testimony, Mr. Merrill focused on those improvements: The AC was upgraded, and Mr. Merrill described the AC renovations as including central air conditioning, with an outside unit that required landscaping. Mr. Merrill said this heat/AC unit cost $8,650.00. Electrical work was done costing $1,050.00. Sliding window doors were installed on an upper level with a crane, which costs $13,000.00.

It was also undisputed that after the parties' separation and the divorce was filed, the renovations came to a screeching halt and a lot was left undone. Ms. Merrill's trial testimony focused on those flaws, primarily located on walls and floors, which included:

There was no carpeting on stairways. Walls were patched where the old AC units were removed, but the subject sheetrock was left unfinished. Carpet was removed from several other areas.

The appraisers agreed that the real estate market in the Seacoast New Hampshire area, particularly for ocean proximity properties, has continued to appreciate since 2016. Interest rates remain low. Demand remains high, and the inventory of available properties is small and moves quickly.

My initial intuitive reaction to all of this undisputed evidence was:

1. How could this property, with significant improvements made in this market, barely increase in value since the time of the bank's appraisal?

2. How could this property, with so many interior amenities unfinished, possibly have grown in value by $ 90,000.00 in just two-and-a-half years?

With those two questions in mind, I quickly observed from the reports and testimony of the two appraisers, that the most significant difference in their appraised values were largely based on their selection of comparable sales:

On behalf of Mr. Merrill, Mr. Brooks selected more recent sales, which carried much higher prices. The sale dates of Mr. Brooks' four comparable sales were 4/27/18, 6/18/18, 6/28/18, and 8/24/18. The associated sale prices ranged from $425,000.00 to $490,000.00.

On behalf of Ms. Merrill, Mr. Stanhope's comparable sales were modestly older. All three of his comparable sales were in March 2018, and their prices ranged from $360,000.00 to $370,000.00.

The number of bedrooms in the condominium units sold also emerged as a probable, partial explanation for the large disparity in value between these two experienced appraisers. Of Mr. Brooks' four comparable sales, three of the units had three bedrooms and one had four. One of his three bedroom comparable sales was in the same St. Magnus complex as the subject property at 943 Ocean Boulevard. Mr. Brooks' unit No. 18, which he used as a comparable sale, was listed by him as having three bedrooms and one and a half baths. It had been substantially renovated and upgraded. Unit No. 18 also consisted of 1,676 square feet, exactly the same as the subject unit at No. 19. No. 18 also had a very similar open concept and decks similar to Unit 19. On 6/18/18, unit No. 18 sold for $490,000.00.

Mr. Stanhope, on behalf of Ms. Merrill, did not even use this unit No. 18 at 943 Ocean Boulevard as a comparable sale. Mr. Stanhope testified that he saw its listing, but specifically excluded it because he said it had four bedrooms, which appears to have been an error.

Mr. Stanhope testified that the market values of ocean proximity units, with two or three bedrooms, is remarkably lower than such condominiums with four or more bedrooms. He described those two bedroom groupings as being a completely separate submarket, which explained to him why two of his three comparable sales had three bedrooms and the third had two bedrooms. Mr. Stanhope explained that prospective owners of ocean proximity properties expect family and friends to visit; and thus, they place sleeping space at a premium.

As to the factual dispute as to whether unit No. 18 at 943 Ocean Boulevard had three or four bedrooms, Mr. Stanhope acknowledged on cross that this unit No. 18 was listed as having three bedrooms in both the multiple listing service and its property tax assessment. I find Mr. Stanhope missed an important opportunity to use this remarkably similar three bedroom unit as a comparable sale.

To make matters slightly more complex, there was also a lot of discussion about how much sleeping space existed in the subject unit in No. 19 at 943 Ocean Boulevard. It was undisputed there were two bedrooms on the first level. There were no other "legal" bedrooms, with a closet; as required by local zoning. Realtors are legally bound to conduct their appraisals on properties "legal use."

Nevertheless, it is undisputed that Ms. Merrill has been using the third level as her bedroom.

Mr. Stanhope never went inside the subject unit at No. 19 in 943 Ocean Boulevard. His associate did, and she made a floor plan, in which she commented on the third level as follows: "...family room; bedroom; no closet."

Mr. Stanhope, who never saw the inside of the subject unit, said the closet had shelving, fit for a family room.

Trying to think like a buyer and not a building inspector, I asked Mr. Stanhope from the bench what a buyer is thinking about while looking at a third level space, which is being used as a bedroom with an ocean view?

To his credit, Mr. Stanhope candidly stated: "On ocean proximity properties, anything you can sleep in is a bedroom."

Whether or not it is allowed under the law, I have never felt comfortable averaging appraised values for a property, particularly when the two values are so far apart. The parties are free to do so, but I typically feel compelled under those circumstances to utilize the opinion of one expert or the other. In this case, for all the reasons as set out above, I find that Mr. Brooks' opinion of value was more reliable.

Consequently, I find that the fair market value of 943 Ocean Boulevard, Unit 19 is $450,000.00.

IV. (B.) GEM SANDPIT

This property consists of an 18.10 acre parcel of land off Shannon Road in Salem and Atkinson, which has been part of the Merrill & Son, Inc. operations since 1971. Originally, it was a gravel pit, from which the excavating company could essentially manufacture its own aggregates. Eventually, the "gravel" got "mined off", and the pit became a holding or staging area for aggregates, either coming from GEM's jobs or emanating from other sources and used on the GEM jobs. The sandpit sells approximately $2,000,000.00 worth of product each year.

The parcel has almost 3,000 feet of frontage on Shannon Road, which defines one side of its half-moon configuration. The former Salem Dump, now a landfill and transfer station, surrounded by barbed wire fence, is directly across the street. The parcel abuts a portion of the Atkinson Country Club, which features its septic lagoon, which can become quite odiferous, particularly on hot summer days.

The appraiser for Mr. Merrill, Mr. Brooks, felt the sandpits highest and best use was its current use. George D. Merrill testified at trial that the sandpit was at GEM's "heart and soul." As such, Mr. Brooks looked at comparable sales of raw commercial industrial land, which included an active gravel pit. His opinion of fair market value was $285,000.00.

On the other hand, the appraiser for Ms. Merrill, Mr. Stanhope, believed that its highest and best use was to be developed into a 10 lot residential development, which lots would sell at $165,000.00 each. After deducting development and related costs, Mr. Stanhope offered the opinion that the fair market value of this property is $1,060,000.00.

Mr. Stanhope, for whom I have developed the utmost respect, made a number of assumptions about this development. He did so without expending a lot of his client's money for engineering, surveying, environmental impact studies, investigation into land reclamation costs, or soils analysis. In his report and trial testimony, Mr. Stanhope specifically acknowledged that it is his standard appraisal practice with these types of properties to assume no contaminates; assume compliance with local, state, and federal laws; assume licensing can be obtained; and assume an engineering study would find his plan plausible. Mr. Stanhope acknowledged taking no responsibility for whatever an engineering study might come up with.

On cross, it became clear that there were legitimate questions about whether this odd shaped parcel could accommodate 10 lots. It was also a nonfactor for Mr. Stanhope that to pursue his highest and best use development, GEM would have to close the sandpit and suffer a related $2,000,000.00 loss in revenue.

Mr. Merrill testified that at his cost of $8.00 per cubic yard, it would cost Merrill & Son, Inc. approximately 1.6 million dollars just to remove the largest mounded stock pile of loam on the sandpit property. That would be one necessary precursor to any development. There are several other smaller mounds or stock piles of material, which would also have to be removed.

With all of the assumptions made and with the absence of any real investigative data, I have doubts about the reliability of Mr. Stanhope's appraisal on the sandpit. I find, therefore, that the fair market value of the sandpit is $285,000.00.

IV. (C.) MERRILL & SON, INC. (GEM)

GEM is an excavating company, which was started in 1953 by Jon Merrill's grandfather, George E. Merrill. The company and its ownership and operation later passed to Jon Merrill's father, George D. Merrill. At least by 2003, Jon Merrill and his brother, Gary Merrill, had each acquired 49 shares of GEM or 24.5%.

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.

Then, in 2012, Jon and Gary Merrill each received into separate irrevocable trusts, another 41 shares or 20.5% interest of GEM stock. Jon Merrill's additional 41 shares went into the JGM 2012 Trust, of which Jon Merrill is both a trustee and beneficiary. These 20.5% interests were gifted to Jon and Gary Merrill's trust by their father, George D. Merrill. I agree with Mr. Maloney, the CPA forensic business evaluator used by Lea Merrill ; that the GEM stock, held in that trust, is a marital asset. The JGM 2012 Trust is reported for tax purposes as a grantor trust "...i.e. owned by Jonathan Merrill. Therefore, Jonathan Merrill reports the income for 45% of the company."

The CPA forensic business evaluator, used by Jon Merrill, Mr. Losapio, attempted to persuade me to ignore the 20.5% interest held in trust due to "...restrictions placed on principal distribution." I found both the attempt and the related explanation to be comparatively weak, and they did little at the very outset of Mr. Losapio's presentation to enhance his reliability in general.

In its own 12/31/18 financial statements, Merrill & Son, Inc. reported total assets of $5,609,804.00 and net sales of $7,072,237.00. In 2018, Jon and Gary Merrill both took "salaries" of approximately $188,088.00.

It is undisputed, however, that for years, while GEM has been able to pay its bills and expenses and the salaries of its officers, GEM has not been able to also make further distributions or pay bonuses to its owners/managers. It is also undisputed that the bank, carrying GEM's $500,000.00 line of credit, has not been happy with the company's profitability. The bank effectively required George D. Merrill to infuse $325,857.45 of its own money into GEM in 2012. Jon and Gary Merrill were recently denied a separate loan at that bank to buy an expensive new truck for the company. Over 50% of GEM's work

and gross receipts come from its single biggest customer, which in my view is good news for cash flow, but also carries a large risk factor.

Both Jon and Gary Merrill work extremely hard for Merrill & 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.

Mr. Losapio, Jon Merrill's expert, acknowledged GEM's total assets as of 12/31/18, to be $5,609,804.00. He also apparently accepted that GEM's gross receipts for 2018 were $7,072,237.00.

It appears that the valuation methods, used by Mr. Losapio, were the income approach or "capitalization of earnings method" and the asset approach or "adjusted book value." Mr. Losapio found and reported that a 100% interest in GEM stock had a fair market value of $1,678,927.00; according to his income approach, and $1,654,259.00, according to his adjusted book value method. It was very difficult for me, however, to ascertain from his narrative report how Mr. Losapio reconciled or weighted those two different results. His Schedule 13 numerically suggested to me that he may have used only the $1,678,927.00 from his income approach and discarded his asset value, perhaps because they were so close.

Mr. Losapio next imposed on this $1,678,927.00 value a 10% discount for Jon Merrill's minority interest and another 27.5% discount for lack of marketability.

After those two discounts, Mr. Losapio calculated that 100% of the GEM stock had a value of $1,095,500.00. Mr. Losapio next offered that Jon Merrill's 24.5% in GEM was worth $268,500.00. He had calculated elsewhere that, if the Court was to give value to the 20.5% interest of GEM stock held in trust for Mr. Merrill, it would add $224,680.00 to his opinion of value of the 45% interest in GEM, deriving a total value for the GEM stock in the marital estate of $493,180.00.

Mr. Maloney, as Lea Merrill's expert, also utilized both the income approach and the asset approach. According to his income approach, 100% of the GEM stock had a fair market value of $4,622,476.00 before its reduction for long term debt or the imposition of any discounts. Mr. Maloney testified that he eventually discarded his income approach because, in an excavation business, the value of equipment is "critical" and because his opinion of value, according to his asset approach, was higher at $5,006,829.00. After subtracting for long term debt, but prior to the imposition of discounts, Mr. Maloney's asset approach value for all the GEM stock was $2,369,027.00; which he testified was quite close, in his profession, to Mr. Losapio's comparable value of $1,678,927.00. The big differences thereafter were discounts. Mr. Maloney imposed a single discount of 10% for lack of control. Mr. Losapio also discounted another 27.5% of value for lack of marketability.

Mr. Maloney testified that, in his opinion, Mr. Losapio's using in this case a marketability discount, in addition to a lack of control discount, was double dipping. Mr. Maloney said he had already accounted for those related factors in his analysis, without taking such a deep additional discount.

Mr. Maloney's final opinion of value of Mr. Merrill's 45% interest in GEM was $959,000.00.

While I ultimately was more persuaded by Mr. Maloney's more pragmatic approach, more moderate discounts, his report, and related testimony; I realized his asset valuation approach also incorporated two real estate asset values, for pieces of property owned by GEM, which were inconsistent with the parties' stipulation of value in one case (37 Highland) and my findings in Section IV.

(B) in the other case (the sandpit). More specifically, the parties stipulated that 37 Highland, owned by GEM, had a fair market value of $267,500.00. Mr. Maloney used $280,000.00. I found the sandpit had a fair market value of 285,000.00. Mr. Maloney used Mr. Stanhope's appraised value of $1,060,000.00. Going to Mr. Maloney's Schedule 13, he utilized $1,340,000.00 for those two pieces of real estate. I reduced that figure to $552,500.00; which is the sum of $285,000.00 and $267,500.00.

Otherwise, I used Mr. Maloney's Schedule 13 asset approach numbers of $2,010,579.00 for total current assets; $1,500.00 due from officers; and $3,144,650.00 for equipment and autos. Those four numbers in my adjusted analysis totaled $5,709,229.00, as compared to Mr. Maloney's $6,495,229. Then, I reduced that figure, as Mr. Maloney had done, for a total current liabilities of $1,488,400.00, yielding an adjusted "total equity" figure of $4,220,829.00 [As an aside, I observed how close that number was to Mr. Maloney's discarded net income approach value of $4,662,476.00; prior to deducting for long term debt or the imposition of discounts.]

Then using Mr. Maloney's model, shown on Schedule 14, I took my $4,220,829.00 and subtracted long term debt of $2,637,802.00, leaving $1,583,027.00. From that figure, I deducted $158,303.00 for a 10% lack of control discount, leaving a total value of GEM stock in the amount of $1,424,724.00. I finally took Jon Merrill's 45% interest from that $1,424,724.00, leaving Jon Merrill's 45% interest in GEM valued at $641,125.80.

My Appendix B was prepared and attached to track the process I have attempted to describe above.

Thus, I find that the fair market value of Mr. Merrill's 45% interest in GEM stock is $641,125.80.

It is at least noteworthy that, after adding back value for the 20.5% interest, held in trust; Mr. Losapio's appraised value of Jon Merrill's 45% interest came to $493,180.00.

Mr. Merrill was respectfully critical during trial of Mr. Maloney's reducing the salaries of his brother and him, as well as adding back into revenue all $48,000.00, which GEM pays their father, George D. Merrill. First, those adjustments were part of Mr. Maloney's income approach to valuation, which he ended up not even utilizing. Next, the premise of Mr. Maloney's appraisal in general was that GEM was an ongoing business enterprise with rational management and with the goal of maximizing ownership value. Notwithstanding the fact that Jon, Gary, and George D. Merrill earn every penny, which they are paid; the income approach to valuation tries to normalize those numbers, in order to demonstrate to a perspective buyer what he or she might be expected to obtain from the company in the future. Mr. Maloney attempted to accomplish this by using figures derived from data at the New Hampshire Employment Security for the town of Salem.

Therefore, I see no inconsistency between Mr. Maloney's income model and the reality of how hard the Merrill men all work.

IV. (D.) KEM REALTY, INC.

KEM Realty, Inc. owns what all the parties described as "The Farm." KEM Realty, Inc. (KEM) also is a business, which operates that horse farm. The horse farm boards horses, owned by other persons. It conducts riding lessons, and many other equestrian activities. The Farm covers 96.5 acres,

over which it has many riding trails. The property has 600 feet frontage on Shannon Road. 90 acres of the property is actually located in Atkinson. The remaining acreage lies in Salem.

In addition to a single family home, The Farm also consists of at least one barn with 23 horse stalls. There is also an enclosed riding arena with another 23 stalls. The parties stipulated that the fair market value of The Farm property is $1,000,000.00. The parties could not agree on the business value of KEM.

While the land was acquired and business started by George E. Merrill in the 1950's, the business was not incorporated until 1964. In 1985, KEM elected to be taxed as a Subchapter S Corporation.

The letters, KEM, derived from the initials of Jon Merrill's grandmother, now deceased.

Jon Merrill and Gary Merrill both own 47.5 shares or 23.75% of KEM's stock. Their dad, George D. Merrill, still owns 105 shares or 52.5% of KEM's stock.

Jon Merrill received his 47.5 shares of KEM's stock in pieces:

Two shares were given by his grandfather in December 2006. Another 37 shares were gifted to Jon by his grandfather in 2007. The remaining 8.5 shares came to Jon in a gift from his grandfather's estate in 2008.

Jon, Lea, and Dustin moved into The Farm in 2009, and became much more involved in its daily operation and management until they separated in 2016/2017. Jon Merrill continues to reside there, as does Dustin, when he is in his father's care.

The parties' respective roles in the operation and management of the property during those years are factually disputed. Those disputed facts will be more fully discussed in Section VIII below on the Equitable Allocation of Marital Assets and Debts.

Notwithstanding KEM's ownership of what is literally a $1,000,000.00 property, Mr. Merrill's business appraiser, Mr. Losapio, gave an opinion of value of $70,000.00 for Jon Merrill's 23.75% interest.

Lea Merrill's business evaluator, Mr. Maloney, offered his opinion that Jon Merrill's 23.75% interest in KEM as a business entity has a fair market value of $190,000.00.

Once again, the major factor in the business valuation experts' divergent opinions was the application of discount rates to what otherwise would be the business value of KEM. Mr. Maloney used marketability and lack of control discounts of 15% and 10% respectively. Once again, it was difficult to follow Mr. Losapio's reported analysis. There was little narrative explanation, and the few attached schedules for KEM were hardly self-explanatory.

Mr. Losapio appears to have utilized a book value method evaluation and an adjusted book value method. For the latter his discounts were 30.60% for minority interest or lack of control and 35% for lack of marketability.

Mr. Losapio used the expression "going concern basis" interchangeably with his adjusted book value method, upon which method Mr. Losapio ultimately relied in arriving at his opinion of value of $70,000.00 for Jon Merrill's 23.75% interest in KEM.

The "going concern" concept was the primary basis of Mr. Maloney's critique of Mr. Losapio's opinion of value, which critique was closely connected to their use of very different discount rates. Mr. Maloney said the entire Losapio approach was misplaced because Mr. Maloney did not even regard KEM as a "business." Mr. Maloney characterized The Farm as a "residence," and the business "KEM" as a "hobby." Mr. Maloney testified that because Jon Merrill's family gathers the significant benefit of living on The Farm rent free; its value to the owner occupant is greater, and the associated discount rates should be correspondingly lower to reflect that value.

On cross, Mr. Maloney underscored his description of KEM as a mere "hobby" by stating that because KEM does not make a profit and typically has not made a profit, KEM does not pass the IRS "ongoing business" standard. Mr. Maloney said: "KEM is an incorporated residence...It is not a business...It is a hobby..." Mr. Maloney added the large discounts of the type utilized by Mr. Losapio are for operating businesses, which KEM was not.

In Mr. Losapio's Schedule 18, he acknowledged KEM's net income from operations were as follows: 2018 $3,353.00; 2017 $7,715.00; 2016(-$15,322.00); 2015 $199.00; 2014 $15,736.00; and in 2013 (-$39,266.00).

Mr. Maloney's Schedule 1 recognized very similar net income figures from operation of KEM:

2018 $3,354.00; 2017 $6,848.00; 2016 (-15,323.00); 2015 $199.00; 2014 $15,737.00.

Before he applied his deep discounts, Mr. Losapio Schedule 20 listed KEM's "total assets" as $1,108,508.00.

In Mr. Maloney's evaluation analysis of KEM, he utilized the net asset approach, explaining that KEM owned "significant fixed assets." In that regard, Mr. Maloney adopted The Farm's stipulated value of $1,000,000.00. Considering other machinery and equipment, Mr. Maloney listed KEM's "net equity" as $1,047,691.00, which was very close to Mr. Losapio's total asset value of $1,108,508.00.

For the reasons as set out above, Mr. Maloney used much lower discount rates of 10% for lack of control and 15% for lack of marketability in coming up with the value for Mr.Merrill's 23.75% interest in KEM in the amount of $190,000.00.

I find Mr. Maloney's analysis of business value to be much more persuasive; and therefore, I find the value of Jon Merrill's 23.75% interest in KEM to be $190,000.00.

IV. (E.) ASSETS NOT PART OF THE MARITAL ESTATE

1. Unit 302 at 703 Ocean Boulevard in Hampton Beach;

After Jon and Lea Merrill bought the Hampton Beach condominium on 12/16/16, it is undisputed that a deed was conveyed on 5/5/17 for the above captioned condominium at 703 Ocean Boulevard, to

Lea Merrill and her mother, Joyce Pinaud. A Corrective Deed was executed on 6/21/17, and Lea Merrill was again named as a grantee with her mother, as "joint tenants with rights of survivorship."

The Divorce Petition was filed by Mr. Merrill on 6/19/17. The Divorce Petition and Notice of the Pretrial Standing Non-Hypothecation Order were served on Lea Merrill on 7/31/17.

On 8/23/17, Joyce Pinaud and Lea Merrill conveyed Lea's record title interest in this condominium to Joyce Pinaud alone, for which Lea Merrill was found in contempt by Order of 5/17/18.

The case was transferred to the Family Division Complex Docket on 11/9/18. I have since received credible evidence that no marital funds were utilized by Lea Merrill to acquire an equitable interest in her mother's condominium at 703 Ocean Boulevard. Lea Merrill never attended a related closing. Lea Merrill did not know about her name being on the deed until around the time the Divorce Petition was filed. Mr. Merrill produced no other evidence that the condominium at 703 Ocean Boulevard should be characterized as a marital asset. It was Joyce Pinaud, who gave the parties $15,000.00 to help them with their earlier purchase of the condominium at 943 Ocean Boulevard.

While Ms. Pinaud may have signaled with her first two deeds her intent to leave the condominium at 703 Ocean Boulevard to her daughter, Lea, upon Ms. Pinaud's death; such an "expectation" does not rise to the level of a marital asset.

I also find that the following assets, owned by George D. Merrill, are not part of the marital estate:

2. 38 School Street, Salem;

3. 40 School Street, Salem;

4. 107 Bedde Hill Road, Fremont;

Also not in the marital estate are the following:

5. Two Belgium horses; (They have both died.)

6. Four thoroughbreds; (There was no evidence of these horses being owned by Mr. Merrill in the face of Mr. Merrill's denial as to ownership.)

7. Equestrian tack and equipment; (The best evidence is that all of this is owned by The Farm/KEM.)

IV. (F.) MISCELLANEOUS PROPERTY

The parties' assets and debts, their values established to my satisfaction, and the debts for which they have a legal obligation to repay are listed on Appendix A. Appendix A also attempts to demonstrate my equitable allocation between the parties of those assets and debts. Those equities are discussed in Section VIII below.

The 401(k) in the name of Mr. Merrill is offset by a small remaining debt. I am disinclined to recreate old marital transactions, as Ms. Merrill requested me to, in order to essentially account for the

original borrowing, where that money went, and then decide whether Ms. Merrill is entitled to some sort of credit.

New Hampshire law supports this Court's division of assets and debts, which exist at the time of divorce, typically as valued at the time of the divorce. *Holliday v. Holliday*, 139 N.H. 213 (1994) and *Hillebrand v. Hillebrand*, 130 N.H. 520 (1988) and *Sarvela & Sarvela*, 154 N.H. 426, 431 (2006).

Debts and assets, which no longer exist at the time of the divorce, are not available for division and distribution, and I have no obligation under the law to recreate and make equitable adjustments for old transactions.

Values for the items listed on Appendix A either came from the documentary evidence, submitted at trial, or the credible testimony of at least one party. I refuse to speculate as to the value of items, when I receive no such evidence.

The 2018 GMC Sierra pickup, listed as an asset of Lea Merrill, is actually in her father's name. I infer that it is in his name because Lea's father put up the money for its acquisition, after Lea put down the first nearly $11,000.00, which she took from the sale of her prior vehicle. Lea's father is serving essentially as her bank. Lea Merrill pays her father $450.00 a month, at least according to her Financial Affidavit. Lea Merrill correctly listed the vehicle as belonging to her, which of course makes it part of the marital estate.

Personal property, which Ms. Merrill may have wanted or requested in a proposed order, will remain in the possession of Mr. Merrill. I did not receive sufficient evidence to order a different result.

Ms. Merrill was essentially accused by Mr. Merrill of taking his jewelry without telling him, refusing to return it, and pretending that it never happened. He testified and essentially established a similar circumstance some years ago when the parties had separated and gotten back together. I find that prior circumstance is telling but insufficient, from which to find that Lea Merrill actually has possession of Mr. Merrill's jewelry.

Consequently, it is more specifically ordered as follows:

1. Ms. Merrill shall promptly deliver to Mr. Merrill his watch, bracelet, and diamond ring; if and when she finds them. If it is later determined that Ms. Merrill has had the jewelry described above, but did not return it to Mr. Merrill; perjury charges shall be considered along with appropriate enforcement orders.

2. The hot tub shall be promptly sold and the net proceeds of the sale equally divided.

V. MARITAL DEBT

As set out briefly in Section IV. (F.), I listed and allocated on Appendix A only the debt, for which I have received evidence, from which I can infer that a party to this divorce has a legal obligation of repayment. A moral obligation to recognize and pay back family helpfulness, for example, is not legally enforceable. *Harvey & Harvey*, 153 N.H. 425, 437 (2006).

The best example of the application of this doctrine to this case, is my finding here that Mr. Merrill's asserted debt of $9,000.00 to his brother, Gary; is not legally enforceable. There was no written evidence of Mr. Merrill's obligation to repay that money. Likewise, I have no documentary evidence of Ms. Merrill's legally enforceable obligation to repay either of her parents. On the other hand, I did see checks made payable to Mr. Merrill from his parents, carrying the "loan" notation. While a promissory note is sometimes required to satisfy the enforceability criteria, I am satisfied from the cancelled checks at Exhibit 41 that Mr. Merrill owes his father $40,000.00 and his mother $15,000.00.

I am also disinclined to include in any divorce analysis the legal fees owed by the parties to their divorce lawyer or lawyers. To do so effectively obligates the other party to partially subsidize those fees, without my having gone through a *Gosselin v. Gosselin*, 136 N.H. 350 (1992), process to determine the reasonableness of those fees.

VI. MOTION FOR CONTEMPT AND TO MODIFY OR CORRECT

Most of the activity raised by these motions derives from Temporary Orders, issued by Judge Stephen on 5/16/18. Starting with the child support ordered therein, Mr. Merrill was obligated to pay $2,155.00 a month. That was precisely the amount proposed by Mr. Merrill's counsel on his 4/30/18 Child Support Worksheet. That Child Support Worksheet also listed Mr. Merrill's income for child support purposes as $15,674.00 a month. Mr. Merrill's Financial Affidavit, dated 5/1/18, listed his base pay as $15,674.00 a month or $188,088.00 a year. Mr. Merrill's 2017 joint individual income tax return listed his 2017 wages and salary as $191,887.00. There was also approximately $125,000.00 of K-1 passive income, included on that 2017 tax return; but there was absolutely no indication in this file that Judge Stephen erroneously relied on the K-1 passive income in imposing Mr. Merrill's temporary child support obligation.

Clearly, *Woolsey & Woolsey*, 164 N.H. 301 (2012), does not allow passive income, which is unavailable to be used for the payment of child support, to be included in that child support calculation. Clearly, Stapleton & Stapleton, 159 N.H. 694, 697 (2010), allows me to correct clear error in prior orders in order to prevent injustice. Just as clearly to me, Judge Stephen committed no such error, and there is nothing to correct.

Next, Mr. Merrill appears to argue that it was an obvious error for Judge Stephen's Temporary Order of 5/16/18, to obligate Mr. Merrill to pay "all outstanding credit card debt incurred before the date of the filing of the Petition for Divorce."

I acknowledge Judge Stephen's Temporary Order did not identify the name of the credit cards or the amounts owed thereon. The test here, however, is not whether I would have issued that Temporary Order or any Temporary Order without also providing a narrative explanation. The test is whether Judge Stephen committed obvious error, which justice demands I correct. He did not.

By reviewing Exhibit RR, I have identified the old credit cards and the associated pre-filing balances and/or charges as follows:

1. Dick's credit card $404.99;

2. Bank of America credit card $6,755.20;

3. Home Depot credit card $64.94;

4. Merrimack Valley Credit Union credit card $4,553.93;

5. City Diamond credit card $1,812.17;

6. Visa Signature credit card $373.20;

Total $13,964.43

The parties' savings were all gone by the time of the divorce filing. All liquid assets of the parties were put into the Hampton Beach condominium purchase and renovation. Ms. Merrill was not working. Mr. Merrill's salary was approximately $190,000.00. Perhaps the provision, taken in the context of everything else Mr. Merrill was obligated to do, was harsh. Temporary Orders sometimes are. I am disinclined to correct or modify the Temporary Order of 5/16/18.

Moving to the Contempt Motions, and having just found that the Temporary Order of 5/16/18 is legally enforceable, I need to ask if Mr. Merrill had the financial ability to comply with all of its provisions, while still supporting himself and Dustin. Mr. Merrill was ordered to pay the following:

1. Child support of $2,155.00 a month;

2. Child support arrears of $250.00 a month;

3. Alimony of $500.00 a month;

4. Alimony arrears of $250.00 a month;

5. Mortgage, taxes, and insurance on 943 Ocean Boulevard totaling $1,858.00 a month;

6. Condo fees of $456.00;

7. Ms. Merrill's old truck payment of $947.00;

8. Health insurance and dental insurance totaling $710.00;

Total $7,126.00 a month

The 5/16/18 Temporary Order obligated Mr. Merrill to devote nearly 73% of his monthly net pay of $9,821.00 a month to what was tantamount to the support of his wife. On top of this $7,126.00 each month, and in addition to trying to support himself and Dustin, including all of Dustin's extracurricular activities and expensive basketball pursuits, Mr. Merrill was ordered to come up with a $7,500.00 advance and approximately $1,000.00 for carpeting the condominium stairs. 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.

On the other hand, on 7/9/18, Judge Stephen reconsidered his Temporary Order of 5/16/18 and ordered Ms. Merrill to equally share with Mr. Merrill the proceeds of the sale of her older vehicle. On

6/21/18, she sold the older truck. On 6/21/18, Attorney Macoul sent then counsel for Ms. Merrill $10,798.93 to hold in escrow. It represented 100% of the net proceeds of sale. On 7/9/18, the Reconsideration Order to share that money was issued. In August of 2018, it is undisputed that Ms. Merrill used all $10,798.93 as a down payment on her 2018 Silverado. Her trial testimony was quite bold:

"He owed me the $7,500.00 advance...He owed me carpeting...He owed me old credit card balances...I did not ask him or the Court for permission to use all the money..."

That is willful contempt in spades.

Consequently, it is more specifically ordered as follows:

1. Ms. Merrill's 5/22/19 Motion for Contempt, found at Court Doc. #143, is denied.

2. Nevertheless, as to the Temporary Order of 5/16/18, I have added on Appendix A, Mr. Merrill's obligation to pay the old balances on the credit card debt, specifically identified above. I have also made a deduction in Ms. Merrill's listed debt, having found that there is overlap, which Mr. Merrill is obligated to pay under the Order of 5/16/18. I also added the $7,500.00 advance as Mr. Merrill's debt to Ms. Merrill, which he shall pay within 90 days.

3. Mr. Merrill remains obligated to pay for the carpeting for Ms. Merrill's condominium stairs. Within 30 days of the effective date of this Decree, Ms. Merrill shall provide Mr. Merrill with three estimates for that specific job. Within the following 30 days from receipt of the three quotes, Mr. Merrill shall pay to Ms. Merrill an amount of money equal to one of those quotes.

4. Mr. Merrill's 6/3/18 Cross Motion for Contempt is granted. Mandatory attorney's fees are awarded pursuant to RSA 458:51 and RSA 461-A:15. His counsel shall file a causally and chronologically connected Affidavit of Attorney's Fees.

5. I have placed as an asset on Ms. Merrill's side of the Appendix A the $5,399.47, which was Mr. Merrill's share of the truck sale proceeds.

6. Mr. Merrill's 12/26/18 Motion for Modification, at Court Doc. #105, is denied, except as otherwise set out in Section IX below on child support and alimony.

7. Mr. Merrill's request to reallocate the GAL's fees is denied.

VII. COHABITATION

The parties disagree on when they first started living together. Based on the recent precedent, articulated in *Munson v. Beal*, 169 N.H. 274 (2016), the resolution of that factual dispute may have legal significance. Premarital cohabitation may now be considered as a factor under RSA 458:16-a, II, and the trial court's failure to take it into account probably constitutes reversible error.

Ms. Merrill was consistently adamant that she started cohabitating with Mr. Merrill sometime in 1998. Mr. Merrill was equally adamant that they did not begin cohabitating until late fall 2004. Ms.

Merrill pointed to the undisputed fact that Mr. Merrill proposed to her and gave her a ring on 2/14/02, at the Main Street apartment in Salem, where she says they were residing together.

Mr. Merrill had testified that his parents bought them a bedroom set in March 2005, shortly after their wedding on 2/14/05, which bedroom set symbolized Lea and Jon's finally residing together. A receipt for that bedroom set purchase was produced and admitted into evidence at Exhibit ZZ. "Lea Merrill" signed for the bedroom set at Jordan's Furniture. Mr. Merrill testified that Lea never used the name "Merrill" until after the marriage. However, the receipt was undated and only of marginal significance.

This evidentiary log jam was broken by the testimony of Mr. Merrill's Main Street, Salem roommate, Matt Wheeler, and to a lesser extent, by the testimony of his father, George D. Merrill.

Matt Wheeler testified that he was Jon's roommate in the apartment on Main Street in Salem from 1998 until 2002, when Matt moved out. Matt Wheeler testified clearly, unequivocally, and credibly that Lea did not reside in that apartment during those four years. He said she may have stayed overnight "a few nights" some weeks, but she did not live there. Her clothes were not there. Her car was not there. On cross examination, Matt Wheeler testified that she had no furniture or house plants there.

George D. Merrill offered through his son's counsel, that when Jon left the Salem Main Street apartment in 2002, in order to buy a house in Hampstead, George and his wife lived in Hampstead with Jon from October of 2002 until May of 2003, while their other son, Gary, was building his own home and residing in his parents' home while he did so. George D. Merrill offered that Lea was not living there in Hampstead for the seven months that he and his wife lived in Hampstead with their son, Jon. In fact, it appeared that Jon and Lea had broken up when Jon had purchased the Hampstead house in 2002. George D. Merrill testified that he visited Jon regularly at his Hampstead home after May of 2003 and Lea was not living there.

Based on all this evidence and all inferences reasonably drawn from it, I find that the parties did not begin to cohabitate until late fall of 2004.

VIII. EQUITABLE ALLOCATION OF ASSETS AND DEBTS

This is a long-term marriage, into which the parties equally contributed. RSA 458:16-a, II(a). Dustin was born shortly after they married, and Ms. Merrill was home with Dustin by agreement of the parties. Mr. Merrill is an extremely hard worker and good provider. He was involved with Dustin in any way he could in the earlier years. His involvement with Dustin became much greater after the 2017 separation and the filing of the divorce.

For the most part, Ms. Merrill's contribution to the marriage has not been financial. RSA 458:16-a, II(g). For example, Ms. Merrill put no money into the Hampstead home, which Mr. Merrill bought in 2002. That Hampstead home was later sold, and I inferred the proceeds of sale were used, at least in part, to help the parties purchase and renovate the Hampton Beach condominium in late 2016 and early 2017.

By 12/5/16, the parties had accumulated $85,821.99 in their savings account. They had sold their boat on 6/8/16 for $39,000.00. Mr. Merrill had sold his Chevelle on 9/1/15 for $18,900.00. They put

$72,129.14 down at the condominium closing on 12/16/16. By 12/15/17, their savings were down to $5,486.02.

Mr. Merrill estimated that as much as $28,000.00 went into the condominium renovations.

Ms. Merrill testified that her mother gave them $15,000.00 to help with the condominium purchase and renovations. Mr. Merrill did not deny that allegation. Ms. Merrill said she also had personal savings of $10,000.00 and cashed in bonds worth another $15,000.00, all of which went into the condominium.

As set out earlier in Sections IV. (C.) and IV. (D.), Mr. Merrill acquired his minority interest in the family businesses, GEM and KEM, by gift. Ms. Merrill's mother gifted them $15,000.00, but the family gifts to Mr. Merrill were obviously much more valuable, as also set out in the two sections referenced above. RSA 458:16-a, II(n). A small percentage of GEM was acquired by Mr. Merrill before the 2005 marriage. RSA 458:16-a, II(m).

My treatment of family helpfulness has evolved over the years that I have been on the bench. New Hampshire law is clear that the gifts all became part of the marital estate, but I have significant discretion on how to allocate the gifted property.

In New Hampshire, the general rule of law is that regardless of the source, all assets owned by each spouse at the time of the divorce is to be included in the marital estate. *Sarvela & Sarvela*, 154 N.H. 426, 431 (2006).

"While the Court has discretion to consider when and by whom property was acquired in determining its distribution, the relevant statutory scheme 'does not classify property based upon when or by whom it was acquired, but rather assumes that all property is susceptible to division.' *Crowe and Crowe*, 148 N.H. 221 (2002)." *Sarvela &Sarvela, supra*, at 431.

Specifically, RSA 458:16-a, II(m) gives the Court the discretion to consider the value of property acquired before the marriage. RSA 458:16-a, II(n) gives the Court discretion to consider the value of property acquired by gift and through inheritance.

New Hampshire common law emphasizes that using premarital funds to purchase assets during the marriage does not exempt the acquired asset from inclusion in the marital estate or its distribution upon divorce. *Hoffman v. Hoffman*, 143 N.H. 514, 522 (1999).

RSA 458:16-a, I does not exclude property gifted to one spouse during the course of the marriage. *Harvey & Harvey*, 153 N.H. 425, 438 (2006). Even if an inherited asset is set aside to the inheriting spouse or there is a "waiver" in that inheritance by the other spouse, the inherited property is "nonetheless a factor to be considered when the judge recommends the property settlement..." *Weeks and Weeks*, 124 N.H. 252, 256 (1983).

A couple of divergence specific examples of the application of these principles demonstrate the scope of the Court's discretion in dividing marital assets which are in whole or part the product of gifts and inheritances and assets held before the marriage.

In *Henderson v. Henderson*, 121 N.H. 807 (1981), the parties were married in 1971. They moved to New Hampshire in 1973, where the Petitioner's parents owned a large parcel of land. In 1976, the parties jointly acquired from the Petitioner's mother, 79 acres of land for the assumption of a $20,000.00 mortgage remaining on the property. The Petitioner's mother provided other financial generosities as well. In 1980, the parties got divorced, during which proceeding virtually all of the assets acquired through her parents' generosity were awarded to the Petitioner.

The award was affirmed on appeal.

In *Harvey & Harvey*, 153 N.H. 425 (2006), the parties were married in 1989. The Petitioner was a former legislative assistant and homemaker. She had a law degree, but did not practice as an attorney. She worked a little in the children's schools.

The Respondent in the *Harvey* case was a dentist. The Respondent's father had established his practice. Prior to the marriage, the Respondent and his family owned a lot of property. The Respondent's parents offered significant financial helpfulness to this couple during the marriage.

In the parties' Final Divorce Decree of 2004, the marital estate was valued at 2.9 million dollars. Of that amount, the Petitioner was awarded 1.6 million dollars. The division of the assets was sustained on appeal even though the extended period allowed for the associated "buyout" was not affirmed.

My generalized treatment of the financial helpfulness of families of divorcing parties considers, among other things, the timing of the helpfulness and the extent into which it has become woven into the fabric of the divorcing family's lifestyle. The older the helpfulness and the greater the extent, to which it has become part of the divorcing family's lifestyle, the more likely it is that that asset will be divided more equally.

Again, as set out in Sections IV. (C.) and IV. (D.), Mr. Merrill's minority interest in GEM and KEM have been in the marital estate for most of this 12 year marriage. Ms. Merrill admittedly did not contribute much to the operation of the excavation company. She cleaned their offices for a very short period of time.

Ms. Merrill's contribution to The Farm (KEM) was factually disputed. She said, at least since the time that the whole family moved into The Farm in 2009, up until 2014 when she was injured, that she did an enormous amount of work. Ms. Merrill testified that even before they moved into The Farm in 2009, she worked there late nights checking on horses. She mucked stalls. Ms. Merrill testified that after the family moved into The Farm in 2009, she "managed" The Farm. She hired employees, mucked stalls, ordered product, worked the fields, worked trails, did advertising, started riding lessons, and put the related money back into The Farm. She said she hosted pony parties and was paid $200.00 a week for 5 years for all of that effort. It is unclear to me when the $200.00 a week started and when it ended. However, it does appear to have been paid for quite a few years.

Ms. Merrill also testified that Jon Merrill oversaw The Farm. He mowed the fields. He worked on the "water brakes." Ms. Merrill said that Mr. Merrill handled hay deliveries but that she did everything else.

Mr. Merrill and his father, George D. Merrill, both disagreed with the testimony of Ms. Merrill about what she did on the farm. George D. Merrill testified in particular as follows:

He said that he and Jon managed the farm. He said that Lea never did. She had no authority. She wrote no checks. He said that he and Jon had three full time employees at The Farm and that they did all the mucking and physical labor. He acknowledged that she may have tended to her own horses. He acknowledged that Lea shared responsibility with Jon for taking boarder checks and putting them in a ledger. He said occasionally she or Jon responded to a boarder's complaint if the need to respond was urgent. He said occasionally she signed for deliveries. George D. Merrill added that The Farm was at best a break even proposition, and Lea never generated a profit. He said she did not create The Farm's website. He had hired professionals to do that. He acknowledged that Lea took some photos.

I suspect and find that Ms. Merrill's daily involvement on The Farm lays somewhere in between her testimony and that of father-in-law.

Mr. Merrill's minority interests in both GEM and KEM have been part of the marital estate for most, if not all, of the marriage. Both have become integrally woven into the marital lifestyle. GEM has paid Mr. Merrill well, and Mr. Merrill has generously supported his wife and son in a very comfortable lifestyle.

Whether Ms. Merrill was managing The Farm or mucking its stalls for her own horse, by at least 2009, she lived on The Farm and became involved on a day to day basis with events occurring there. The Farm actually came to define the family's lifestyle beginning in 2009.

I find, therefore, that the statutory presumption of equality applies to both Mr. Merrill's interests in GEM and KEM. RSA 458:16-a (II).

In addition to the factors already mentioned above, Mr. Merrill is far more capable than Ms. Merrill of earning income and acquiring assets moving forward. RSA 458:16-a, II(b)(c). Mr. Merrill makes over $188,000.00 a year. Ms. Merrill works for $13.00 an hour. She has a high school education, and aside from a short modeling career after she graduated from high school in 1994, Ms. Merrill has been at home with Dustin or has had relatively modest employment, often bartending.

Thus, as visually demonstrated on Appendix A, I have equally divided the net marital estate. In doing so, Ms. Merrill is awarded the Hampton Beach condominium, and Mr. Merrill is awarded his interests in GEM and KEM. However, in order to equalize the shares of the marital estate on a net basis, Mr. Merrill will have to pay Ms. Merrill the sum of $286,165.50.

Consequently, it is more specifically ordered as follows:

1. The attached Decree on Petition for Divorce is incorporated herein.

2. Mr. Merrill is hereby ordered to buy out Ms. Merrill's remaining interest in the marital estate by paying to her $286,165.50.

   (a) The first payment installment shall occur in the amount of $100,000.00 within 120 days of the Clerk's notice of this Decree.

(b) The remaining balance, plus 3.9% statutory interest, shall be due within 16 months of the Clerk's notice of this Decree. It shall be secured by an attachment on Mr. Merrill's stock in KEM.

IX. CHILD SUPPORT AND ALIMONY

In any case involving a child, who is eligible to receive child support, I have significant discretion in the selection of the child support "obligor." *Wheaton-Dunberger v. Dunberger*, 137 N.H., 504 (1993). That discretion extends to characterizing one parent as obligor, without regard "...to which parent has physical and legal custody. RSA 458-C:3, VII." *Wheaton-Dunberger v. Dunberger, supra* at 509.

Pursuant to the terms of this Decree, Mr. Merrill is now residentially responsible for Dustin for the majority of Dustin's school year. That reality does not prevent me from designating him as the child support "obligor," in this case, particularly because his income so dwarfs that of Ms. Merrill. However, Mr. Merrill will be paying alimony to Ms. Merrill, and Dustin will benefit from his father's income and his father's likelihood of making significant expenditures on Dustin's behalf while Dustin is in his father's residential care. The more equitable outcome is to designate Ms. Merrill as the child support "obligor," and then address how the RSA 458-C:5, I "special circumstances" impacts her ability to pay child support.

Before I do that, there is an intuitive disconnect associated with ordering Ms. Merrill to pay child support to Mr. Merrill, and then having to assess her needs for alimony purposes, which would include my consideration of her child support obligation to the person paying her alimony.

I find that Ms. Merrill has "significantly low" income, and Mr. Merrill has "significantly high" income. RSA 458-C:5, I(b). I am obligated, having made that finding, to "...determine how to optimize use of the parents' combined incomes to arrive at the best possible outcome for the child...provided that the basic support needs of the child...are met." RSA 458-C:5, I(b)(2)

I find that the best possible outcome for Dustin is not to order his father to pay child support to his mother, but rather to conserve that income of his father for the support of Dustin. That will ensure that Dustin's basic support needs are met, and I anticipate much more. I also find that ordering Dustin's mother to pay child support to his father, which child support she cannot afford; and then simply order his father to effectively reimburse her with alimony, is nonsensical and not in Dustin's best interests. Dustin's best possible outcome is for me not to order either parent to pay child support to the other.

Ms. Merrill is going to need to marshal her income and resources just to pay the mortgage, taxes, insurance, and condo fees on the Hampton Beach condominium, which total $2,404.00 a month. RSA 458-C:5, I(e). Dustin and his mother need a place to live, when he is in her care. Dustin's father, on the other hand, can live at The Farm rent free.

Regarding alimony, the resolution of that issue is guided by RSA 458:19, prior to its amendment. Furthermore, because this case was filed on 6/19/17, and in the absence of the parties' agreement, I am precluded by the enabling statute for the 1/1/19 amended alimony statute, RSA 310:6, II, from adopting or utilizing any portion of the amended alimony statute, which is found at RSA 458:19-a and RSA 458:19-aa.

Ms. Merrill has been working for $13.00 an hour at the front desk of Seacoast Sports Club since March of 2019. She has worked towards getting her weekends free for Dustin's benefit. She is also trying to move from 33 hours to 40 hours. I find until Ms. Merrill gets her 40 hours or finds additional part-time employment, she is underemployed. I therefore impute to Ms. Merrill $520.00 a week income based on a 40 hour work week and $13.00 an hour. That equates to $2,251.60 a month.

Mr. Merrill wanted me to impute $600.00 a week to his wife, but he did not point to one job, which she had or is now qualified for, which would pay her that kind of money. Mr. Merrill admitted: "She could never hold a job...she had a different work ethic." I also find Ms. Merrill is an unlikely candidate to go to school in order to rehabilitate her earning capacity.

In order to assess her need for alimony, I have to compare her imputed income to Ms. Merrill's reasonable needs, taking into consideration the approximate marital lifestyle. RSA 458:19, I(a). I am also statutorily mandated to consider the property awarded to Ms. Merrill pursuant to the terms of this Decree. RSA 458:19, I(a).

With respect to that property award, Ms. Merrill is getting the Hampton Beach condominium, which she is going to have to carry financially to the tune of $2,404.00 a month. Both she and Mr. Merrill are getting a modest retirement asset of approximately $37,000.00 each. Ms. Merrill does not have the kind of job or job skills that are going to allow her to grow her retirement from her employment. She is also inheriting a $265,000.00 mortgage on the Hampton Beach condominium, which she may want to pay down some day in order to better afford her home on a month to month basis. Currently, Ms. Merrill has no liquid assets. It would be incredibly inequitable for me to enter an alimony order, which effectively expects her to spend her one time buyout of the marital estate in the amount of $286,165.50 to meet even some of her regular monthly expenses.

Mr. Merrill makes $188,000.00 a year and has been doing so for years. He is much better financially positioned than Ms. Merrill moving forward. RSA 458:19, IV(b).

The parties contributed equally to their 12 year marriage. RSA 458:19, IV(d).

So, on imputed income of $2,251.60 a month, Ms. Merrill lists in her most recent Financial Affidavit monthly expenses of $5,343.00. They included $1,000.00 a month for uninsured medical bills, which she has never paid. Taking that $1,000.00 out leaves expenses of $4,343.00 a month, which I find to be very reasonable, and probably at a level a little beneath the comfortable marital lifestyle. Ms. Merrill then must add to that $4,343.00 a month her housing expenses of $2,404.00 a month, which brings her reasonable monthly expenses to $6,747.00.

I also find that the marital lifestyle was not as "amazing" as Ms. Merrill attempted to describe it. She and Mr. Merrill were never on a plane together. They were never on an island together. They were never on a cruise together. They drove to Disney World once with Dustin. They had nice three day weekends on the lakes or in the mountains. They lived a good life, with a comfortable lifestyle.

So, with reasonable monthly expenses of $6,747.00, to which Ms. Merrill can apply her imputed income of $2,251.60, Ms. Merrill demonstrates a need for alimony in the amount of $4,495.40 a month.

I must next determine if Mr. Merrill can afford to meet that alimony need, while still supporting himself and Dustin. His available income is $15,674.00 a month, which equates to $188,088.00

annually. On his recent Financial Affidavit he listed $20,154.00 a month in expenses. I can deduct $2,404.00, which are Ms. Merrill's housing expenses, which she is being ordered to pick up. For the moment, I can remove his court ordered child support and alimony obligation of $3,155.00 a month. His 401(k) debt payment of $619.00 a month will soon be gone. Mr. Merrill may need to cut down a little on meals out, vacations, and gifts. It is hard for me to believe that KEM does not absorb the food he feeds his horses, which are now all deceased. That would take another $600.00 off his expenses. Consequently, I find his reasonable monthly expenses before alimony are closer to $12,150.00. Thus, that analysis demonstrates that Mr. Merrill can afford to pay alimony in the amount of $3,524.00 a month.

How long Mr. Merrill should pay that alimony to Ms. Merrill is the next inquiry, which I must make. Ms. Merrill made a lot of what I will call excessive requests in her proposed orders. One of those excessive requests was for alimony until the year 2041. This is a 12 year marriage. The duration of alimony needs to have some relationship to the length of the marriage. RSA 458:19, IV(b).

I have already found that Ms. Merrill is not a strong candidate for the rehabilitation of her earning capacity, which will probably always be under $3,000.00 a month. So her need for alimony is unlikely to change, which supports a longer duration of the alimony award. Mr. Merrill is 45. Ms. Merrill is 44.

I find that 8 more years of alimony strikes a balance between a marriage of 12 years and an alimony candidate, not likely to grow her earned income substantially.

Consequently, it is more specifically ordered as follows:

1. The attached Uniform Support Order is incorporated herein.

2. The attached Uniform Alimony Order is incorporated herein.

Consequently, my Final Orders are summarized as follows:

1. The attached Parenting Plan is incorporated herein.

2. As it states, the parties are awarded joint decision-making authority. Neither party shall make important decisions for Dustin unilaterally. The failure of either party to communicate about important child related decisions and/or to refrain from making unilateral decisions shall face the potential consequence of losing decision making authority.

3. Mr. Merrill is awarded legal residence of Dustin for school attendance purposes.

4. Regarding residential responsibility, during the school year, Dustin shall reside with his father in Salem from each Monday morning to each Friday after school and every other weekend. During the school year, Dustin will reside with his mother in Hampton Beach every other weekend from Friday after school until Monday morning, when she shall deliver Dustin to school in Salem.

5. The parties will alternate February and April school vacations and equally split each December school vacation. Ms. Merrill is awarded all three day weekends, appended to her regular every other weekend schedule, upon which she will deliver Dustin to school on Tuesday mornings.

6. For eight weeks in each summer this residential schedule shall flip, and Ms. Merrill will have Dustin from Monday to Friday and every other weekend, and Mr. Merrill will have Dustin every other weekend from Friday at noon until Monday at noon.

7. The attached Decree on Petition for Divorce is incorporated herein.

8. Mr. Merrill is hereby ordered to buy out Ms. Merrill's remaining interest in the marital estate by paying to her $286,165.50.

   a. The first installment payment shall occur in the amount of $100,000.00 within 120 days of the Clerk's notice of this Decree.

   b. The remaining balance, plus 3.9% statutory interest, shall be due within 16 months of the Clerk's notice of this Decree. It shall be secured by an attachment on Mr. Merrill's stock in KEM.

9. Ms. Merrill shall promptly deliver to Mr. Merrill his watch, bracelet, and diamond ring; if and when she finds them. If it is later determined that Ms. Merrill has had the jewelry described right along but did not return it to Mr. Merrill as ordered; perjury charges shall be considered along with appropriate Enforcement Orders.

10. The attached Uniform Support Order is incorporated herein.

11. The attached Uniform Alimony Order is incorporated herein. Ms. Merrill's alimony award shall sooner terminate upon her remarriage, "cohabitation" with a man, as defined by New Hampshire law, or the death of either party.

12. Ms. Merrill's 5/22/19 Motion for Contempt, found at Court Doc. #143, is denied.

13. Nevertheless, as to the Temporary Order of 5/16/18, I have added to Appendix A, Mr. Merrill's obligation to pay the old balances on credit card debt, specifically identified herein. I have also made a deduction in Ms. Merrill's listed debt, inferring there is overlap, which Mr. Merrill is obligated to pay pursuant to the terms of that 5/16/18 Order. I have also added the $7,500.00 advance as his debt to be paid to Ms. Merrill, which he shall pay within 90 days of the Clerk's notice of this Decree.

14. Mr. Merrill remains obligated to pay for carpeting for Ms. Merrill's condominium stairs. Within 30 days of the Clerk's notice of this Order, Ms. Merrill shall provide Mr. Merrill with 3 estimates for that specific job. Within the following 30 days from receipt of those 3 quotes, Mr. Merrill shall pay to Ms. Merrill an amount equal to one of those quotes.

15. Mr. Merrill's 6/3/19 Cross Motion for Contempt is granted. Mandatory attorney's fees are awarded pursuant to RSA 458:51 and RSA 461-A: 15. Mr. Merrill's counsel shall file a causally and chronologically connected Affidavit of Attorney's Fees.

16. I have placed as an asset on Ms. Merrill's side of the Appendix A, the $5,399.47, which was Mr. Merrill's share of the truck sale proceeds.

17. Mr. Merrill's 12/26/18 Motion for Modification, found at Court Doc. #105, is denied, except as otherwise set out in Section IX above.

18. Mr. Merrill's request to reallocate the GAL fees is denied.

19. The parties shall sell the hot tub, and equally share the proceeds of sale.

20. As to the Petitioner's proposed Findings of Fact and Rulings of Law, they are all granted with the exception of the following, which are denied: 1,3, 8, 16,17,18,19,20,21,29,30,36,37,41,44,45,56,60,61,62,63,64,72,84,94,98,101,107,108,126,127,136,139,147,151,188,203,207,208,211,212,219,223,229,232,233,237,240,241,246,251,252,253,254,255,257,263,267,270273,277,282,283,284,286,289,290,291,297,303,326,327,350,356,369,371,383,385,386,387,392,393,394,395,396,397,398,400,401,402, and 405.

21. As to the Respondent's proposed Findings of Fact and Conclusions of Law, they are all granted with the exception of the following, which are denied: 2,13,22,23,24,28,30,32,33,35,36,40,41,42,45,46,48,49,53,57,59,65,66,68,69,72,73,74,75,76,77,2,13,22,23,24,28,30,32,33,35,36,40,41,42,45,46,48,49,53,57,59,65,66,68,69,72,73,74,75,76,77,78,79,80,81,82,83,84,85,86,87,88,89,90,96,99,100,113,114,118,119,120,121,122,123,125,126,127,128,129,130,131, and Conclusions 1,7,17,18, and 40.

So Ordered.

November 11, 2019
Date

Hon. Robert J. Foley, Judge

In the Matter of:
Jonathan Merrill, Petitioner, and Lea Merrill, Respondent
Case No. 673-2017-DM-00122

Appendix A

Jonathan	Asset	Lea
	Unit #19 943 Ocean Boulevard Hampton Beach (450,000.00 - 265,022.00)	$184,978.00
$641,125.80	45% interest in GEM	
190,000.00	23.75% interest in KEM	
37,563.53	401(k)/Profit Sharing (80,100.26 - 4,972.93)	37,563.54
	Ms. Merrill's jewelry	unknown
	Pontiac Trans Am (NADA low retail)	8,600.00
	2018 GMC Pickup (38,000.00 - 37,000.00)	1,000.00
12,000.00	Horse Trailer	
	2001 Honda 4 wheeler	800.00
800.00	2001 Bombardier 4 wheeler	
2,067.00	2004 4 wheeler	
unknown	Snowmobiles	
unknown	1 Welsh pony	
500.00	Tools	
2,500.00	Furniture	
50% from sale	Hot tub	50% from sale
	Jonathan's 1/2 share of truck sale proceeds	5,399.47
$886,556.33	Asset Subtotal	$238,341.01

Jonathan	Debt	Lea
$40,000.00	George E. Merrill	
15,000.00	Gail Merrill	
14,786.53	Best Egg	
6,652.86	Bank of America Visa	
1,919.81	Bank of America Mastercard	
13,051.00	First Bank Card	
858.75	American Express	
	Bank of America	$7,638.58
	Capital One	10,792.16
	Citicard	1,698.12
	Citizens	1,094.42
	Dicks	2,345.95
	Discover	3,166.51
	Medical Bills	12,054.08
	VISA	5,833.87
	Credit One	385.56
$92,268.95	Debt Subtotal	$45,099.25
13,964.43	(Plus pre 6-19-17 credit card debt per Temporary Order of 5-16-18)	
	(Less Dick's and Bank of America's old balances assumed by Mr. Merrill per Temporary Order of 5-16-18)	(7,160.19)
7,500.00	(Plus $7,500.00 "advance" per Temporary Order of 5-16-18)	
$113,733.38	New Debt Total	$37,849.06

Jonathan		Lea
$886,556.33	Asset Subtotal	$238,341.01
(113,733.38)	Debt Subtotal	(37,849.06)
772,822.95	Net Asset Subtotal	200,491.95
(286,165.50)	Equitable Adjustment	286,165.50
486,657.45	Net Estate Total	486,657.45
50%	% of Net Marital Estate	50%

In the Matter of:

Jonathan Merrill, Petitioner, and Lea Merrill, Respondent

Case No. 673-2017-DM-00122

Appendix B

Merrill & Son, Inc.

Asset Approach Value

Current Assets	$2,010,579.00
Land and Buildings	552,500.00
Equipment and Autos	3,144,650.00
Due from Officers	1,500.00
Total Assets	5,709,229.00
Less Current Liabilities	(1,488,400.00)
Total Equity	4,220,829.00
Less Long Term Debt	(2,637,802.00)
Gross Value of GEM	1,583,027.00
Less 10% Lack of Control Discount	(158,303.00)
100% Fair Market Value of GEM	1,424,724.00
Jonathan Merrill's 45%	$641,125.80

Rule 16 Certification of Word Limitation

I hereby certify that this brief does not exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters

/s/ Thomas K. MacMillan
Thomas K. MacMillan, Esq.

Certificate of Service

I, Thomas K. MacMillan, hereby certify that on August 7, 2020, I served on behalf of the Appellee the Brief of Respondent/Appellee, Lea Merrill and the Supplemental Appendix Volume I and Volume II upon counsel for Appellant John A. Macoul, Esq., guardian ad litem Timothy S. Wheelock, through the e-filing website, and mailed a copy to the Complex Docket, Brentwood Family Division.

s/ Thomas K. MacMillan
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