

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

2021 TERM

CASE NUMBER 2021-0373

**IN THE MATTER OF BRIAN COLSIA AND ALLANA KELLEY-  
COLSIA**

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**Interlocutory Appeal  
From the 9th Circuit Family Division (Merrimack),  
Case Number 657 -2015-DM-00092**

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**BRIEF OF RECEIVER, EDMOND J. FORD (APPELLEE)**

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**Rule 16(3) (b): QUESTIONS PRESENTED FOR REVIEW**

NH R S CT Rule 16 (4)(a) permits Appellee to present the questions presented for review if it is “dissatisfied with their presentation by the other side.” The Receiver does so here:

1. Does a divorce court that appointed a receiver for the marital estate have authority to approve settlements proposed by the receiver of causes of action that are part of the marital estate?

**Yes.**

2. Do mortgagees possess standing to intervene in a divorce proceeding, in connection with proposed agreements with them?

**Yes, if the Family Division in the exercise of its discretion, permits.**

3. Does a divorce court which appointed a receiver have authority to approve settlements of marital claims against third parties over the objections of a spouse, without review and approval by the superior courts in which those claims are pending?

**Yes.**

4. Did the divorce court err in approving the settlements over a spouse's objections?

**No.**

5. Can a party who moved to have a receiver appointed with broad settlement powers and failed to challenge the Marital Court's issuance of an order providing the receiver with such settlement powers subsequently challenge the receiver's ability to exercise such settlement powers?

**It depends on the nature of the challenge and whether to allow such a challenge creates an unfair advantage or detriment.**

**Rule 16(3)(c): THE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, OR REGULATIONS INVOLVED IN THE CASE:**

The Receiver adds the following:

N.H. Rev. Stat. Ann. § 490-D:3:

Notwithstanding any law to the contrary, the judicial branch family division shall have the powers of a court of equity in cases where subject matter jurisdiction lies with the judicial branch family division....

N.H. Rev. Stat. Ann. § 458:16

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:

...

(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.

**Rule 16(3)(d): STATEMENT OF THE CASE**

Brian Colsia (Brian) began this divorce from Allana Kelly-Colsia (Allana) by petition filed March 23, 2015. A month earlier, in February 2015, Brian mortgaged numerous properties owned by entities controlled by him to his brother Wayne Colsia to secure a claimed obligation of \$2,000,000.00. The Family Division concluded that those properties were “in effect the assets of the marital estate.” *Order on Motion for Substituted Receiver* #532 p. 2. App. p. 23.

In January of 2020, ten of those properties remained unsold. In January of 2020, the Family Division appointed the Receiver. *Id.* The receivership included “any and all inchoate equitable, and/or residual rights, such as the right to bring suit to set aside fraudulent transfers or otherwise recover property that has been removed from the marital estate.” *Id.* p. 1. The receiver was ordered to “arrange for the liquidation of all such assets in a commercially reasonable manner forthwith.” *Id.* p. 2.

Most of the real property assets were mortgaged to Wayne. Wayne and the Receiver entered into an agreement that the Family Division approved<sup>1</sup> allowing the properties to be sold with the proceeds to the extent burdened by the Wayne Mortgages placed in escrow. The properties have been sold. The Receiver presently holds \$1,830,999.59 of sale proceeds in escrow subject to Wayne’s claims. *See* Transcript of January 12, 2021 hearing “*Trans.*” Volume I, p. 30.

The Family Division granted the Receiver’s request for authority to sue Wayne to avoid the Wayne Mortgages and to recover damages by order

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<sup>1</sup> This appeal involves no challenge to that approval or agreement.

entered May 26, 2020. *Initial Order on May 15, 2020 Motions Hearing* (#571 & 573) *Receiver's App. Vol. I* p. 19. The Family Division ordered that

“[t]he receiver shall exercise his discretion in prosecuting the case and negotiating a resolution. The receiver shall seek court approval prior to finalizing any settlement that does not have the assent of Brian and Allana Kelly-Colsia.”

*Id.* p. 2. The Receiver negotiated such a resolution and sought court approval prior to finalizing it. The Court granted that approval. *Order on Receiver's Settlement Approval Motions* (#640, #666, #686) *App.* p. 40 (the “Order Below”). The Order below is in the best interest of the marital estate because it achieves the best practical outcome creating in excess of \$2,000,000.00 for the marital estate. *See, Receiver's Settlement Motion, Receiver's App. Vol. I* p. 22, ¶¶ 3, 5 - 17. This interlocutory appeal arises from the Order Below.

The Order Below also approved resolution of a dispute relating to mortgages held by Faith Deeter Macomber (or her company Foxtrot Delta, LLC) on a property sold by the Receiver in Concord, NH. Ms. Deeter Macomber or Foxtrot Delta, LLC, held notes secured by two mortgages on 132 Loudon Road, Concord, NH, the first in the approximate amount of \$150,000 and the second in the amount of \$50,000.00. *Partially Assented-to Motion to Authorize and Approve Settlement Agreement Between Receiver and Foxtrot Delta, LLC and for Authority to Distribute Funds* ¶3, *Receiver's App.* Vol I. p. 68 (the “Foxtrot Settlement”). The Receiver presently holds \$167,401.95 in escrow pending the Court’s approval of the Foxtrot Settlement. *Trans. Vol. I*, p. 39.

Pursuant to Supreme Court Rule 17(1), the Receiver is submitting his own appendix to include pleadings which he believes should be part of



the record, but which were not included in Appellant's Appendix ("App."). It is submitted as a separate submission and is cited as "*Receiver's App.*"<sup>2</sup>

### **SUMMARY OF ARGUMENT**

The Family Division, as a court of equity, has the power to appoint a receiver to preserve the marital estate and, if necessary, to liquidate property of the marital estate for its preservation or division. Such a receiver acts on behalf of the court.

At the request of the Appellant, Allana, the Family Division acted on that authority and appointed a receiver who, at the Appellant's request and with the court's approval, brought litigation to bring marital property into or back into the marital estate for division. The receiver is not required to litigate such claims through trial and all appeals but may, and here did, negotiate terms he would recommend to the Court to settle. The Court has the authority to approve such settlement (just as it had authority to approve property sales) over the objection of one of the spouses if the settlement is in the best interest of the marital estate. Based on the proffered evidence and argument the court found these settlements in the best interest of the marital estate. That finding was within the court's discretion and unassailable on appeal.

The Appellant, Allana, is estopped to challenge the authority of the Family Division to appoint such a receiver because it did so at her request. She is not estopped to challenge the terms of the proposed settlement but failed to rebut the receiver's evidence that the course which maximized the marital estate was the proposed settlement.

The proposed settlement requires no order by any superior court because: (a) it does not adjudicate any issue other than whether the

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<sup>2</sup> The Receiver has redacted account numbers on documents appearing at pages 111 and 138 of the *Receiver's App. Vol. I*.

settlement is in the best interest of the marital estate and that question is solely within the jurisdiction of the Family Division; and (2) like any other private litigant, no superior court approval is required to settle and dismiss litigation.

Finally, the rules of procedure give the Family Division discretion to permit third parties to appear in front of it to argue about the appropriateness of approval of settlement agreements in which they are involved. The Family Division did not abuse that discretion by permitting intervention.

### **ARGUMENT**

**I. THE FAMILY DIVISION HAS AUTHORITY TO AUTHORIZE AND APPROVE TRANSACTIONS, INCLUDING SETTLEMENTS, PROPOSED BY ITS RECEIVER RELATING TO ASSETS (INCLUDING LITIGATION CLAIMS) OF THE MARITAL ESTATE.**

Question 1 raises issues about the extent of the equity powers of the Family Division.

***A. The Family Division is a Court with equity powers and may appoint a receiver to manage the marital estate.***

Notwithstanding any law to the contrary, the judicial branch family division shall have the powers of a court of equity in cases where subject matter jurisdiction lies with the judicial branch family division.

N.H. Rev. Stat. Ann. § 490-D:3. Like all courts in equity, the family division may appoint a receiver to aid in the protection or liquidation of property for the benefit of those entitled:

The appointment of a receiver is a matter resting in the sound discretion of the court, and when appointed he is virtually an officer of the court and subject to their orders. It is exercised for the more speedy getting in of a party's estate and securing it for the benefit of those entitled to it, and it does not affect the right.

*Eastman v. Sav. Bank*, 58 N.H. 421, 422 (1878).

A receiver may be appointed in a divorce proceeding to protect the assets of the marital estate. *In re O'Neil*, 159 N.H. 615, 624, 992 A.2d 672, 679 (2010) (“Pursuant to its equity powers under RSA 490–D:3, the family division's jurisdiction over the divorce necessarily included the ancillary order of receivership issued by the superior court, even without a specific grant of jurisdiction over receiverships under RSA 490–D:2.”). Through possession by the receiver, the court in equity has itself taken possession of the assets of the receivership estate. *Rand v. Merrimack River Sav. Bank*, 86 N.H. 351, 168 A. 897, 899 (1933) (“The possession of the receiver is the possession of the court, and the court holds and administers the estate through the receiver.”); *cf.* *Baron v. Vogel*, No. 3:15-CV-232-L, 2016 WL 1273465, at \*5 (N.D. Tex. Mar. 31, 2016), *aff'd*, 678 F. App'x 202 (5th Cir. 2017) (“Court appointed receivers act as arms of the court and are entitled to share the appointing judge's absolute immunity provided that the challenged actions are taken in good faith and are within the scope of the authority granted to the receiver.”) (*quoting*, *Davis v. Bayless*, 70 F.3d 367, 373 (5th Cir. 1995)).

The receivership estate here includes the marital property comprising the properties sold by the receiver and the claims brought by both the receiver and Allana Kelly-Colsia.

***B. The marital estate includes all property of every kind of both spouses.***

RSA 458:16–a, I (2004) defines as marital property: “[A]ll tangible or intangible property and assets, real or personal, belonging to either or both parties, whether title to the property is held in the name of either or both parties.” RSA 458:16–a, I, makes no distinction between property brought to the marriage by the parties and that acquired during marriage. . . . Regardless of the source, all property owned by each

spouse at the time of divorce is to be included in the marital estate.

*In re Harvey*, 153 N.H. 425, 438, 899 A.2d 258, 269 (2006), *overruled on other grounds by In re Chamberlin*, 155 N.H. 13, 918 A.2d 1 (2007); *Matter of Geraghty*, 169 N.H. 404, 418, 150 A.3d 386, 398 (2016) (all property whenever acquired is marital property). Property acquired after the divorce starts is included in marital property. *Holliday v. Holliday*, 139 N.H. 213, 215, 651 A.2d 12, 14 (1994).

The marital estate in this matter includes at least three kinds of property:

1. *The marital estate included the real estate properties owned and hidden by Brian Colsia but in which he retains an equitable interest. Cf. Marcucci v. Hardy*, 65 F.3d 986 (1st Cir. 1995) (constructive trust imposed for benefit of grantor who conveyed homestead to his daughter to protect it from business debts); RESTATEMENT (SECOND) OF TRUSTS § 404 (1959) (“A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein...”). Property of this kind may include the various pieces of real estate sold by the receiver.

2. *The marital estate included Allana Kelly-Colsia’s right to recover the real estate properties because transferred in fraud of creditors, including her, even if under circumstance that might not give rise to a constructive or resulting trust. Cf. N.H. REV. STAT. ANN. § 545-A:7* (Permitting creditor to avoid transfers in fraud of creditors).

3. *The marital estate included Allana Kelly-Colsia’s claims for damages against Wayne Colsia for wrongs done or conspiracy. See, N.H. REV. STAT. ANN. § 458:16-A* (Property includes “all tangible and intangible property”); *In re Preston*, 147 N.H. 48, 49, 780 A.2d 1285, 1287 (2001)

(Annuity arising from personal injury award is property of the marital estate); *cf.*, *McDaniel v. SkillSoft Corp.*, No. 04-CV-0311-PB, 2005 WL 3133035, at \*1 (D.N.H. Nov. 18, 2005) (“Legal claims existing when an individual files a Chapter 7 petition become part of the bankruptcy estate.”). All of those litigation claims relate to the properties allegedly belonging to the marital estate but hidden. *See, Order Below*, p. 3, App. p. 42 (“it is unable to find and articulate any standing in these cases that Allana would have separate and apart from her interest in an equitable division of marital property.”)

The marital estate includes all the claims being settled by the Order Below.

***C. The Family Division had authority to manage the property of the marital estate through its receiver.***

A court in equity appointing a receiver to manage some or all the marital estate manages that property through its receiver. *In re O'Neil*, 159 N.H. 615. As in *O'Neil*, the receiver may manage the businesses of the warring divorcing spouses. Here, managing the business means managing the real estate and litigation. Managing the litigation means being empowered to negotiate a resolution. The Family Division was empowered to settle the litigation and it may do so through the offices of the receiver.

***D. The Family Division in fact managed the litigation through its receiver.***

In two orders the Family Division appointed the receiver to pursue litigation claims. First, in the *Order on Motion for Substituted Receiver* (#532), 2/6/2020 App. p. 2218, at Allana Kelly-Colsia’s request, the Family Division addressed litigation claims three times:

To be clear, the receivership will cover the following real properties and any and all proceeds thereof, *which shall include any and all inchoate, equitable and/or residual rights, such as the right to bring suit to set*

*aside fraudulent transfers or otherwise recover property from the marital estate:*

...

The receivership shall also encompass any and all membership interests of either party to the following corporate entities and any and all real estate owned thereby, *which shall include any and all residual rights such as the right to bring suit to set aside a fraudulent transfer or otherwise recover property that has been improperly removed from the marital estate:*

...

To initiate and prosecute such actions and to defend against such actions, as the receiver may deem reasonable to recover and protect the assets of those entities, and, in effect, the assets of the marital estate.

Second, by decision dated May 26, 2020, the Family Division approved the commencement of the Receiver's suit against Wayne Colsia saying:

the receiver shall exercise his discretion in prosecuting the case and negotiating a resolution. The receiver shall seek court approval prior to finalizing any settlement that does not have the assent of Brian and Allana Kelly-Colsia.

*Initial Order on May 15, 2020 Motions Hearing (#571, #573) p. 1, Receivers' App. Vol. I p. 19.* The court expressly included in the receivership estate the claims against Wayne and ordered that the receiver bring them and manage them.

As requested by Allana Kelly-Colsia, and as authorized by the Family Division, the receiver brought the claims, negotiated a resolution, and in the Order Below, the family division approved the resolution. The resolution resolved the claims against Wayne Colsia belonging to either spouse because all those claims are part of the marital estate.

The Family Division had unquestioned authority to appoint a receiver to manage the properties; the Family Division had unquestioned authority to appoint a receiver to sell the assets of the marital estate; the Family Division had unquestioned authority to authorize the receiver to bring claims against Wayne Colsia. The Family Division could not have those authorities without also having authority to authorize the receiver to settle those claims.

This Court should answer Question Number 1 posed by the Interlocutory Appeal Statement: “Yes, the Family Division has authority to enter the Order Below.”

II. **PERMITTING PARTIES WITH WHOM THE RECEIVER PROPOSED AGREEMENTS TO PARTICIPATE IN THE HEARING ON THE MOTION TO APPROVE THOSE AGREEMENTS WAS NOT AN ABUSE OF DISCRETION AND WAS HARMLESS.**

Question 2 challenges the intervention by Foxtrot Delta, LLC, and Wayne Colsia in connection with approval of agreements with them.

The rules permit parties other than the divorcing spouses to intervene in a Family Division matter. The rule says:

Any person asserting an interest in the proceedings may seek to intervene as a party in the action by filing a motion to intervene. The motion must include a brief statement concerning the person's relationship to the subject matter of the case and reason for seeking intervention.

NH R FAM DIV DOM REL Rule 2.7 A. The extent of discretion given to the Family Division by the rule instructs that permitting intervention is a matter of the trial court’s case management.

The standard of review when appealing case management decisions is abuse of discretion:

“The trial court has broad discretion in managing the proceedings before it... and we will not disturb such a

ruling unless the court unsustainably exercised its discretion... The trial court's decision is not sustainable if it is clearly untenable or unreasonable to the prejudice of [appellant's] case.

*Buzzard v. F.F. Enterprises*, 161 N.H. 28, 29, 8 A.3d 87, 88 (2010)  
(citations and quotations omitted).

Permitting the parties with whom the Receiver had made proposed agreements to intervene in the hearing on the approval of those agreements was not an abuse of discretion. It was not an abuse of discretion because it served a trial management purpose. Each party had an interest in the orders governing the receivership estate. Each party had a perspective to bring to the matter different from that of the receiver and useful to the Court.

Permitting intervention was not an abuse of discretion because intervention for the purpose of defending the appropriateness of the agreements with the receiver did not risk turning the “dissolution action into a creditor's proceeding.” *In re Muller*, 164 N.H. 512, 518, 62 A.3d 770, 775 (2013). Instead, the creditor’s proceedings (the action against Wayne Colsia, any prospect of a lawsuit by Ms. Deeter-Macomber) remained cabined in the superior court and the only function intervenors performed in the Family Division was to provide insight into the appropriateness of the receiver’s business judgment.

Even were it reversible error to allow non-spouses to intervene in connection with the receivership, it was harmless error because the Family Division made the correct decision.

This Court should answer Question Number 2 posed by the Interlocutory Appeal Statement: “Yes, the Family Division did not abuse its discretion when it allowed Foxtrot Delta and Wayne Colsia to intervene for the purpose of advocating for approval of the receiver’s settlements with them.”



III. **THE FAMILY DIVISION HAS AUTHORITY TO ENTER THE ORDER BELOW WITHOUT AN ORDER BY ANY SUPERIOR COURT.**

Question 3 asks this Court to create a rule that a receiver appointed by the Family Division to prosecute actions that are part of the marital estate may not consensually and with the Family Division's approval, resolve those actions without superior court review and approval.

In general litigants in superior court who are not minors simply inform the court that the matter is settled. N.H. SUPER. CT. R. CIV 39 (a);<sup>3</sup> Cf. N.H. SUPER. CT. R. CIV 40 (requiring approval for certain settlements by minors).

Appellant suggests a different rule for Family Division receiverships. Appellant offers no hint of a basis for such a rule. No standard is offered that the superior court might apply. No such rule applies to other superior court litigants.

Instead, the basis of the suggestion appears to arise from a confusion between the role of the Family Division in the appointment and supervision of the receiver, and the role of the superior court in hearing and deciding causes brought (with the Family Division's approval) by the receiver. The two are different roles. The Family Division did not exceed its jurisdictional authority when it approved an agreement between the receiver and Wayne Colsia. It did not exceed its authority because it did not decide the legal or factual issues involved in the Superior Court action, but, instead, merely decided that the business decision to settle made by the receiver was in the best interest of the parties and the marital estate.

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<sup>3</sup> "Whenever an attorney, non-attorney representative or self-represented party states orally or in writing to the court that a particular case has been settled and that agreements will be filed, the court shall forthwith notify by mail or through electronic delivery the parties of record or their representatives of such statement, and, if the agreements and/or docket markings are not filed within thirty days after the date of mailing or electronic delivery of such notice, the court shall take such action as justice may require."

The Order Below is consistent with *In re Muller*, 164 N.H. 512. Muller held that “the family division does not have the jurisdiction to disregard or invalidate a third party's claim of interest in marital property.” *In re Muller*, 164 N.H. at 519. *Muller* does not prevent the parties, nor one of them with a court order, nor the court’s receiver with a court order, from selling an interest in marital property, nor from exchanging a limited interest in marital property for a release of other interests. *See, e.g.*, N.H. Rev. Stat. Ann. § 458:16-b (I)(e) (permitting the transfer of property by a party with a court order).

The exchange of a limited interest in marital property for a release of claims against marital property is the essence of the settlement agreement approved by the Order Below. Such an agreement does not adjudicate interests of third parties. Approval of such an agreement does not require jurisdiction to adjudicate the claims it merely requires jurisdiction over the receivership and the marital estate. The family division has jurisdiction over its receivership and over the marital estate and so has power to enter the Order Below and approve the settlement without review by any Superior Court. *See*, N.H. REV. STAT. ANN. § 490-D:2 & 3.

This Court should answer Question Number 3 posed by the Interlocutory Appeal Statement: “No, no Superior Court review of the Family Division’s approval of the settlement is required.”

IV. **THE FAMILY DIVISION DID NOT ERR IN APPROVING THE SETTLEMENT OVER A SPOUSE’S OBJECTIONS.**

Question 4 of the Interlocutory Appeal Statement raises four sets of issues, the issues raised in Questions 1 and 3 and further: (a) what standard should the Family Division apply to the evidence to review and approve a settlement of litigation proposed by its receiver; (b) did the Family Division abuse its discretion in determining that the receiver had met his burden.

***A. The standard applied by the Family Division, whether the proposed settlement is in the “best interests of the marital estate,” is appropriate and unchallenged on appeal.***

The Family Division applied a “best interests of the marital estate” test:

The receiver has met his burden of proof in demonstrating that a settlement now and in the amount proposed is in the best interests of the marital estate, and Allana has not provided the court with any specific realistic alternative path to a better resolution.

*Order Below* at p. 5 App. p. 44. Allana does not now argue that the court applied the wrong standard.

***B. The Family Division’s factual finding that the settlements are in the best interests of the marital estate is correct and an appropriate exercise of the trial court’s discretion.***

The standard of review on appeal is whether the record contains an objective basis upon which to sustain the trial court’s findings:

A trial court has broad discretion ... in managing the proceedings before it. ... We will not overturn a trial court's rulings absent an unsustainable exercise of discretion. ... This means that we review the record only to determine whether it contains an objective basis upon which to sustain the trial court's discretionary judgment. ... If the trial court's findings can reasonably be made on the evidence presented, they will stand.

*Matter of Kempton*, 167 N.H. 785, 792, 119 A.3d 198, 204 (2015) (citations omitted).

The trial court made finding that both settlements were in the best interest of the marital estate. Each was reasonably made on the evidence presented and so must stand.

- i. *The Family Division found that the Wayne Colsia settlement was in the best interests of the marital estate and that finding can be reasonably made on the evidence.*

The Family Division found, consistent with the evidence, that the proposed settlement with Wayne Colsia maximized the value of the marital estate. The Court noted that: the payment was essentially “a ‘litigation costs’ settlement with an adjustment for the small risk of an unfavorable outcome” *Order Below*, p. 2 App. p. 41; and that there was no evidence that continuing litigation would yield any better result; *Id.* pp. 2-3. The trial court concluded:

Rejecting the receiver's settlement proposal without a clear alternative litigation strategy and a plan for a more advantageous resolution and collection, seems likely to deplete the marital estate for both parties and further prolong this divorce.

...

the court believes that the receiver has presented a realistic proposal that will make a significant amount of unencumbered money available for distribution. Approving the settlement will also have no adverse effect on Allana's right to ask this court for a property division that favors her and disfavors Brian because of Brian's fraudulent conduct.

*Id.* p. 4 App. p. 43.

The proffered evidence supports the Family Division’s conclusion. The receiver’s motion detailed the likely results from settlement and from continued litigation. No substantive challenge was made to the receiver’s analysis. No alternative analysis was presented. In the absence of a challenge to the receiver’s analysis and in the absence of a better alternative, the Family Division’s ruling is, on appeal, unassailable.

- ii. *The Family Division found that the Foxtrot Delta settlement was in the best interest of the marital estate and that finding can be reasonably made on the evidence.*

The Family Division found that the proposed settlement with Foxtrot Delta was in the best interests of the marital estate:

The receiver has met his burden of proof in demonstrating that a settlement now and in the amount proposed is in the best interests of the marital estate, and Allana has not provided the court with any specific realistic alternative path to a better resolution.

*Id.* p. 5 App. p. 44. The proffered evidence in the receiver’s motion to approve the Foxtrot Delta settlement support the Family Division’s conclusion.

Allana, the appellant here, did not substantively challenge the receiver’s proffers below and does not challenge them here. The Family Division’s finding was reasonably made on the evidence.

This Court should answer Question Number 4 posed by the Interlocutory Appeal Statement “No, the Family Division did not commit reversible error in approving receiver’s proposed settlement over the objection of a spouse.”

V. **THE DOCTRINE OF JUDICIAL ESTOPPEL BARS A PARTY FROM ADVOCATING FOR AND PREVAILING WITH THE APPOINTMENT OF A RECEIVER AND THEREAFTER CHALLENGING THE COURT’S AUTHORITY TO APPOINT THAT SAME RECEIVER.**

Question 5 of the Interlocutory Appeal Statement asks:

Can a party that moved to have a receiver appointed with broad settlement powers and failed to challenge the Marital Court's issuance of an order providing the receiver with such settlement powers subsequently challenge the receiver's ability to exercise such settlement powers?<sup>4</sup>

*Interlocutory Appeal Statement*, p. 12. Question 5 raises the issue of judicial estoppel.

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<sup>4</sup> The Receiver is uncertain how it makes sense to say that he might have “exercise[d] such settlement powers” when every agreement he entered into, including, every settlement agreement was expressly subject to, and contingent upon, court approval. He did nothing more than act as a conduit for the court to exercise its authority over the receivership estate.

No appellate issue relating to judicial estoppel is preserved in the record because no judicial estoppel argument was made below. Below, Allana was permitted to make her arguments without impediment. Because no argument made below was barred by judicial estoppel, there is no judicial estoppel issue on appeal.

If there is a reason to consider judicial estoppel it is only if new arguments made on appeal justify the application of judicial estoppel.

Judicial estoppel in New Hampshire has three elements: inconsistency, acceptance by the Court of one position, and resulting unfairness.

New Hampshire has adopted the doctrine of judicial estoppel as part of its common law... The doctrine of judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase... The general function of judicial estoppel is to prevent abuse of the judicial process, resulting in an affront to the integrity of the courts...

While the circumstances under which judicial estoppel may be invoked vary with each situation, the following three factors typically inform the decision whether to apply the doctrine: (1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

*Alward v. Johnston*, 171 N.H. 574, 584, 199 A.3d 1190, 1199 (2018) (citations and quotations omitted); *compare, Guay v. Burack*, 677 F.3d 10, 16 (1st Cir. 2012) (As a matter of federal law, in the First Circuit the third element of unfair advantage is “generally” “not required”).)

***A. Inconsistency: Some challenges meet the element of inconsistent positions and therefore are potentially subject to judicial estoppel.***

Allana has filed motions with the Family Division asserting that the Family Division had the authority and should appoint a receiver with authority manage property, sell properties and to sue and settle claims belonging to the marital estate. *See, Receiver's App. Vol. I p. 3. (Motion) and Receiver's App p. 13, ¶ 28* (allowing Receiver to compromise claims) (Appellant proposed Order regarding appointment of Receiver). Such a motion contains the explicit assertion to a court that it has the power to make such an appointment.

A later pleading asserting that the Family Division had no such authority and, if the other elements of judicial estoppel are met, would be estopped because the positions are inconsistent.

A later pleading asserting that, while the Family Division had such authority, such authority was not properly exercised in the approval of a specific settlement agreement might not be estopped because the positions might not be inconsistent.

***B. Acceptance: Some challenges meet the element of acceptance by the Court and therefore are potentially subject to judicial estoppel.***

Allana filed motions with the Family Division asserting that it had authority to appoint a receiver to liquidate property of the marital estate through sale or litigation and settlement. The Family Division accepted those positions when it appointed the receiver. Such positions are potentially subject to judicial estoppel if unfairness would result from a change in position.

Allana's motions also asserted that the Family Division could appoint a receiver to settle litigation without review by the court. *See Proposed Order, Receiver's App. Vol. I p. 13, ¶ 28.* The Family Division

did not accept those positions and authorized settlement only with the consent of the parties or court order. The assertion that the Family Division could grant the receiver settlement authority without court review was not accepted by the court and is not subject to judicial estoppel.

***C. Unfairness: unfairness would result if Allana were permitted to assert and prevail upon the court to appoint a receiver, over Brian's objection, and then, when the receiver proposed a settlement that Brian supported but Allana did not, to assert that the court had no such authority.***

Over Brian's objection, the receiver sold properties including the house in which Brian and Danielle were living and required them to move out. With Allana's encouragement and over Brian's objection the Court authorized the receiver to sue Brian's brother, Wayne.

Now that the receiver proposes a settlement with Brian's brother, Wayne, which Brian supports and Allan opposes, Allana cannot assert that the Family Division had no authority to empower the receiver: the result is unfair – the receiver, becomes a collection agent for Allana rather than being an impartial extension of the court's authority.

If Allana is asserting in this appeal that the Family Division did not have authority to appoint a receiver with authority to sue and, with court approval, settle litigation claims then that argument is barred by the doctrine of judicial estoppel. If, on the other hand, Allana is asserting in this appeal that the Family Division had such authority but improperly exercised it in approving these settlements then that argument is not barred by judicial estoppel.

This Court should answer Question 5: "No, not if the elements of judicial estoppel are met."

### **CONCLUSION**

The proposed settlement makes approximately \$2,000,000.00 available to be divided among the divorcing parties when failure to settle



may result in nothing to the parties. This Court should answer the questions presented in the Interlocutory Appeal Statement as follows:

1. Yes, the Family Division has authority to enter the Order Below.
2. Yes, the Family Division did not abuse its discretion when it allowed Foxtrot Delta and Wayne Colsia to intervene for the purpose of advocating for approval of the receiver's settlements with them.
3. No, Superior Court review of the Family Division's approval of the settlement is not required.
4. No, the Family Division did not commit reversible error in approving receiver's proposed settlement over the objection of a spouse.
5. No, a party is not permitted to contest the power of the Family Division to appoint a receiver to sell property and sue and settle litigation where the elements of judicial estoppel are met.

### **REQUEST FOR ORAL ARGUMENT**

The undersigned, respectfully request oral argument in this matter.

The oral argument will be presented by Marc W. McDonald, Esquire.

Respectfully submitted,  
EDMOND J. FORD, RECEIVER

By his attorneys,  
FORD, MCDONALD,  
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Dated: December 27, 2021

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**CERTIFICATION**

I, Marc W. McDonald, hereby certify that on December 27, 2021, I served the foregoing Brief with Appendices Volume I and II to the following parties via the Court's electronic filing system:

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And on December 27, 2021, I served paper copies of this Brief and Appendices Volumes I and II via first class mail, postage prepaid, to the following parties at their last known mailing address:

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