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Case 1

Lost Profits Calculation

Factual Background:

ABC manufacturers widgets.

XYZ is a major wholesaler of widgets.

ABC had a three-year contract to manufacture widgets for XYZ; XYZ was ABC's only customer.

ABC's sales to XYZ for the first year of the contract were $500,000.

ABC anticipated that sales under the XYZ contract would increase by 5% per year.

ABC's direct manufacturing costs are, and will continue to be, 45% of sales.

At the end of the first year of the contract, XYZ cancelled the remainder of the contract (without cause).

ABC estimates that it will take six months to acquire another customer; sales to this new customer are estimated to be 65% of the anticipated sales to XYZ.

Lost Profits Calculation:

	Projected Second Year	*Projected Third Year*
XYZ sales	$ 525,000	$ 551,000
Replacement sales	171,000	358,000
Lost sales	354,000	193,000
Direct manufacturing costs related to lost sales	159,000	87,000
Gross profit related to lost sales	195,000	106,000
Present value discount factor, at 10% cost of capital	0.923077	0.858491
Present value of gross profit related to lost sales	$ 180,000	$ 91,000
Lost profits calculation		$ 271,000

Case 2

Business Valuation Calculation

Factual Background:

LMN has two shareholders, each of which owns 50% of the outstanding capital stock.

LMN and its shareholders have an agreement that provides (a) a shareholder must offer his/her shares to the Company before attempting to sell them to an outside party, and (b) the Company must pay the shareholder "fair market value" for the redeemed shares.

Following a dispute, Shareholder M withdraws and demands LMN redeem his capital stock pursuant to the terms of the Shareholder Agreement.

LMN distributes all of its profits to its shareholders, as compensation, each year.

LMN has no major assets other than its ongoing business operations and a $31,000 note receivable.

There have been no previous sales or redemptions of LMN's capital stock.

There have been no recently reported sales of companies similar to LMN.

Fair Market Value Calculation:

Using the Income Approach

Income before shareholders' compensation and income taxes	$ 750,000
Comparable market rate for shareholders' compensation	250,000
Normalized operating income	500,000
Provision for federal and state income taxes, at 40%	(200,000)
Normalized income	300,000
Capitalization rate (net of anticipated growth rate)	18.25%
Capitalized earnings	1,644,000
Add: Nonoperating assets	31,000
Deduct: Interest-bearing debt	(275,000)
Enterprise value	1,400,000
Percentage of subject ownership interest	50.00%
Value of subject ownership interest, before discounts	700,000
Discounts for lack of marketability and lack of control (30%/10%)	(259,000)
Business valuation calculation	$ 441,000

Case 3

Gross Income Calculation

Factual Background:

H and W are divorcing.

H's Financial Affidavit reports $5,000 as gross monthly income; from his sole proprietorship and a 10% ownership interest in an s-corporation (he receives no cash distributions from the s-corporation).

H based his gross monthly income on his last federal income tax return ($60,000 ÷ 12 months).

H deducts certain personal expenses (gas credit cards, cell phone, personal meals, etc.) as business deductions on his tax return, which are also included as expenses on his Financial Affidavit.

H's Financial Affidavit reports $20,000 as monthly expenses.

H's Financial Affidavit does not report any other financial resources to supplement the deficit created by his monthly expenses exceeding his monthly income.

Gross Income Calculation:

H's Gross Income	*Income Tax Return*	*NH Adjustments*	*NH Gross Income*
Sales	$ 800,000	$ -	$ 800,000
Business expenses	(430,000)	-	(430,000)
Depreciation (including $200,000 Sec. 179 deduction)	(250,000)	250,000	-
Actual payments for equipment and related debt	-	(70,000)	(70,000)
Deduction for personal expenditures	(50,000)	50,000	-
Subtotal, sole proprietorship	70,000	230,000	300,000
Schedule K-1 s-corporation income (loss)	(10,000)	10,000	-
Annual income	$ 60,000	$ 240,000	$ 300,000

Gross income calculation, monthly	$ 25,000

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127 N.H. 187 (N.H. 1985)

498 A.2d 339

HYDRAFORM PRODUCTS CORPORATION

v.

AMERICAN STEEL & ALUMINUM CORPORATION.

No. 83-375.

Supreme Court of New Hampshire.

August 16, 1985

[498 A.2d 340]

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Devine, Millimet, Stahl & Branch P.A., Manchester (Bartram C. Branch and Raymond E. Liguori (orally), on brief, Manchester), for plaintiff.

Sheehan, Phinney, Bass & Green P.A., Manchester (Thomas H. Richards and Peter S. Cowan (orally), Manchester), on brief, for defendant.

SOUTER, Justice.

The defendant, American Steel & Aluminum Corporation, appeals from the judgment **[498 A.2d 341]** entered on a jury verdict against it. The plaintiff, Hydraform Products Corporation, brought this action for direct and consequential damages based on claims of

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negligent misrepresentation and breach of a contract to supply steel to be used in manufacturing woodstoves. American claims that prior to trial, the Superior Court (Nadeau, J.) erroneously held that a limitation of damages clause was ineffective to bar the claim for consequential damages. American further claims, inter alia, that the Trial Court (Dalianis, J.) erred (a) in allowing the jury to calculate lost profits on the basis of a volume of business in excess of what the contract disclosed and for a period beyond the year in which the steel was to be supplied; (b) in allowing the jury to award damages for the diminished value of the woodstove division of Hydraform's business; (c) in failing to direct a verdict for the defendant on the misrepresentation claim; and (d) in allowing Hydraform's president to testify as an expert witness. We hold that the trial court properly refused to enforce the limitation of damages clause, but we sustain the other claims of error and reverse the judgment.

Hydraform was incorporated in 1975 and began manufacturing and selling woodstoves in 1976. During the sales season of 1977-78 it sold 640 stoves. It purchased steel from a number of suppliers until July 1978, when it entered into a "trial run" contract with American for enough steel to manufacture 40 stoves. Upon delivery of the steel, certain of Hydraform's agents and employees signed a delivery receipt prepared by American, containing the following language: "Seller will replace or refund the purchase price for any goods which at the time of delivery to buyer were damaged, defective or not in conformance with the buyer's written purchase order, provided that the buyer gives seller written notice by mail of such damage, defect or deviation

within 10 days following its receipt of the goods. In no event shall seller be liable for labor costs expended on such goods or other consequential damages."

(Emphasis added.)

When some of the deliveries under this contract were late, Hydraform's president, J.R. Choate, explained to an agent of American that late deliveries of steel during the peak season for manufacturing and selling stoves could ruin Hydraform's business for a year. In response, American's agent stated that if Hydraform placed a further order, American would sheer and stockpile in advance, at its own plant, enough steel for 400 stoves, and would supply further steel on demand. Thereafter Hydraform did submit a purchase order for steel sufficient to manufacture 400 stoves, to be delivered in four equal installments on the first days of September, October, November and December of 1978.

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American's acceptance of this offer took the form of deliveries accompanied by receipt forms. The forms included the same language limiting American's liability for damages that had appeared on the receipts used during the trial run agreement. Hydraform's employees signed these receipts as the steel was delivered from time to time, and no one representing Hydraform ever objected to that language.

Other aspects of American's performance under the trial run contract reoccurred as well. Deliveries were late, some of the steel delivered was defective, and replacements of defective steel were tardy. Throughout the fall of 1978 Mr. Choate protested the slow and defective shipments, while American's agent continually reassured him that the deficient performance would be corrected. Late in the fall, Mr. Choate finally concluded that American would never perform as agreed, and attempted to obtain steel from other suppliers. He found, however, that none could supply the steel he required in time to manufacture stoves for the 1978-79 sales season. In the meantime, the delays in manufacturing had led to cancelled orders, and by the end of the season Hydraform **[498 A.2d 342]** had manufactured and sold only 250 stoves. In September, 1979, Hydraform sold its woodstove manufacturing division for $150,000 plus royalties.

In December, 1979, Hydraform brought an action for breach of contract, which provoked a countersuit by American. In January, 1983, American moved to dismiss Hydraform's claims for consequential damages to compensate for lost profits and for loss on the sale of the business. American based the motion on the limitation of damages clause and upon its defense that Hydraform had failed to mitigate its damages by cover or otherwise. In February, 1983, Hydraform's pretrial statement filed under Superior Court Rule 62 disclosed that it claimed $100,000 as damages for lost profits generally and $220,000 as a loss on the sale of the business. Later in February, 1983, the superior court permitted Hydraform to amend its writ by adding further counts, which included claims for fraudulent and negligent misrepresentation. Hydraform did not, however, proceed to trial on the claim of fraud.

In April, 1983, Nadeau, J., denied American's motion to dismiss the claims for consequential damages. He relied on the Uniform Commercial Code as adopted in New Hampshire, RSA chapter 382-A, in ruling that the limitation of damages clause was unenforceable on the alternative grounds that the clause would have been a material alteration of the contract, see RSA 382-A:2-

207(2)(b), or was unconscionable or was a term that had failed of its essential purpose, see RSA 382-A:2-719(2) and (3). He further concluded that,

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under the circumstances of the case, the failure to cover, if proven, would not bar consequential damages.

The case was tried to a jury before Dalianis, J. American's exceptions at trial are discussed in detail below. At the close of the evidence, American objected to the use of a verdict form with provision for special findings, and the case was submitted for a general verdict, which the jury returned for Hydraform in the amount of $80,245.12.

American's first assignment of error for our consideration challenges the trial court's refusal to recognize the provision insulating American from liability for consequential damages caused by defective goods. We hold that the trial court was correct.

To begin with, we think the trial court was correct in construing the quoted language in question as a single provision. Theoretically, of course, it can be analyzed as two distinct terms, the first providing for replacement or refund if the seller gives notice of non-conformance within ten days of receipt, the second precluding recovery of certain labor costs and general consequential damages. However, the fact that the terms were placed together confirms what we believe is the more reasonable interpretation, that the parties were agreeing to eliminate a right to consequential damages for the very reason that replacement or refund would operate as effective remedies. Therefore, we are unable to view this as a case in which the status of the limitation of damages clause should be determined independently of the provision for replacement or refund.

Thus reading the provision as a unity, we believe that it became a term of the parties' contract. RSA 382-A:2-207(1) contemplates that an offeree's reply may operate as an acceptance, even though it proposes a term additional to or different from the terms of the offer. When the parties are merchants the additional term becomes a part of the contract unless the offer itself precludes such an addition, or the new term would be a material alteration of the contract, or the offeror seasonably objects. Id. at 2-207(2).

In this case, the trial court found that the parties did not dispute their merchant status. Since the offer contained no preclusion and since Hydraform never objected to the new provision, the limitation must have become a term of the contract unless it worked a material alteration. We conclude that it did not.

[498 A.2d 343] Official comment 4 to § 2-207 implies that the test for material alteration is whether the term in question would result in surprise or hardship if incorporated in the contract without the express

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assent of the party placed at a disadvantage by it. While this standard may seem to beg the question, comment 5 notes that a limitation of remedy that is otherwise reasonable under §§ 2-718 and 2-719 of the code is not considered to be unreasonably surprising. It thus becomes a term of the contract in the absence of preclusion in the original offer or seasonable objection by the offeror. Since § 2-718 is not applicable here, the issue of material alteration turns on whether the term is reasonable when judged under the standard of § 2-719.

The relevant portions of § 2-719 are these:

"(1) Subject to the provisions of subsections (2) and (3) ...
(a) the agreement ... may limit ... the measure of damages recoverable ... as by limiting the buyer's remedies to ... replacement of non-conforming goods ...; and
(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

As subsection (3) provides, a limitation or exclusion of consequential damages is enforceable unless unconscionable, but such a term is not prima facie unconscionable where the consequential loss is commercial. RSA 382-A:2-719(3). Since the loss in question here was commercial, the exclusion was not prima facie unconscionable, and we are left with the question whether there is reason otherwise to hold the exclusion unconscionable. To answer this question we turn again to the official comments of the code.

The comments to § 2-302 of the code state that unconscionability is a one-sidedness that must be assessed as tolerable or not "in the light of the general commercial background and the commercial needs of the particular trade or case ... The principle is one of the prevention of oppression and unfair surprise ... and not of disturbance of allocation of risks because of superior bargaining power." RSA 382-A:2-302 comment 1 (citations omitted); see *American Home Improvement Co. v. MacIver,* 105 N.H. 435, 439, 201 A.2d 886,
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888-89 (1964); *Dow Corning Corporation v. Capitol Aviation, Inc.,* 411 F.2d 622, 626 (7th Cir.1969); *Williams v. Walker-Thomas Furniture Company,* 350 F.2d 445, 450 (D.C.Cir.1965).

Within this general framework, courts dealing with unconscionability claims have espoused the principle that the parties ought to be left free to make their own agreements in the absence of fraud or patent overreaching. *Kansas City Structural Steel Co. v. L.G. Barcus & Sons, Inc.,* 217 Kan. 88, 95, 535 P.2d 419, 424 (1975). Such overreaching may occur when one party is vastly more experienced than the other. See id.; cf. *Cryogenic Equipment, Inc. v. Southern Nitrogen, Inc.,* 490 F.2d 696, 699 (8th Cir.1974) (where negotiator on each side was highly experienced and no evidence of disparate bargaining power, limitation of remedy not unconscionable); *K & C, Inc. v. Westinghouse Elec. Corp.,* 437 Pa. 303, 308-09, 263 A.2d 390, 393 (1970) (based upon parties' prior experience, exclusion of consequential damages was an allocation of risk and was not unconscionable). But the most common indicator of overreaching, or its absence, is the relative bargaining power of the two parties. See, e.g., Cryogenic Equipment, Inc. v. Southern Nitrogen, Inc., supra.

[498 A.2d 344] As we have seen already, however, the superior bargaining power of the favored party by itself is not enough to taint a limitation clause. Nor is difference in size enough to

establish unequal bargaining power. *Cailler v. Humble Oil & Refining Co.,* 117 N.H. 915, 919, 379 A.2d 1253, 1256 (1977). The issue of overreaching therefore tends to turn on whether the bargaining power is so disparate that the weaker party is left without any genuine choice. See Williams v. Walker-Thomas Furniture Company, supra at 449; *Pittsfield Weaving Co., Inc. v. Grove Textiles, Inc.,* 121 N.H. 344, 346, 430 A.2d 638, 639 (1981). Such a conclusion is difficult to draw when the favored party has competitors with whom the other party may deal. See *County Asphalt, Inc. v. Lewis Welding & Engineering Corp.,* 323 F.Supp. 1300, 1308 (S.D.N.Y.1970), aff'd, 444 F.2d 372 (2d Cir.), cert. denied, 404 U.S. 939, 92 S.Ct. 272, 30 L.Ed.2d 252 (1971); Cailler v. Humble Oil & Refining Co. supra.

In the light of these standards for assessing claims of unconscionability resulting from overreaching, we do not find the present clause unconscionable. It is apparent from the testimony of Hydraform's president that he was not an innocent in the industry. While we may assume that American is the larger company, Hydraform had access to American's competitors and had dealt with them

before. Thus, the record would not support a finding that Hydraform had no alternative to dealing with American.

Nor would any circumstances of the dealings of these parties support a finding of unconscionability. American had used the term in question in the course of the trial run contract, and it was reasonable to expect that American would continue to contract on that basis. Therefore, there was no surprise or reason for claiming that American was attempting to add a term after performance had been completed in whole or in part by delivery of the goods ordered. Responsible officials of Hydraform had signed the forms containing the term, and Mr. Choate knew from past experience that late delivery was both a serious danger to his business and a genuine risk when dealing with American. Since Hydraform began to accept goods in these circumstances and thereby assented to the limitation clause, there is no reason to declare that the clause was unconscionable, that is, unreasonable under § 2-719(3). It follows that the clause should not be classified as unreasonably surprising or as a material alteration within the meaning of § 2-207(2)(b). Hence, the clause was initially enforceable as a term of the contract. Id.

It is quite another question, however, whether the clause remained enforceable under the terms of § 2-719(2). This section provides that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose" the clause in effect must be set aside, leaving a party free to pursue remedies otherwise available under article two of the code, including consequential damages. We are satisfied that the record amply supports the trial court's conclusion that the circumstances in this case did cause the exclusive remedy clause to fail of its purpose.

The purpose of the clause was to limit the right to seek consequential damages, but only subject to American's obligation to provide replacements as a remedy for defective goods. It is apparent, however, that the limitation clause did not address the problem of late shipment at all. It is equally apparent that if replacement is to be an appropriate response to the delivery of defective materials to a seasonal manufacturing business, the replacement must be prompt. Thus, if

American delayed the basic shipments or the required replacements, the clause would fail of its essential purpose to provide some effective remedy for breach. Time was of the essence, and delay of a replacement shipment would negate its adequacy. *Cf. Xerox Corp. v. Hawkes,* 124 N.H. 610, 619-20, 475 A.2d 7, 11-12 (1984); County Asphalt, Inc.
[498 A.2d 345] v. Lewis Welding & Engineering Corp., 323 F.Supp. 1300, 1309 (S.D.N.Y.1970).
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In fact, the evidence indicates that neither the basic shipments nor the required replacements were timely. For both those reasons, the clause failed. Hydraform would have been left without any effective remedy if the limitation clause had been enforced, and therefore the trial court committed no error in refusing to enforce it.

Since the clause was not enforceable, the trial court allowed the jury to consider Hydraform's claims for lost profits in the year of the contract, 1978, and for the two years thereafter, as well as its claim for loss in the value of the stove manufacturing business resulting in a lower sales price for the business in 1979. American argues that the court erred in submitting such claims to the jury, and rests its position on three requirements governing the recovery of consequential damages.

First, under RSA 382-A:2-715(2)(a) consequential damages are limited to compensation for "loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know ..." This reflection of Hadley v. Baxendale, 156 Eng.Rep. 145 (1854) thus limits damages to those reasonably foreseeable at the time of the contract. See *Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists,* 14 Cal.App.3d 209, 220, 92 Cal.Rptr. 111, 118 (1971); *Petrie-Clemons v. Butterfield,* 122 N.H. 120, 124, 441 A.2d 1167, 1170 (1982). To satisfy the foreseeability requirement, the injury for which damages are sought "must follow the breach in the natural course of events, or the evidence must specifically show that the breaching party had reason to foresee the injury." *Salem Engineering & Const. Corp. v. Londonderry School Dist.,* 122 N.H. 379, 384, 445 A.2d 1091, 1094 (1982). Thus, peculiar circumstances and particular needs must be made known to the seller if they are to be considered in determining the foreseeability of damages. *Lewis v. Mobil Oil Corporation,* 438 F.2d 500, 510 (8th Cir.1971).

Second, the damages sought must be limited to recompense for the reasonably ascertainable consequences of the breach. See RSA 382-A:2-715, comment 4. While proof of damages to the degree of mathematical certainty is not necessary, *Smith v. State,* 125 N.H. 799, 805, 486 A.2d 289, 294 (1984), a claim for lost profits must rest on evidence demonstrating that the profits claimed were "reasonably certain" in the absence of the breach. *Whitehouse v. Rytman,* 122 N.H. 777, 780, 451 A.2d 370, 372 (1982). Speculative losses are not recoverable.

Third, consequential damages such as lost profits are recoverable only if the loss "could not reasonably be prevented by
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cover or otherwise." § 2-715(2)(a). See § 2-712(1) (i.e., by purchase or contract to purchase goods in substitution for those due from seller). In summary, consequential damages must be reasonably foreseeable, ascertainable and unavoidable.

Applying these standards, we look first at the claim for lost profits for the manufacturing season beginning in September, 1978. There is no serious question that loss of profit on sales was foreseeable up to the number of 400 stoves referred to in the contract, and there is a clear evidentiary basis for a finding that Hydraform would have sold at least that number. There was also an evidentiary basis for the trial court's ruling that Hydraform acted reasonably even though it did not attempt to cover until the season was underway and it turned out to be too late. American had led Hydraform on by repeatedly promising to take steps to remedy its failures, and the court could find that Hydraform's reliance on these promises was reasonable up to the time when it finally and unsuccessfully tried to cover.

Lost profits on sales beyond the 400 stoves presents a foreseeability issue, however. Although American's agent had stated that American would supply steel beyond the 400 stove level on demand, there is no evidence that Hydraform indicated **[498 A.2d 346]** that it would be likely to make such a demand to the extent of any reasonably foreseeable amount. Rather, the evidence was that Mr. Choate had told American's agent that the business was seasonal with a busy period of about four months. The contract referred to delivery dates on the first of four separate months and spoke of only 400 stoves. Thus, there appears to be no basis on which American should have foreseen a volume in excess of 400 for the season beginning in 1978. Lost profits for sales beyond that amount therefore were not recoverable, and it was error to allow the jury to consider them.

Nor should the claims for profits lost on sales projected for the two subsequent years have been submitted to the jury. The impediment to recovery of these profits was not total unforeseeability that the breach could have effects in a subsequent year or years, but the inability to calculate any such loss with reasonable certainty. In arguing that a reasonably certain calculation was possible, Hydraform relies heavily on *Van Hooijdonk v. Langley,* 111 N.H. 32, 274 A.2d 798 (1971), a case that arose from a landlord's cancellation of a business lease. The court held that the jury could award damages for profits that a seasonal restaurant anticipated for the three years that lease should have run. It reasoned that the experience of one two-month season provided sufficient data for a reasonably certain

opinion about the extent of future profits. The court thus found sufficient certainty where damages were estimated on the basis of one year of operation and profit, as compared with no operation and hence no profit in the later years.

Hydraform's situation, however, presents a variable that distinguishes it from Van Hooijdonk. In our case the evidence did not indicate that American's breach had forced Hydraform's stove manufacturing enterprise out of business, and therefore the jury could not assume that there would be no profits in later years. Without that assumption the jury could not come to any reasonably certain conclusion about the anticipated level of sales absent a breach by American. The jury could predict that Hydraform would obtain steel from another source and would be able to manufacture stoves; but it did not have the evidence from which to infer the future volume of manufacturing and sales. Thus, it could not calculate anticipated lost profits with a reasonable degree of certainty.

There is, moreover, a further reason to deny recovery for profits said to have been lost in the later years. Although Hydraform's pretrial statement disclosed that Hydraform claimed $100,000 in lost profits, it did not indicate that the claim related to the seasons beginning in 1979 and 1980. Since the pretrial statement also listed a claim for loss of the value of the business at the time of its sale in 1979, we believe that the statement could reasonably be read as claiming lost profit only for the one year before the business was sold. Therefore the claim for profits in 1979 and 1980 should have been disallowed for failure to disclose the claim as required by Superior Court Rule 62.

We consider next the claim for loss in the value of the business as realized at the time of its sale in 1979. As a general rule, loss in the value of a business as a going concern, or loss in the value of its good will, may be recovered as an element of consequential damages. See *Salem Engineering & Const. Corp. v. Londonderry School Dist.,* 122 N.H. at 384, 445 A.2d at 1094; *Salinger v. Salinger,* 69 N.H. 589, 591-92, 45 A. 558, 559-60 (1899); see also J. Story, Partnership § 99, at 169-70 (6th ed. 1868).

In this case, however, it was error to submit the claim for diminished value to the jury, for three reasons. First, to the extent that diminished value was thought to reflect anticipated loss of profits in future years, as a capitalization of the loss, it could not be calculated with reasonable certainty for the reasons we have just discussed. Second, even if such profits could **[498 A.2d 347]** have been calculated in this case, allowing the jury to consider both a claim for diminished
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value resting on lost profits and a claim for the lost profits themselves would have allowed a double recovery. See *Westric Battery Co. v. Standard Electric Co., Inc.,* 522 F.2d 986, 989 (10th Cir.1975). Third, to the extent that diminished value was thought to rest on any other theory, there was no evidence on which it could have been calculated. There was nothing more than Mr. Choate's testimony that he had sold the business in September of 1979 for $150,000 plus minimum royalties, together with his opinion that the sales price was less than the business was worth. This testimony provided the jury with no basis for determining what the business was worth or for calculating the claimed loss, and any award on this theory rested on sheer speculation.

In summary, we hold that the jury should not have been allowed to consider any contract claim for consequential damages for lost profits beyond those lost on the sale of 150 stoves, the difference between the 400 mentioned in the contract and the 250 actually sold. Nor should the trial court have allowed the jury to consider the claim for loss in the value of the business.

We turn now to American's argument that the court should have directed a verdict for it on the count for negligent misrepresentation. The misrepresentation claim rested on the statement allegedly made by American's agent in the aftermath of the trial run contract. The statement was that if Hydraform would contract for the purchase of further steel, American would sheer and store enough for 400 stoves prior to September 1, 1978, and would supply additional steel beyond that amount on demand.

American's claim of error is best approached by considering the basic elements of the tort: the defendant's negligent misrepresentation of a material fact and the plaintiff's justifiable reliance on that misrepresentation. *Ingaharro v. Blanchette,* 122 N.H. 54, 57, 440 A.2d 445, 447 (1982). While

a promise is not a statement of fact and hence cannot, as such, give rise to an action for misrepresentation, a promise can imply a statement of material fact about the promisor's intention and capacity to honor the promise. See W. Prosser, The Law of Torts at 762-63 (5th ed. 1984). It follows that mere proof of breach of promise, whether or not the promise is a contractual term, will not support an action for misrepresentation. See *Munson v. Raudonis,* 118 N.H. 474, 477, 387 A.2d 1174, 1176 (1978); W. Prosser, supra at 764. Otherwise every contract action would automatically acquire a tandem count in tort, and the tort claim would render nugatory any contractual limitation on liability. See Tareyton Electronic Composition, Inc. v. Eltra Corp. v. Tareyton
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Corp., 21 U.C.C.Rep.Serv. (Callaghan) 1064, 1079 (M.D.N.C.1977); *Investors Premium Corp. v. Burroughs Corp.,* 389 F.Supp. 39, 45-46 (D.S.C.1974); *Mooney v. State Farm Insurance Companies,* 344 F.Supp. 697, 700 (D.N.H.1972).

Measured against these principles, the statement allegedly made by American's agent was in the form of a promise, but it implied that American had the capacity and the intention to sheer and store the amount of steel in question and to provide more if requested. Thus it could have supported the conclusion that the defendant made a factual representation. There is no evidence, however, from which the jury could have concluded that the implicit representations were made falsely. The evidence is sufficient to prove only that American breached its promises, not that it initially lacked the capacity or intent to perform them. Therefore, considering the evidence in the light most favorable to Hydraform, a reasonable jury could not find that the element of false factual representation had been proven, and a verdict should have been directed for American on this count. See *Reid v. Spadone Mach. Co.,* 119 N.H. 457, 462, 404 A.2d 1094, 1097 (1979); *Sargent v. Alton,* 102 N.H. 476, 478, 160 A.2d **[498 A.2d 348]** 345, 346 (1960); R. Wiebusch, 5 New Hampshire Practice, Civil Practice and Procedure § 1578, at 294 (1984).

The remaining issue to be considered in this appeal is academic so far as any possible retrial of this case is concerned, but we will nevertheless deal with it for its value in future cases. American objected to the trial court's decision to allow Mr. Choate to give opinion evidence as an expert witness. The only ground for this objection that we find well-taken was Hydraform's failure to disclose in advance of trial that Mr. Choate would offer opinion testimony.

In *Willett v. General Elec. Co.,* 113 N.H. 358, 360, 306 A.2d 789, 791 (1973) we held that as a matter of course a party may discover (a) the names of those whom his adversary intends to call to give opinion evidence as an expert, (b) the substance of the facts and opinions about which they are expected to testify, and (c) the basis for their opinions. American served standard interrogatories on Hydraform seeking this information, but Hydraform failed to respond that Mr. Choate would testify as an expert and failed to provide the substance and basis for any opinions he might offer. We believe that this was error on Hydraform's part.

Hydraform's failure to list Mr. Choate as an expert may well exemplify common practice, for Mr. Choate was doubtless regarded as a party, rather than as an independent expert. Clearly
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no sharp practice was intended in this case. But, Mr. Choate did function as an expert, and the

policy of disclosure that underlies Willett is as applicable when a party acts as expert as it is when the opinion testimony is to come from an outsider. Hence we caution counsel to make full disclosure when identification of experts is called for by interrogatories. Without good reason to excuse a failure to make such disclosure, a trial court should sustain an opposing party's objection to the opinion testimony of a proffered expert.

Having found error, we reverse. We do not remand for an immediate new trial, however, for we believe that the trial court should first consider the propriety of a remittitur. The trial judge should determine whether on the evidence before it the jury could reasonably have found liability under the tort claim without finding liability under the contract claim as well. If it could not have, and a finding of contract liability is therefore reasonably certain, then the court may consider a remittitur to the amount of a contract verdict that would be consistent with the evidence and this opinion. There was evidence that the average profit per stove was $284.26 and that the difference between actual sales and foreseeable sales in the absence of breach was 150 stoves. Thus if the trial court finds a remittitur otherwise appropriate, a reduction of the verdict to $42,639 would be warranted.

Reversed.

All concurred.

TITLE XLIII
DOMESTIC RELATIONS

CHAPTER 458-C
CHILD SUPPORT GUIDELINES

Section 458-C:2

458-C:2 Definitions. – In this chapter:

I. "Adjusted gross income" means gross income, less:

(a) Court-ordered or administratively ordered support actually paid to others, for adults or children.

(b) Fifty percent of actual self-employment tax paid.

(c) Mandatory, not discretionary, retirement contributions.

(d) Actual state income taxes paid.

(e) Amounts actually paid by the obligor for allowable child care expenses or the medical support obligation for the minor children to whom the child support order applies.

I-a. "Allowable child care expenses" means actual work-related child care expenses for the children to whom the order applies and includes necessary work-related education and training costs.

II. "Child support obligation" means the proportion of total support obligation which the obligor parent is ordered to pay in money to the obligee parent as child support.

III. "Court" means issuing authority, including the office of fair hearings, department of health and human services, having jurisdiction to issue a child support order.

IV. "Gross income" means all income from any source, whether earned or unearned, including, but not limited to, wages, salary, commissions, tips, annuities, social security benefits, trust income, lottery or gambling winnings, interest, dividends, investment income, net rental income, self-employment income, alimony, business profits, pensions, bonuses, and payments from other government programs (except public assistance programs, including aid to families with dependent children, aid to the permanently and totally disabled, supplemental security income, food stamps, and general assistance received from a county or town), including, but not limited to, workers' compensation, veterans' benefits, unemployment benefits, and disability benefits; provided, however, that no income earned at an hourly rate for hours worked, on an occasional or seasonal basis, in excess of 40 hours in any week shall be considered as income for the purpose of determining gross income; and provided further that such hourly rate income is earned for actual overtime labor performed by an employee who earns wages at an hourly rate in a trade or industry which traditionally or commonly pays overtime wages, thus excluding professionals, business owners, business partners, self-employed individuals and others who may exercise sufficient control over their income so as to recharacterize payment to themselves to include overtime wages in addition to a salary. In addition, the following shall apply:

(a) The court, in its discretion, may consider as gross income the difference between the amount a parent is earning and the amount a parent has earned in cases where the parent voluntarily becomes unemployed or underemployed, unless the parent is physically or mentally incapacitated.

(b) The income of either parent's current spouse shall not be considered as gross income to the parent unless the parent resigns from or refuses employment or is voluntarily unemployed or underemployed, in which case the income of the spouse shall be imputed to the parent to the extent that the parent had earned income in his or her usual employment.

(c) The court, in its discretion, may order that child support based on one-time or irregular income be paid when the income is received, rather than be included in the weekly, bi-weekly, or monthly child support calculation. Such support shall be based on the applicable percentage of net income.

IV-a. "Medical support obligation" means the obligation of either or both parents to provide health insurance coverage for a dependent child and/or to pay a monetary sum toward the cost of health insurance provided by a public entity, parent, or other person.

V. "Minimum support order" means an order of support equal to $50 per month, unless the court determines that a lesser amount is appropriate under the particular circumstances of the case.

VI. "Net income" means the parents' combined adjusted gross income less standard deductions published on an annual basis by the department of health and human services and based on federal Internal Revenue Service withholding table amounts for federal income tax, F.I.C.A., and Medicare, which an employer withholds from the monthly income of a single person who has claimed a withholding allowance for 2 people.

(a) Federal income tax;

(b) F.I.C.A.

VI-a. "Reasonable medical support obligation" means the amount established under RSA 458-C:3, V.

VII. "Obligor" means the parent responsible for the payment of child support under the terms of a child support order.

VIII. "Obligee" means the parent or person who receives the payment of child support under the terms of the child support order.

VIII-a. "Parental support obligation" means the proportional amount of the total support obligation allocated to each parent under RSA 458-C:3, II(b) and (c).

IX. "Percentage" means the numerical figure that is applied to net income to determine the amount of child support.

X. "Self-support reserve" means 115 percent of the federal poverty guideline for a single person living alone, as determined annually by the United States Department of Health and Human Services.

XI. "Total support obligation" means net income multiplied by the appropriate percentage derived from RSA 458-C:3.

Source. 1988, 253:1. 1989, 406:1. 1990, 224:1, 2, 5. 1995, 310:181. 1998, 242:1-3. 2004, 77:1, eff. May 7, 2004. 2006, 189:1, eff. July 29, 2006. 2007, 227:3 to 5, eff. June 25, 2007. 2008, 245:1, eff. June 24, 2008. 2010, 26:1, eff. Jan. 1, 2011; 71:1, eff. Jan. 1, 2011; 166:4, eff. June 17, 2010. 2013, 81:1, 2, eff. June 19, 2013.

IN THE MATTER OF MARCIE ALBERT AND GOSSETT W. MCRAE, JR.

No. 2006-139

SUPREME COURT OF NEW HAMPSHIRE

155 N.H. 259; *922 A.2d 643*; *2007 N.H. LEXIS 54*

January 5, 2007, Argued
April 18, 2007, Opinion Issued

SUBSEQUENT HISTORY: Released for Publication April 18, 2007.

PRIOR HISTORY: [***1]
Hillsborough-northern judicial district.

DISPOSITION: Reversed in part; vacated in part; and remanded.

COUNSEL: Law Offices of Christopher W. Kelley, of Nashua (Christopher W. Kelley on the brief and orally), for the petitioner.

Keefe and Browne, P.A., of Manchester (Shaunna L. Browne on the brief and orally), for the respondent.

JUDGES: BRODERICK, C.J. DALIANIS, DUGGAN, GALWAY and HICKS, JJ., concurred.

OPINION BY: BRODERICK

OPINION

[**644] [*259] BRODERICK, C.J. The respondent, Gossett W. McRae, Jr. appeals a child support order recommended by a Marital Master (*Green*, M.) and approved by the Superior Court (*Lewis*, J.). Among other things, McRae objects to the trial court's inclusion of approximately $ 75,000 of passive income in its child support calculation. We reverse in part, vacate in part and remand.

The following facts appear in the record or are undisputed by the parties. In September 2004, McRae was divorced from his wife of thirty-eight years. The couple had two adult sons. During the course of his marriage, McRae had a romantic relationship with the petitioner, Marcie Albert, which resulted in the birth of a daughter. In May 2004, during the litigation of the McRaes' divorce, Albert served McRae with a petition for child support for her daughter, [***2] who was then nine years old. In April 2005, DNA testing showed that McRae was the father of Albert's daughter, and shortly thereafter, he began making temporary child support payments of $ 419 per month.

The McRaes had various business interests that were addressed in their divorce decree, two of which are relevant here. The decree required McRae to transfer three percent of his stock in Plastic Techniques, Inc. (Plastic Techniques), a closely held family company, to one of his sons. The [*260] purpose of the transfer was to dissipate McRae's controlling interest in the [**645] company. Three months before the divorce was finalized, as the McRaes were negotiating the terms of their permanent stipulation, McRae retired from his position as chief executive of Plastic Techniques and no longer received a paycheck from the company. At the time of his retirement, McRae was sixty-one years old. The divorce decree also awarded McRae all of the couple's right, title and interest in Hyaire, LLC (Hyaire), a real estate holding company in which he held a fifty-percent interest. Hyaire owned two buildings, which were subject to a $ 1,600,000 mortgage. It rented one building to Plastic Techniques and the other [***3] to Bayhead Products.

On the McRaes' 2003 federal income tax return, McRae reported $ 116,633 in wages and salaries and another $ 91,178 on the line titled "Rental real estate, royalties, partnerships, S corporations, trusts, etc." On schedule E, the entire $ 91,178 was identified as schedule K-1 income; that is, income to Hyaire attributed to McRae as passive income due to his status as a member of Hyaire. For 2004, the year he retired from Plastic Techniques, McRae reported $ 75,543 in wages and sal-

aries, and $ 85,623 in K-1 passive income. While the tax forms in the record report schedule K-1 income, the record does not include the schedule K-1 forms themselves. On his financial affidavit and at the hearing on Albert's petition, McRae anticipated that in 2005, his gross income would include a $ 2,000 per month draw from Hyaire, $ 293 per month in interest and dividends, and approximately $ 75,000 in K-1 passive income. The K-1 passive income reported on McRae's tax returns was income to Hyaire that, under the federal tax code, is reported on the individual tax returns of the members of the LLC. *See 26 U.S.C. §§ 1361 et seq. (2000).*

At the hearing, McRae testified that the Hyaire income [***4] he reported on his tax returns was not actually available to him because it was used to pay the mortgage on the LLC's two rental properties. However, the record includes no documentation indicating Hyaire's rental income or the amount of Hyaire's mortgage payments. Thus, apart from McRae's testimony, the record does not indicate whether Hyaire had any retained earnings and, if so, how much they were. McRae also explained that Hyaire was set up as a tax shelter, and was near the end of its life cycle, meaning that it had already taken much of the available depreciation on its buildings, and was paying its mortgage lender much more principal than interest. In such a situation, McRae testified, he, as a member of the LLC, was obligated to report substantial income that was offset by few deductions and that was not actually available to Hyaire or to him. Conversely, he testified, at the earlier end of its life cycle, when Hyaire could offset income with deductions for accelerated depreciation and [*261] interest payments, he was able to claim a loss for tax purposes while actually having considerable actual income from Hyaire in the form of distributions of profit. But, again, the record does [***5] not include any documentation of Hyaire's gross rental income or its mortgage payments.

Prior to the hearing on Albert's petition, McRae prepared a financial affidavit listing his gross income as $ 2,293 per month and a child support guidelines worksheet listing Albert's gross income as $ 2,000 per month. He did not initially list his K-1 passive income, but during a recess in the hearing, he amended his affidavit to include several previously unlisted assets as well as "$ 75,000 [yearly] attributed to myself as a member of LLC." Based upon the income he initially listed on his financial affidavit, McRae proposed that his child support obligation should be $ 444 per [**646] month, retroactive to May 11, 2004, the date upon which he was served with Albert's petition. He also proposed to pay an arrearage of $ 5,028 in monthly installments of $ 20.

After a hearing, the trial court ordered McRae to pay Albert $ 335 per week, based upon an annual income of approximately $ 100,000. In the words of the Master:

> The court finds it is not unreasonable to look at what Mr. McRae reports to the United States government as his income for tax purposes in determining child support. If one includes his $ 2200 [***6] a month in income plus $ 70,000 to $ 80,000 in passive income, we are looking at a person, who for tax purposes, earns $ 100,000 plus or minus. The court will utilize that figure in determining the appropriate obligation to pay for child support.

In addition, the trial court ordered McRae to pay child support retroactively to April 13, 2004, and ordered him to pay an arrearage of $ 27,470 within ninety days. Finally, the trial court observed in its narrative order that McRae "is actively participating in the family business [Plastic Techniques] as his son is currently in Iraq," and concluded under item 18 of the uniform support order that McRae "ha[d] voluntarily reduced his income and ha[d] an ownership interest in several companies." However, the trial court did not check the box on the uniform support order that provides: "Obligor is unemployed and MUST REPORT EFFORTS TO SEEK EMPLOYMENT." On McRae's motion for reconsideration, the trial court adjusted the starting date of his obligation to May 11, 2004, but denied relief on all the other grounds McRae raised. This appeal followed.

I

According to McRae, the trial court erred by including his projected K-1 passive income for 2005 in [***7] determining his child support obligation, and [*262] unsustainably exercised its discretion by imposing a ninety-day deadline for payment of his arrearage and by failing to deduct from that arrearage the child support payments he began making in May 2005. He also argues that the trial court erred by finding that his decision to retire constituted a voluntary reduction of income intended to circumvent his child support obligations and unsustainably exercised its discretion by imputing income to him based upon a finding of voluntary unemployment. We consider each issue in turn.

II

Whether the trial court should have included McRae's K-1 projected passive income as part of his gross income as defined under *RSA 458-C:2, IV* (2004) is a question of law which we review *de novo. See In the Matter of State & Taylor, 153 N.H. 700, 702, 904 A.2d 619 (2006)* (treating whether trial court correctly ruled that lump sum personal injury settlement was "gross in-

come" as matter of statutory construction); *Mortgage Specialists v. Davey, 153 N.H. 764, 774, 904 A.2d 652 (2006)* ("interpretation of a statute . . . is a question of law that we review *de novo*"). Because the determination of whether income to an LLC that is reported on a member's [***8] individual tax return is "gross income" as that term is defined in the child support statute is a question of law, we must necessarily reject the petitioner's argument that the respondent's initial failure to disclose his projected $ 75,000 in K-1 passive income was a factor that justified the trial court's inclusion of that income in its support calculation. While a party's credibility and forthrightness are factors for a trial court to consider when accepting evidence of *net* income, *see In the Matter of Crowe & Crowe, 148 N.H. 218, 223,* [**647] *804 A.2d 455 (2002)*, a finding that McRae was not credible or forthright would not have given the trial court the authority to categorize as gross income an item not otherwise includable under the statute.

Turning to the question before us, the relevant statute provides, in pertinent part:

> "Gross income" means all income from any source, whether earned or unearned, including, but not limited to, wages, salary, commissions, tips, annuities, social security benefits, trust income, lottery or gambling winnings, interest, dividends, investment income, *net rental income*, self-employment income, alimony, business profits, pensions, bonuses, and payments from other government [***9] programs . . . .

RSA 458-C:2, IV (emphasis added). The respondent testified, without contradiction, that the income at issue is the rent that Plastic Techniques and Bayhead Products paid Hyaire, income that Hyaire used to pay the [*263] mortgage on its two rental properties. Thus, the question before us is whether the Hyaire income attributed to the respondent was gross rental income or net rental income.

While the record does not indicate the amount of Hyaire's mortgage payments, McRae testified that the $ 75,000 in passive K-1 income he expected to report in 2005 was either paid out to him in the form of his $ 2,000 monthly draw or was paid to Hyaire's mortgage lender. Any part of that $ 75,000 that was paid to the mortgage lender was not "net rental income" that would be included as "gross income" under *RSA 458-C:2, IV.* That statute expressly states that "gross income" includes, but is not limited to, the items listed therein, which allows the trial court to count as gross income items that are not specifically listed in the statute. *See, e.g., In the Matter of Dolan and Dolan, 147 N.H. 218, 221-22, 786 A.2d 820 (2001)* (counting exercised stock options as gross income). But here, where the statute specifically [***10] qualifies the term "rental income" with the adjective "net," we cannot ignore the qualifier and include rental income above and beyond the amount a landlord nets. *See Winnacunnet Coop. Sch. Dist. v. Town of Seabrook, 148 N.H. 519, 525-26, 809 A.2d 1270 (2002)* ("When construing a statute, we must give effect to all words in a statute and presume that the legislature did not enact superfluous or redundant words."); *cf. In the Matter of Jerome & Jerome, 150 N.H. 626, 629, 843 A.2d 325 (2004)* (holding that legislature's use of the term "annuities," without qualification, indicated legislature's intent to include all annuities, not just certain annuities, in "gross income"). Because the legislature plainly limited the rental income to be included as gross income for child support purposes to net rental income, to whatever extent the trial court determined that Hyaire income actually paid to Hyaire's mortgage lender was McRae's income for child support purposes, it erred, as a matter of law. However, because the record does not include any information on the amount of rent Hyaire actually took in or the amount of its mortgage payments, the extent of the trial court's error will have to be determined on remand.

Both the [***11] trial court and Albert relied upon the fact that McRae's passive income was reported on his federal income tax returns, but that reliance is misplaced. We recently explained that "how federal income taxation statutes define 'income' is of little relevance to our interpretation of gross income under the child support guidelines." *Taylor, 153 N.H. at 704.* This is so because "[t]he objectives of the child support guidelines . . . [**648] differ from the objectives of the federal income taxation statutes." *Id. at 703-04.* Thus, it is not incongruous for us to hold that an item of taxable income does not qualify as gross income for child support purposes.

[*264] The Kansas Supreme Court has noted in a case involving issues similar, but not identical, to those before us: "Few courts rely solely on personal income tax returns to determine the amount of income available for purposes of calculating support. Taxable income of a Subchapter S corporation which is attributable to a shareholder does not reflect actual income received as a cash distribution." *In re Marriage of Brand, 273 Kan. 346, 44 P.3d 321, 328 (Kan. 2002).* The facts of this case demonstrate why income tax returns are an unreliable guide to the income available [***12] for child support purposes. McRae testified that because Hyaire has depreciated its buildings and is now paying mostly principal to its mortgage lender, it has few deductions to claim and shows a "paper" profit for income tax purposes, while producing very little actual cash for itself or its members. Conversely, he testified that early in Hyaire's

life cycle, he was able to claim losses for federal income tax purposes while realizing a substantial amount of cash, presumably in the form of distributions of profit. While the question is not before us, we can easily envision a situation in which a member of an LLC such as Hyaire could demonstrate "paper" losses for IRS purposes but have a substantial income that could be drawn upon for child support. Our point is this: the fact that Hyaire's payments of principal are not deductible on McRae's income tax return does not make the money used to make those payments available to him for paying child support.

Regarding the tax treatment of subchapter S corporations, which also applies to the LLC in this case, the Kansas Supreme Court explained:

> Although a Subchapter S corporation may distribute income, it is not required to do so. Earnings are [***13] owned by the corporation, not by the shareholders. Subchapter S corporations may accumulate profits, referred to as 'retained earnings.' Retained earnings are the net sum of a corporation's yearly profits and losses.
>
> Subchapter S status provides an alternate method of taxing a corporation's income. In a Subchapter S corporation, income tax is paid by the shareholders rather than by the corporation itself. When the tax is paid by the individual, the corporation avoids income tax liability.
>
> A Subchapter S corporation allocates various items of income to shareholders based upon the shareholder's proportionate ownership of stock. Allocations are itemized on an individual shareholder's Schedule K-1.

Id. at 325 (citations omitted). Here, McRae reported an annual draw of $ 24,000 from Hyaire and recognized, as he must, that his draw is available [*265] for child support purposes. Albert does not argue that McRae received any distributions from Hyaire other than his draw or that Hyaire had any retained earnings, both of which probably qualify as gross income under *RSA 458-C:2, IV. See Mitts v. Mitts, 39 S.W.3d 142, 148 (Tenn. Ct. App. 2000)* (counting as income for child support purposes distributions [***14] made to minority shareholder from corporate earnings); *Brand, 44 P.3d at 327-28* (explaining that in some jurisdictions, subchapter S corporation's retained earnings are considered income to shareholders for child support purposes). The question before us is limited solely to the Hyaire income allocated to McRae. Because the record does not allow [**649] a determination of Hyaire's net rental income, *i.e.*, the amount of income retained by Hyaire after payment of its mortgage and other expenses, the trial court's determination of McRae's gross income is vacated and the case is remanded for a further evidentiary hearing on this issue and a recalculation of McRae's child support obligation, including the amount of his arrearage.

III

McRae argues that the trial court unsustainably exercised its discretion by ordering him to pay his child support arrearage within ninety days of its order. Because we have vacated the trial court's calculation of the amount of his child support arrearage, making the amount of his arrearage undetermined, his argument that the trial court unsustainably exercised its discretion by ordering full payment within ninety days is moot. The factors cited by the respondent may [***15] or may not apply with equal force to the arrearage the trial court recalculates on remand. And of course, on remand, both parties are free to argue for what they believe to be an equitable schedule for paying the calculated arrearage.

IV

McRae argues that the trial court unsustainably exercised its discretion by failing to reduce the assessed arrearage by the amount of the child support payments he began making in May 2005. The petitioner does not suggest any reason why McRae was not entitled to such a credit, but only that the record does not support his claim that he was denied credit for the payments he made, and that absent such record support, we must assume that the record supports the trial court's decision. We disagree.

The trial court ordered McRae to pay an arrearage of $ 27,470, based upon a weekly child support obligation of $ 335. The total amount of the assessed arrearage divided by 335 equals eighty-two. There are approximately eighty-six weeks between April 13, 2004, and the date of the trial court's order, and approximately eighty-two weeks between the [*266] correct retroactive date, May 11, 2004, and the date of the trial court's order. Thus, the record appears to establish [***16] that the trial court's listing of the April date was a scrivener's error and that the court based its arrearage calculation upon the correct retroactive date, but did not deduct the amount that the respondent has already paid to the petitioner. That was an error, and should be corrected on remand.

V

McRae argues that the trial court: (1) committed reversible error by finding that his decision to retire was both unreasonable and an attempt to avoid his support

obligation to his daughter; and (2) unsustainably exercised its discretion by imputing income to him based upon a determination that he was voluntarily underemployed.

As we have already noted, the trial court stated, under item eighteen of its uniform support order: "Obligor has voluntarily reduced his income . . . ." However, notwithstanding its statutory authority to impute income to a voluntarily unemployed or underemployed parent, *see RSA 458-C:2, IV(a)*, the trial court in this case demonstrably did not impute any income to McRae based upon its finding of voluntary income reduction. Rather, the trial court based its child support calculation upon gross income of $ 100,000, composed of McRae's draw from Hyaire ($ 24,000), his [***17] investment income ($ 2,400), and his projected passive income from Hyaire (between $ 70,000 and $ 80,000). Because we are remanding for reconsideration of the [**650] child support award, we vacate the trial court's finding that McRae voluntarily reduced his income. Upon remand, if the trial court revisits this issue, it shall make specific findings of fact and rulings of law to assist in any appellate review. In addition, in assessing the reasonableness of McRae's retirement, the trial court should address the unique facts of this case and consult our opinion in *In the Matter of Arvenitis & Arvenitis, 152 N.H. 653, 657, 886 A.2d 1025 (2005)*, which adopts the reasonableness test set out in *Pimm v. Pimm, 601 So. 2d 534, 537 (Fla. 1992)* (superseded by statute on other grounds).

Reversed in part; vacated in part; and remanded.

DALIANIS, DUGGAN, GALWAY and HICKS, JJ., concurred.

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IN THE MATTER OF JANICE E. MAVES AND DAVID L. MOORE

No. 2013-171

SUPREME COURT OF NEW HAMPSHIRE

166 N.H. 564; *101 A.3d 1*; *2014 N.H. LEXIS 93*

April 3, 2014, Argued
August 13, 2014, Opinion Issued

PRIOR HISTORY: [***1] 2d Circuit Court -- Plymouth Family Division.

DISPOSITION: Vacated and remanded.

HEADNOTES

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

1. Divorce--Child Support--Guidelines "Gross income," as defined by statute, evinces the legislature's intent to minimize the economic consequences to children in domestic relations cases by mandating that an obligor's entire income be considered. *RSA 458-C:1.*

2. Divorce--Child Support--Particular Cases Capital gains from sales of condominiums were part of a husband's "gross income" for the purpose of determining child support. *RSA 458-C:2, IV.*

3. Divorce--Child Support--Particular Cases As calculation of a parent's ability to pay child support necessitates determining an actual ability to pay, the trial court properly included the capital gains from the former husband's sale of condominiums, but excluded the funds obtained through a line of credit, in determining "gross income." *RSA 458-C:2, IV.*

4. Divorce--Child Support--Guidelines Property division and child support serve different functions and are governed by different requirements because the child of divorced parents receives nothing from the property division. *RSA 458-C:2, IV.*

5. Divorce--Child Support--Guidelines Few courts rely solely on personal income tax returns to determine the amount of income available for purposes of calculating child support because how federal income taxation statutes define "income" is of little relevance to the interpretation of gross income under the child support guidelines. *RSA 458-C:2, IV.*

6. Divorce--Child Support--Practice and Procedure It was error for a trial court to rely on a former husband's adjusted gross income for purposes of calculating his "gross income" for child support purposes because it included deductions for expenses that were not necessary for producing income. *RSA 458-C:2, IV.*

7. Divorce--Child Support--Guidelines For purposes of calculating child support, the proper measure of "gross income" is to deduct legitimate business expenses from business profits; a sole shareholder of an S-corporation is considered to be self-employed. *RSA 458-C:2, IV.*

COUNSEL: *Upton & Hatfield, LLP*, of Concord (*Marilyn B. McNamara*, *James A. O'Shaughnessy*, and *Sandra H. Kenney* on the brief, and *Ms. McNamara* orally), for the petitioner.

Martin, Lord & Osman, PA, of Laconia (*Judith L. Homan* on the brief and orally), for the respondent.

JUDGES: DALIANIS, C.J. HICKS, CONBOY, LYNN, and BASSETT, JJ., concurred.

OPINION BY: DALIANIS

OPINION

[*565] [**2] DALIANIS, C.J. The petitioner, Janice E. Maves, appeals, and the respondent, David L.

Moore, cross-appeals, the decision of the Circuit Court (*RAPPA*, J.) modifying the respondent's child support obligation. We vacate and remand.

The trial court found, or the record supports, the following facts. The parties, who were divorced in 2004, are the parents of a son, who was fourteen years old at the time of the hearing on the petitioner's motion to modify child support. The son has a "solid relationship" with both parents, who share parenting time, alternating on a weekly basis. Under the initial child support order, the respondent paid $650 per month for the son's support. In 2008, his support obligation was increased to $950 per month. In addition, the respondent provides the son's health insurance [***2] and covers all uninsured medical expenses, pays for sports and academic summer camps, and furnishes the ski pass, clothing, and equipment for the son's ski racing.

As part of the property settlement in the parties' divorce, the respondent was awarded Squam Lakeside Farm, Inc. (SLF), a campground consisting of 119 sites with trailer hook-ups for water, electricity, and sewer. SLF is a Subchapter S corporation (S-corporation); the respondent is the sole shareholder. SLF's profits, losses, and capital gains are reported on the personal federal income tax returns of the respondent, as shareholder.

In 2010, the respondent altered his business plan and, after expending almost $400,000 in legal bills and surveying costs and obtaining the necessary permits from the State, began marketing the campsites as condominiums, rather than as seasonal rentals. Based upon the sale of many of the condominiums, the respondent reported capital gains of $1,000,389 on his 2011 personal tax return.

In 2011, the respondent restructured a loan that he owed to SLF, converting it to a line of credit. Since that time, he has used the line of credit for various expenses, both personal and business-related. At the time [***3] of the hearing, the respondent had borrowed $887,754 against the line of credit. The respondent has never made any payments toward the outstanding principal or interest.

[**3] In November 2011, the petitioner moved to modify child support, asserting that three years had passed since the previous support order and that circumstances had materially changed, warranting a new support order. *See RSA 458-C:7* (Supp. 2013). In addition, the respondent filed two motions to modify orders regarding health insurance and medical expenses and miscellaneous expenses. A final hearing on all motions was held on August 10, 2012.

At the hearing, the parties disagreed about what comprised the respondent's "gross income" for the purpose of determining child support. Paul [*566] Buck, a certified public accountant who performs various financial services for the respondent and SLF, including preparing the individual and S-corporation tax returns, testified that because the capital gains from the condominium sales were not transferred from SLF to the respondent "in any way, shape or form," they were not available to the respondent. Rather, he testified that the respondent's "income" in 2011 should be limited to his $39,000 salary [***4] and the $2,750 monthly housing benefit for his residence in Holderness.

The trial court determined that the capital gains generated by the sale of the condominium units were "irregular" income that should be considered as part of the respondent's gross income for the purpose of establishing his child support obligation. *See RSA 458-C:2, IV(c)* (2004). To calculate the weekly child support obligation, the court used the adjusted gross income figure from the respondent's 2011 federal income tax return, resulting in a support amount of $2,411 per week. Accordingly, the court ordered the respondent, within sixty days, to pay $9,644 for the four weeks from the date of service of the request for modification, November 29, 2011, through the end of 2011. Upon reconsideration, however, the court amended its order to permit payment in monthly installments. The court also concluded that it needed to review the respondent's 2012 federal income tax return to calculate the amount of irregular income from capital gains for 2012. The trial court has held in abeyance further calculation of the respondent's on-going child support pending the outcome of this appeal.

Both parties appealed the support order. In her appeal, [***5] the petitioner argues that the trial court erred in: (1) failing to characterize a loan from SLF to the respondent as income for the purpose of child support; (2) failing to impute substantial "regular" income to the respondent as a result of that loan and the respondent's capital gains; (3) treating the capital gains as "irregular" income and calculating the associated arrearage as applicable only to a four-week period at the end of 2011; and (4) using the respondent's adjusted gross income figure, rather than gross income minus legitimate business expenses, to determine his 2011 income. In his cross-appeal, the respondent maintains that the trial court erred in: (1) considering capital gains income from SLF, given that the asset was awarded exclusively to him in the divorce decree and that the capital gains were received by the corporation and, though taxable to him, were not actually distributed to him individually; (2) using his adjusted gross income figure to determine his income for 2011; and (3) arriving at a "grossly excessive" child support obligation based upon his 2011 capital gains income.

Child support is governed by *RSA chapter 458-C* (2004 & Supp. 2013), and, accordingly, resolution of [***6] the issues on appeal requires us to interpret this chapter. As we examine the statutory language, we do not merely look [*567] at isolated words or phrases, but instead we consider the statute as a whole. *In the Matter of* [**4] *Woolsey & Woolsey, 164 N.H. 301, 304, 55 A.3d 977 (2012)*. In so doing, we are better able to discern the legislature's intent, and therefore better able to understand the statutory language in light of the policy sought to be advanced by the entire statutory scheme. *Id.* We review the trial court's statutory interpretation *de novo. Id. at 303*.

We must first determine whether capital gains from the sale of the condominium units should be included in "gross income" for the purpose of calculating the respondent's child support obligation. The statute provides:

> "Gross income" means all income from any source, whether earned or unearned, including, but not limited to, wages, salary, commissions, tips, annuities, social security benefits, trust income, lottery or gambling winnings, interest, dividends, investment income, net rental income, self-employment income, alimony, business profits, pensions, bonuses, and payments from other government programs [ ] except public assistance programs ... .

RSA 458-C:2, IV. The petitioner asserts that the net profits from the sales of SLF [***7] condominium units are "gross income" for purposes of calculating child support. The respondent counters that, because several neighboring states include capital gains in the definition of "gross income," but New Hampshire does not, the legislature intended to exclude capital gains from "gross income" when calculating child support.

[1, 2] We agree with the petitioner. The statute expressly states that "gross income" means "all income from any source, whether earned or unearned," *id.*, and, therefore, it "includes, but is not limited to, the items listed therein, which allows the trial court to count as gross income items that are not specifically listed in the statute." *In the Matter of Albert & McRae, 155 N.H. 259, 263, 922 A.2d 643 (2007)*. The statute's broad language evinces the legislature's intent to "minimize the economic consequences to children," *RSA 458-C:1* (Supp. 2013), in domestic relations cases by "mandat[ing] that an obligor's entire income be considered." *In the Matter of Jerome & Jerome, 150 N.H. 626, 633, 843 A.2d 325 (2004)* (quotation omitted). Moreover, "[m]ost states that have considered the question classify realized capital gains as income for the purpose of child support computation." *In re Children of Knight v. Lincoln, 2014 OK CIV APP 2, 317 P.3d 210, 214, 214 n.4 (Okla. Ct. App. 2013)* (collecting cases). Accordingly, we conclude that capital gains from SLF are "gross income" for the purpose of determining child support.

We are not persuaded [***8] by the respondent's argument that, because some states include capital gains in the definition of "gross income" but New Hampshire does not, our legislature specifically intended to exclude them. [*568] Our task here is to interpret our child support statute, *RSA chapter 458-C*; the definition of "gross income" in other states' statutes does not control our analysis.

Furthermore, were we to exclude capital gains from "gross income," a person deriving substantial income *exclusively* from capital gains would pay no child support. The legislature could not have intended such an absurd result. *See Bank of N.Y. Mellon v. Cataldo, 161 N.H. 135, 138, 13 A.3d 134 (2010)* (refusing to construe statute to lead to absurd result).

[3] The petitioner asserts that both the capital gains from the sales of the condominium units and the money available to the respondent through the line of credit should be included in "gross income." We reject this assertion. The capital gains were treated as SLF funds, [**5] which, in turn, the respondent drew down as a line of credit. Including both in "gross income," therefore, would be double-counting the funds available to the respondent for the purpose of child support. Because "[w]e believe that calculating a parent's ability to pay child support necessitates determining [***9] an actual ability to pay," *Woolsey, 164 N.H. at 306*, we find no error in including the capital gains, but excluding the funds obtained through the line of credit, in determining "gross income."

The respondent asserts that because he was awarded SLF as part of the property settlement in the parties' divorce, the capital gains on the sales of the condominium units should not constitute "gross income" for the purpose of calculating child support. He maintains that "[t]he party who is awarded the property [as part of the division of marital assets] is entitled to develop, invest, sell or otherwise manage the property as his or her own for life."

[4] "[P]roperty division and child support serve different functions and are governed by different requirements... . [T]he child of divorced parents receives nothing from the property division." *Jerome, 150 N.H. at 633* (quotation omitted). Accordingly, "it is not necessarily 'double-counting' to treat the [S-corporation] as marital property, award it to [the respondent], offset the award to [the petitioner], and then use the income from the asset to

determine the level of child support." *Rattee v. Rattee, 146 N.H. 44, 49, 767 A.2d 415 (2001)*. We note that here we are dealing with capital gains generated in a business context, so we have no occasion to consider whether, [***10] for example, capital gains generated from the sale of a personal residence and reinvested in a new residence must be included in gross income for child support purposes.

[5, 6] We next address whether the trial court correctly calculated the "gross income" generated by the sales of the condominium units. To [*569] determine "gross income," the trial court used the adjusted gross income figure from the respondent's 2011 tax return. The petitioner contends that this was error, and we agree. "Few courts rely solely on personal income tax returns to determine the amount of income available for purposes of calculating child support." *Albert, 155 N.H. at 264* (quotation omitted). Indeed, "how federal income taxation statutes define 'income' is of little relevance to [the] interpretation of gross income under the child support guidelines." *In the Matter of State & Taylor, 153 N.H. 700, 704, 904 A.2d 619 (2006)*. Moreover, as the petitioner observes, the respondent's adjusted gross income for federal tax purposes does not reflect his "gross income" for child support purposes because it includes deductions for such things as depreciation, discretionary retirement contributions for the respondent and his current wife, and nonbusiness-related rental property losses -- expenses that were not necessary [***11] for producing income. Accordingly, because the trial court erroneously relied upon the respondent's adjusted gross income, we vacate and remand for a redetermination of his child support obligation.

[7] The petitioner contends that the proper measure of "gross income" is to deduct legitimate business expenses from business profits. We agree. SLF is an S-corporation; the respondent is the sole shareholder. Courts in other jurisdictions have decided that a sole shareholder of an S-corporation is considered to be self-employed. *See Glass v. Oeder, 716 N.E.2d 413, 415, 416 (Ind. 1999)*; *Gase v. Gase, 266 Neb. 975, 671 N.W.2d 223, 231 (Neb. 2003)*; *see also In the Matter of Hampers and Hampers, 166 N.H. 422, 439, 97 A.3d 1106 (2014)* (decided June 24, 2014) [**6] (analogizing self-employment to joint ownership of partnership, which, like S-corporation, is subject to "pass through" taxation). In *Woolsey*, we held that self-employment income includable for the calculation of child support was gross receipts net of legitimate business expenses. *Woolsey, 164 N.H. at 306*. We explained that business expenses must be "actually incurred and paid" and "reasonable and necessary for producing income" in order to be deductible from self-employment income. *Id. at 307* (quotations omitted). "It is for the trial judge to determine whether claimed expenses meet those criteria." *Id.* Consequently, the trial court should "scrutinize the [***12] self-employed parent's financial situation closely, and ... exclude as a business expense any expenditure which the court in its discretion finds will personally benefit the parent." *Merrill v. Merrill, 587 N.E.2d 188, 190 (Ind. Ct. App. 1992)*. We note that "[i]n situations where the individual with the support obligation is able to control the retention and disbursement of funds by the [S-corporation], he or she will bear the burden of proving that such actions were necessary to maintain or preserve the business." *In re Marriage of Brand, 273 Kan. 346, 44 P.3d 321, 327 (Kan. 2002)*; *cf. Hampers, 166 N.H. at 442* [*570] (holding that limited partner has burden of demonstrating deductibility of partnership's expenses because partner has ability to obtain information to establish propriety of partnership's actions).

Because the respondent has raised the issue on appeal, on remand the trial court shall include written findings addressing whether special circumstances warrant deviation from the application of the support guidelines. *See RSA 458-C:5, I* (Supp. 2013) (requiring court, where the issue is raised by either party, to make written findings "relative to the applicability" of special circumstances). In light of our decision, we need not address the parties' remaining arguments.

Vacated and remanded.

HICKS, CONBOY, LYNN, and BASSETT, JJ., concurred.

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164 N.H. 301 (N.H. 2012)
55 A.3d 977
In the Matter of Nancy E. WOOLSEY and Grant E. Woolsey.
No. 2011-483.
Supreme Court of New Hampshire.
October 30, 2012

Argued: June 7, 2012.

[55 A.3d 978]

Martin, Lord & Osman, P.A., of Laconia (Judith L. Homan on the brief and orally), for the petitioner.

Seufert, Davis & Hunt, PLLC, of Franklin (Lexie Rojas on the brief and orally), for the respondent.

HICKS, J.

The respondent, Grant E. Woolsey, appeals an order of the Plymouth Family Division (*Rappa,* J.) modifying his child support obligation to the petitioner, Nancy E. Woolsey. We reverse and remand.

The trial court found, or the record supports, the following relevant facts. The parties have two daughters who, at the time of the order, were seventeen and fourteen. The respondent is a self-employed truck driver, doing business under the name Fox Ridge Reliance (the business). He transports construction materials from April to December and plows snow in the winter and spring. Before working as a truck driver, the respondent had been employed selling recreational vehicles at a salary of $50,000 per year.

According to his business's 2008 profit and loss statement, the business had gross income of $70,451.48; the net, after business expenses of $42,947.79 were deducted, was $27,947.79. The respondent took that amount as his personal income. The 2009 profit and loss statement showed gross income of $50,601.08; after expenses of $25,556.85 were deducted, the net was $25,044.23, which the respondent again took as personal income. For 2010, the profit and loss statement showed $49,624.86 in gross income, and $24,652.97 in expenses, leaving $24,971.89 for the respondent's income.

On December 8, 2010, the respondent moved to modify a child support order issued on January 28, 2008. He alleged a substantial change in circumstances due to the economic downturn. For instance, he testified that although he had regularly received work from Ambrose Brothers in the past, he did no hauling for that company in 2010 "because the economy had gotten so horrible." In addition, he testified that his fuel expense had gone up because of the economy.

The petitioner questioned the respondent's business expenses, argued that he is underemployed, and alleged that he had additional income he was not reporting to the Internal Revenue Service or to the court. She argued that the respondent did not show signs of financial hardship, and asked the court to find that he is financially capable of paying his original support

obligation.

Under the 2008 order, the respondent was obligated to pay $189.00 per week in child support. At the time of the hearing, he was $12,907.00 in arrears and had not been current since 2004.

The trial court found that the respondent had failed to show a substantial change in circumstances because he continued to operate the same business and "[h]is gross income from that business was $49,624.86 in 2010, which is virtually the same as the income that was considered by the Court

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in 2008." *See* RSA 458-C:7, I(a) (Supp.2012)(party not prohibited from applying "at any time for a modification [of child support order] based on substantial change of circumstances"). Nevertheless, because the hearing took place three years after entry of the support order under review, the court acknowledged that the petitioner was entitled to review without a showing of a substantial change of circumstances. *See id.* (party may apply for modification three years after entry of order "without the need to show a substantial change of circumstances").

The court found "that the [r]espondent's claims of financial hardship [were] not credible." It specifically found that his checking account balance was over

[55 A.3d 979] $6,000.00 at the end of 2010 and that "[t]here were many months that the [r]espondent did not pay his child support in spite of having a significant positive balance in his checking account." The court acknowledged, but presumably discounted, the respondent's claim that his business needs a "cash cushion" to start "at the beginning of the spring and to deal with unexpected repairs and other expenses."

The trial court found that the respondent's 2010 gross income was $49,624.86— that is, $4,135.40 per month. It found that he paid $436.00 in self-employment taxes per month, entitling him to a $218.00 per month deduction under RSA 458-C:2, I (Supp.2012), resulting in an adjusted gross income of $3,917.40 per month. Applying the child support guidelines, the court calculated the respondent's support obligation to be $233.00 per week.

On appeal, the respondent argues that: (1) the trial court erred by finding that his gross income for purposes of calculating his child support obligation was the same as the business's gross income; (2) the trial court incorrectly applied RSA 458-C:2, I, in finding that the only expense it could deduct was fifty percent of the respondent's self-employment tax; (3) the trial court misinterpreted RSA 458-C:2, IV (2004) so as to impose a confiscatory order; (4) the trial court's finding as to the credibility of the respondent could not be used to support an upward adjustment to the guideline support obligation; and (5) the trial court's order constituted an "inequitable application of the law in violation of [the New Hampshire] [C]onstitution."

We first address the respondent's claim that the trial court erred in equating the gross income of his business with his gross income for purposes of calculating his child support obligation. "Resolution of this issue requires that we interpret RSA 458-C:2, IV, which defines gross income for child support purposes. We review the trial court's statutory interpretation *de novo.* We are the final arbiters of the legislature's intent

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as expressed in the words of the statute considered as a whole." *In the Matter of Fulton & Fulton,* 154 N.H. 264, 266, 910 A.2d 1180 (2006) (quotations and citation omitted).
When examining the language of the statute, we will ascribe the plain and ordinary meaning to the words used. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language the legislature did not see fit to include. As we examine the language, we do not merely look at isolated words or phrases, but instead we consider the statute as a whole. In so doing, we are better able to discern the legislature's intent, and therefore better able to understand the statutory language in light of the policy sought to be advanced by the entire statutory scheme.
Appeal of Kat Paw Acres Trust, 156 N.H. 536, 537-38, 937 A.2d 925 (2007) (quotations and citations omitted).

The statute defines "gross income" to mean, in pertinent part, "all income from any source, whether earned or unearned, including, but not limited to, wages, salary, commissions, tips, annuities, social security benefits, trust income, lottery or gambling winnings, interest, dividends, investment income, net rental income, self-employment income, alimony, business profits, pensions, bonuses, and payments from [certain] other government programs." RSA 458-C:2, IV.

The respondent argues that the "business profits" includable under the statute must be net of expenses because "the very definition of the word ' profit' necessitates that in order to calculate profits one must remove the expenses from the gross business income." We agree. Profit is defined as "the excess of returns over **[55 A.3d 980]** expenditure in a transaction or series of transactions" or "net income (as in a business) usu[ally] for a given period of time." *Webster's Third New International Dictionary* 1811 (unabridged ed.2002). Net income, in turn, is defined as "the balance of gross income remaining after deducting related costs and expenses usu[ally] for a given period and losses allocable to the period." *Id.* at 1520. In using the term "profits," the legislature contemplated the deduction of business expenses from business income.

The statute also includes as gross income "self-employment income," RSA 458-C:2, IV, but does not define that term. Other courts, however, at least for the purpose of interpreting separation agreements, have noted that "[i]n the context of alimony and child support, ' income' is ordinarily construed to mean gross receipts less business expenses related thereto, because it is the [obligor's] net income that must be referred to in

determining his ability to pay." *Dobbins v. Dobbins,* 59 A.D.2d 548, 397 N.Y.S.2d 412, 414 (1977) (citation omitted); *see Cannan v. Cannan,* 79 A.D.2d 1085, 436 N.Y.S.2d 133, 134 (1981). The *Dobbins* court reasoned that "[i]t is improbable that the parties would agree upon a measure of income, such as gross income or receipts, which had no relation to the [obligor's] actual ability to pay support." *Dobbins,* 397 N.Y.S.2d at 414.

We conclude that it is similarly improbable that the legislature intended the term "self-employment income" in RSA 458-C:2, IV to mean the gross receipts of a sole proprietorship when a portion of that money is payable to others as legitimate business expenses, and is therefore unavailable for the payment of child support. *See In the Matter of Rupa & Rupa,* 161 N.H. 311, 319, 13 A.3d 307 (2010) (noting that "[w]e interpret a statute to lead to a reasonable result"

(quotation omitted)). Our prior cases recognize the importance of the availability of income to the obligor for child support. Thus, in *In the Matter of Albert & McRae,* 155 N.H. 259, 922 A.2d 643 (2007), we noted that the definition of income for federal income tax purposes is "of little relevance" to determining what is includable as gross income under our child support guidelines. *Albert,* 155 N.H. at 263, 922 A.2d 643 (quotation omitted). We explained that, as the facts of that case demonstrated, "income tax returns are an unreliable guide to the income *available for child support purposes.* " *Id.* at 264, 922 A.2d 643 (emphasis added).

Courts in other jurisdictions have also relied upon the interpretation of language denoting self-employment income in separation agreements to construe the statutory meaning of the term. In *Barber v. Cahill,* 240 A.D.2d 887, 658 N.Y.S.2d 738 (1997), the court cited a case construing the term "earnings" in a divorce settlement to mean "gross income *less allowable business expenses.* " *Barber,* 658 N.Y.S.2d at 739 (quotation omitted); *see Bottitta v. Bottitta,* 194 A.D.2d 510, 598 N.Y.S.2d 304, 306 (1993). Relying upon that precedent, the court held that although the child support "statute itself contain[ed] no explicit authorization to deduct the business expenses of a self-employed individual from income ... [the] Family Court erred in not allowing [such] business expenses." *Barber,* 658 N.Y.S.2d at 739 (citation omitted).

Similarly, in *Whelan v. Whelan,* 74 Mass.App.Ct. 616, 908 N.E.2d 858 (2009), the court interpreted child support guidelines that did "not specifically provide for deduction of business-related expenses from self-employment income" to nevertheless allow such a deduction. *Whelan,* 908 N.E.2d at 866. The guidelines contained a broadly-worded definition of income roughly comparable to RSA 458-C:2, IV's definition of gross income.

[55 A.3d 981] *Id.* at 865 n. 16. "Indeed, these guidelines list[ed] in the definition of income from whatever source both ' income from self-employment' as well as, by way of comparison, ' net rental income.' " *Id.* at 866. Notwithstanding the lack of explicit authorization to deduct business expenses from self-employment income, the court found it "implicit that such expenses may be deducted where they are reasonable and necessary for the production of income." *Id.* We find it similarly implicit in RSA 458-C:2, IV that the term "self-employment income" means self-employment income net of legitimate business expenses incurred for the purpose of earning that income. Accordingly, we reverse the trial court's decision to use gross business receipts as the respondent's self-employment income.

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The petitioner argues that the respondent "exercised total individual control over the distributions made to himself, his creditors, and to [her] for child support." The argument implicitly rests upon the ground that because the respondent operates a sole proprietorship, payments to the business are payments to him. The trial court appears to have used the same reasoning, noting that "the [r]espondent is a sole proprietor of his business. The trucking business is a d/b/a/, not a corporation." The respondent disputes the amount of actual control he has over paying his business expenses, arguing, "[f]or instance, [that] he cannot choose between fueling his dump truck or receiving a salary. If he fails to put fuel in his truck, he does not earn a salary."

We agree with the respondent. His theoretical ability to pay himself rather than his business creditors, and, likewise, the form of his business entity as a "d/b/a" (doing business as) rather than

a corporation, are irrelevant in this context. We believe that calculating a parent's ability to pay child support necessitates determining an actual ability to pay, and, therefore, as indicated above, it presupposes the deduction of legitimate business expenses. As the Colorado Court of Appeals stated:

To embrace ... a rule [that a child support obligation takes precedence over the self-employed obligor's business expenses] ... could create the untenable situation that the expenses associated with the production of income be held in abeyance until the child support is paid. The inevitable result of such a disposition of resources, in circumstances such as are present here, would be the eventual loss of all income when the business reached the point where it was no longer a viable, going concern.

In re Marriage of Crowley, 663 P.2d 267, 269 (Colo.Ct.App.1983).

These concepts also inform what constitute legitimate business expenses. We have noted that "[u]nlike personal living expenditures, business ... expenses are costs incurred by the taxpayer in earning gross income." *Thayer v. Thayer,* 119 N.H. 871, 873, 409 A.2d 1326 (1979) (decided before

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adoption of child support guidelines), *superseded by statute as stated in In the Matter of Clark & Clark,* 154 N.H. 420, 425, 910 A.2d 1198 (2006). Other courts similarly focus upon the income-producing role of business expenses in determining whether they are deductible for purposes of calculating self-employment income for child support purposes. Thus, the *Whelan* court found it implicit in the child support guidelines that business-related expenses "may be deducted where they are reasonable and necessary for the production of income." *Whelan,* 908 N.E.2d at 866. In *Dobbins,* the court ruled that the obligor's support obligation under his separation agreement "should be measured by taking into account all of his income, from whatever source derived, and by deducting therefrom all losses and expenses actually incurred and paid which **[55 A.3d 982]** were directly related to the production of that income." *Dobbins,* 397 N.Y.S.2d at 414. We similarly hold that to be deductible for purposes of determining "self-employment income" under RSA 458-C:2, IV, business expenses must be "actually incurred and paid," *Dobbins,* 397 N.Y.S.2d at 414, and "reasonable and necessary" for producing income, *Whelan,* 908 N.E.2d at 866. It is for the trial judge to determine whether claimed expenses meet those criteria. *See, e.g., Whelan,* 908 N.E.2d at 867. Accordingly, we remand to the trial court to make that determination in this case. In light of our decision, we need not address the respondent's remaining arguments.

Reversed and remanded.

DALIANIS, C.J., and CONBOY and LYNN, JJ., concurred.

166 N.H. 422 (N.H. 2014), 2012-696, In re Hampers /**/ div.c1 {text-align: center} /**/

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166 N.H. 422 (N.H. 2014)

97 A.3d 1106

In the Matter of Marcus J. Hampers and Kristin C. Hampers

No. 2012-696

Supreme Court of New Hampshire

June 24, 2014

Argued November 14, 2013.

[97 A.3d 1107] [Copyrighted Material Omitted]

[97 A.3d 1108] [Copyrighted Material Omitted]

[97 A.3d 1109] [Copyrighted Material Omitted]

[97 A.3d 1110] 5th Circuit Court -- Claremont Family Division.

Orr & Reno, P.A., of Concord (Jeremy D. Eggleton and Judith A. Fairclough on the brief, and Mr. Eggleton orally), for the husband.

Primmer, Piper, Eggleston & Cramer, P.C., of Manchester (Doreen F. Connor on the brief and orally), for the wife.

CONBOY, J. DALIANIS, C.J., concurred; LYNN, J., concurred specially.

OPINION

[97 A.3d 1111]

Conboy, J.

In these cross-appeals, Marcus J. Hampers (husband) and Kristin C. Hampers (wife) challenge a post-divorce decision of the 5th Circuit Court -- Claremont Family Division (Yazinski, J.) on the husband's motion to modify his child support and alimony obligations and on the wife's petition for contempt. The husband asserts that the trial court erred by: (1) applying a standing order requiring him to pay the reasonable attorney's fees incurred by the wife for any proceeding or matter related to the divorce decree and subsequent amendments; and (2) failing to calculate " gross income" for child support purposes under RSA chapter 458-C by using " net" figures for investment income to account for losses and expenses as well as gains. The wife asserts that the trial court erred by: (1) calculating child support based upon the husband's 2009 income and tax return when his 2010 income information and tax return were available; and (2) ordering her to repay sums that she had received in excess child support. We affirm in part, reverse in part, vacate in part, and remand.

I. Attorney's Fees Order

The husband contends that the standing attorney's fees order should be vacated because, among other things, it violates his rights to equal protection and due process under the State and Federal Constitutions. *See* U.S. Const. amends. V, XIV; N.H. Const. pt. I, art. 14. The wife responds that the husband has challenged the same attorney's fees order on two

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prior occasions before this court, and, therefore, this **[97 A.3d 1112]** challenge is barred by res judicata or collateral estoppel. The husband counters that these preclusive doctrines are

inapplicable because the court has never issued a final decision on the merits as to the constitutionality of the attorney's fees award, because the same cause of action is not at issue in this case, and because the trial court maintains jurisdiction to review ongoing child support, custody, and alimony issues. We agree with the wife that res judicata bars this claim.

Evaluation of the parties' procedural arguments requires an analysis of our previous rulings on the attorney's fees award. In the parties' 2004 divorce decree, the trial court ordered the husband to pay all of the wife's attorney's fees incurred in the case and in any appeal from its ruling. *In the Matter of Hampers & Hampers*, 154 N.H. 275, 289, 911 A.2d 14 (2006) (*Hampers I*). The court further ordered the husband to pay all of the wife's " reasonable attorney's fees for any proceeding or any other matter relating to any term of this decree and any amendment thereto or to the child in this matter in the future" within thirty days of the husband's receipt of the wife's attorney's fee statement. *Id.* (brackets, ellipsis, and quotation omitted). The court found that it would not be equitable for the wife to pay fees and costs, *id.*, and that it was necessary to require the husband to pay the wife's future attorney's fees to " prevent abuse of this justice system." *Id.* at 290 (quotation omitted).

We left undisturbed the attorney's fees that the wife had already incurred and the husband had already paid. *Id.* at 290-91. However, we vacated the award of attorney's fees that the wife had incurred, but the husband had not yet paid, and remanded to the trial court to determine the reasonableness of those fees pursuant to the procedure we set out in *Gosselin v. Gosselin*, 136 N.H. 350, 353-54, 616 A.2d 1287 (1992). *Id.* at 291. We further held that the *Gosselin* procedure would apply to any attorney's fees the wife incurred in the future. *Id.* We declined to address the husband's constitutional arguments because he did not demonstrate that he had preserved them for our review. *Id.*

In 2007, the husband again challenged the attorney's fees award. In an unpublished order, we vacated the trial court's attorney's fees award " [t]o the extent that the trial court awarded fees to the [wife], which were incurred between December 2004 and September 2006, without first subjecting these fees to a *Gosselin* review." *In the Matter of Hampers and Hampers*, No. 2007-519 (N.H. Jan. 24, 2008). We explained that " fees incurred after the date of the final divorce decree could not have been part of the property settlement," and, therefore, were required to be reviewed under *Gosselin* -- including those incurred in connection with the defense of the original case and appeal. *Id.* However, we rejected the husband's

argument that the trial court erred by, in effect, awarding the wife appellate attorney's fees. *Id.* We explained, first, that such an award is permissible, *see Salito v. Salito*, 107 N.H. 77, 78, 217 A.2d 181 (1966), and, second, that " we [had] already impliedly upheld the trial court's inherent authority to award such fees in the instant case." *Hampers*, No. 2007-519 (N.H. Jan. 24, 2008).

The applicability of res judicata presents a question of law that we review *de novo*. *Sleeper v. Hoban Family P'ship*, 157 N.H. 530, 533, 955 A.2d 879 (2008). " The doctrine of res judicata prevents parties from relitigating matters actually litigated and matters that *could have* been litigated in the first action." *Gray v. Kelly*, 161 N.H. 160, 164, 13 A.3d 848 (2010) **[97 A.3d 1113]** (quotation omitted). The doctrine " applies if three elements are met: (1) the

parties are the same or in privity with one another; (2) the same cause of action was before the court in both instances; and (3) the first action ended with a final judgment on the merits." *Id.*

The husband contests both the second and third elements, arguing as to the latter that our decision based upon his failure to preserve constitutional arguments for vacating the attorney's fees award does not constitute a decision on the merits. We are not persuaded, since even a default judgment can " constitute res judicata with respect to a subsequent litigation involving the same cause of action." *McNair v. McNair*, 151 N.H. 343, 353, 856 A.2d 5 (2004) (quotation omitted). " The essence of the doctrine of res judicata is that a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action," *Brzica v. Trustees of Dartmouth College*, 147 N.H. 443, 454, 791 A.2d 990 (2002) (quotation omitted), " even though the plaintiff is prepared in the second action to present evidence or grounds or theories of the case not presented in the first action." *Id.* at 455-56. Because we consider our decision in *Hampers I* to constitute a final decision on the merits for the purposes of res judicata analysis, we must determine only whether the petition to modify at issue here involves the same cause of action.

" The term 'cause of action' means the right to recover and refers to all theories on which relief could be claimed arising out of the same factual transaction in question." *Radkay v. Confalone*, 133 N.H. 294, 297, 575 A.2d 355 (1990). " Generally, once a party has exercised the right to recover based upon a particular factual transaction, that party is barred from seeking further recovery, even though the type of remedy or theory of relief may be different." *Id.* at 298; *see also Shepherd v. Town of Westmoreland*, 130 N.H. 542, 544, 543 A.2d 922

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(1988) (finding barred plaintiff's constitutional and inverse condemnation claims that arose out of the same factual transaction as did her previous claim for a variance).

The husband argues that the divorce proceeding and the present petition to modify are not the same " cause of action" because " a cause of action is the underlying right that is preserved by bringing a suit or action" (quotation omitted), and the underlying right at issue in the divorce proceeding was the bundle of issues connected with the dissolution of a marriage requiring equitable review. The underlying right now at issue, he contends, is his statutory ability to modify his child support payments under RSA 458-C:7 (Supp. 2013). He maintains that the attorney's fees award was ancillary to each of these rights, and, therefore, his claim is not barred. We are not persuaded.

In our 2006 opinion on the divorce proceeding, we upheld the enforceability of the standing attorney's fees order, including the portion of the order awarding the wife her reasonable attorney's fees for " any proceeding or any other matter relating to any term of this decree and any amendment thereto or to [the child] in this matter in the future." *See Hampers I*, 154 N.H. at 289-91. The husband's current arguments that the standing attorney's fees order is unconstitutional and contrary to law are therefore barred by that determination. *See Brzica*, 147 N.H. at 455 (" 'Cause of action' has a broad transaction definition in the res judicata context, including the right to recover regardless of the theory of recovery.").

[97 A.3d 1114] Although attorney's fees may be an ancillary issue, *see, e.g., Vinson v. Ass'n*

of Apartment Owners, 130 Haw. 540, 312 P.3d 1247, 1253 (Haw. Ct. App. 2013), in *Hampers I*, it was one of the bases upon which the husband challenged the trial court's order. *Hampers I*, 154 N.H. at 289-91. Because " [t]he essence of the doctrine of res judicata is that a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action," *Brzica*, 147 N.H. at 454 (quotation omitted), and because we reached a final judgment specifically addressing the propriety of the same attorney's fees order at issue here, the husband has not demonstrated that his petition to modify constitutes a different " cause of action" such that our earlier judgment on the standing attorney's fees order lacks preclusive effect.

The husband next argues that res judicata does not apply to attorney's fees awards when the trial court maintains jurisdiction to review ongoing child support, custody, and alimony issues. He distinguishes " ordinary" divorce-related attorney's fees awards, which address the attorney's fees incurred during the initial divorce action, from the award here, which

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provides that the husband will continue to pay the wife's attorney's fees " for any proceeding or any other matter relating to any term of this decree and any amendment thereto or to [the child] in this matter in the future." *See Hampers I*, 154 N.H. at 289. He cites *Appeal of Carnahan*, a workers' compensation case, for the proposition that when a body exercises continuing jurisdiction over a matter, res judicata will not apply to prevent that body from exercising its statutory power to correct a mistake of law. *Appeal of Carnahan*, 160 N.H. 73, 77-78, 993 A.2d 224 (2010). That proposition does not apply here.

Although the modifiability of an order may affect the applicability of res judicata, *see* Restatement (Second) of Judgments § 13 comment *c* at 133-34, § 73, at 197-200 (1982), here, unlike in *Appeal of Carnahan*, 160 N.H. at 77, the standing order on attorney's fees was not part of the judgment subject to modification pursuant to statute. The statutory provisions the husband cites, RSA 458-C:2 (2004), :7, refer to the court's authority to modify child support orders, not orders on attorney's fees included in a divorce decree.

We recognize that the Restatement (Second) of Judgments provides that " [j]udgments that govern continuing or recurring courses of conduct may be subject to modification even though the power of doing so is not expressly provided." Restatement (Second) of Judgments, *supra* § 73 comment *b* at 198. However, " the principal factor in whether a judgment is subject to modification is whether it contemplates an interaction between the activity of the judgment obligor and some other conditions over which the judgment does not exercise control." *Id.* at 199. Thus, when an " unforeseen or uncontrollable interaction occurs between the judgment obligor and the surrounding circumstances, the balance between burden and benefit can be disturbed," and if such disturbance " assumes substantial proportion, redress by modification may be appropriate." *Id.*

The husband, however, does not argue that changed circumstances warrant modifying the standing attorney's fees order. Rather, he contends that the standing attorney's fees order is based upon an error of law. Thus, the husband alleges no reason why the " balance between burden and benefit" should be disturbed, and has **[97 A.3d 1115]** failed to demonstrate that " redress by modification" is warranted. *Id.*

II. Investment Income

On the issue of child support, the parties' 2004 divorce decree, which deviated from the child support guidelines, explained:

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For purposes of calculating child support under the guidelines, [the husband's] income shall consist of his employment income plus one-half of all interest, taxable or tax-exempt, dividends, capital gains, or other income to which he is legally entitled whether he chooses to actually receive it annually as reported on this tax return. The court makes this deviation from the requirements of RSA 458-C:2, IV.

On appeal from the divorce decree, the husband did not challenge this definition of income for child support purposes, but rather the trial court's alleged failure to apply it properly. *See Hampers I*, 154 N.H. at 283. Because we agreed that the record did not support the figure the trial court had used for his monthly gross income, we vacated the order and remanded. *Id.* at 277, 283. The subsequent procedural challenges to that recalculation are not before us in this appeal.

This appeal challenges the trial court's ruling on the husband's March 5, 2010 motion to modify the child support order. *See* RSA 458-C:7, I(a) (permitting either party to move for " modification of such order 3 years after the entry of the last order for support, without the need to show a substantial change of circumstances"). The parties agreed to the amount of the husband's earned income for child support purposes, but disagreed as to how to calculate his " substantial unearned income from investments in partnerships and capital gains." Each party presented an expert witness to testify as to calculation of the husband's " present income." The husband's expert, Richard J. Maloney, CPA, testified that capital losses of more than $3,000 in excess of capital gains should be carried forward to offset capital gains in subsequent years, in order to fully recognize the " economic reality" of the capital loss. He also testified that only the net income from the husband's investments in partnerships should be attributable to present income for the purposes of child support.

The wife's expert, Dennis R. Stone, CPA, testified that a capital loss in excess of a capital gain should not affect gross income for child support purposes because it represents a loss of principal, not a reduction of income available for child support purposes. He contended that the practice of carrying forward capital losses to offset unrelated capital gains was tantamount to averaging income over time. As for partnership investment expenses, Stone explained that they are reported on the partner's personal tax return as itemized deductions, " [n]ot as a reduction of the [partnership] income."

The trial court agreed with the wife's expert. It noted that federal tax law is inapplicable to calculations of child support under New Hampshire law, and that RSA 458-C:2 " includes a definition of gross income and contains

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the word net only in reference to rental income," indicating the legislature's familiarity with the terms " gross" and " net" and suggesting its intent to limit " net" to rental income. Recognizing that its ruling would result in a large child support figure under the guidelines, the trial court explained that " the legislature provided an avenue to address the [husband's] concern by providing the Court with discretion to lower any child support award it deems confiscatory."

[97 A.3d 1116] On appeal, the husband argues that the trial court erred by refusing to allow him to carry over capital losses in excess of capital gains to offset future years' capital gains, and by declining to deduct the partnerships' expenses from the revenues of the partnership investments.

Trial courts have broad discretion in reviewing and modifying child support orders. *In the Matter of Jerome & Jerome*, 150 N.H. 626, 628, 843 A.2d 325 (2004). However, whether capital losses may be carried over to offset future years' capital gains in calculating " investment income," and whether the trial court should have included the husband's partnership expenses as part of his gross income as defined under RSA 458-C:2, IV, are questions of statutory interpretation, and, thus, are questions of law, which we review *de novo*. *See In the Matter of Albert & McRae*, 155 N.H. 259, 262, 922 A.2d 643 (2007). We are the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole. *In the Matter of Plaisted & Plaisted*, 149 N.H. 522, 523, 824 A.2d 148 (2003). We interpret legislative intent from the statute as written, and we will not consider what the legislature might have said or add words that the legislature did not include. *Id.* at 524. We interpret statutes in the context of the overall statutory scheme and not in isolation. *Id.*

For purposes of calculating a parent's child support obligation, RSA 458-C:2, IV defines gross income as:

all income from any source, whether earned or unearned, including, but not limited to, wages, salary, commissions, tips, annuities, social security benefits, trust income, lottery or gambling winnings, interest, dividends, *investment income*, net rental income, self-employment income, alimony, *business profits*, pensions, bonuses, and payments from other government programs ... including, but not limited to, workers' compensation, veterans' benefits, unemployment benefits, and disability benefits.

(Emphases added.). Although trial courts have discretion to adjust a child support award based upon special circumstances, *see* RSA 458-C:4, II (2004), the legislative scheme requires that all items includable as " gross income" be considered to determine the parties' support obligation. *In the*

Matter of State & Taylor, 153 N.H. 700, 703, 904 A.2d 619 (2006); *see also In the Matter of Feddersen & Cannon*, 149 N.H. 194, 197, 816 A.2d 1033 (2003). The parties characterize both questions before us as relating to the definition of " investment income." Contrary to the wife's assertion that we implicitly answered these questions in *Albert*, 155 N.H. at 263, the meaning of " investment income" for child support purposes under RSA 458-C:2 is an issue of first impression for this court. We note at the outset that " income tax returns are an unreliable guide to the income available for child support purposes," *Albert*, 155 N.H. at 264, and we have interpreted the statute so that the concept of gross income encompasses the money available to the obligor parent for paying child support. *Id.*

A. Capital Losses in Excess of Capital Gains

The husband argues that the trial court erred by allowing capital losses to offset gains only to the extent of the capital gains for any given year. He contends that this ruling: (1) is internally

inconsistent because it recognizes losses only up to the point of the gain, but no further; (2) conflicts with persuasive authority recognizing the effect of capital losses; and (3) is against sound public policy.

[97 A.3d 1117] None of the husband's arguments is persuasive as to the issue at hand: *i.e*., the treatment, for child support purposes, of capital losses that exceed capital gains within a given year. Maloney testified to three potential ways to address capital losses in excess of capital gains: (1) to follow the method consistent with federal tax law, pursuant to which a portion of the excess loss ($3,000) is deducted from other income, and the remainder of the loss is carried over to offset capital gains (and up to $3,000 of other income) in future years; (2) to deduct the entire capital loss from gross income in the year in which the loss was incurred; or (3) to " ignore the economic reality of the loss" by deducting capital losses only up to the point of capital gains. Another option, which neither party addresses, is to treat capital gains as income and not to account for capital losses when calculating gross income. The husband argues in favor of option (1), and claims that option (3), which he characterizes as the approach that Stone supported and the trial court ordered, is not " rational" because it does not accurately reflect the income available for child support purposes. We disagree and discuss each option in turn.

We first conclude that " investment income" for child support purposes should not be defined as consistent with the federal taxation approach of carrying over to future years capital losses which exceed capital gains. *See* 26 U.S.C. § 1212(b) (2012). " [H]ow federal income taxation statutes define 'income' is of little relevance to our interpretation of gross income under the child support guidelines." *Taylor*, 153 N.H. at 704;

see Albert, 155 N.H. at 263. " This is so because the objectives of the child support guidelines differ from the objectives of the federal income taxation statutes." *Albert*, 155 N.H. at 263 (quotation, brackets, and ellipsis omitted). " The objectives of the child support guidelines are to reduce the economic consequences of divorce on children and ensure that children enjoy a standard of living equal to that of the noncustodial parent's subsequent family." *Taylor*, 153 N.H. at 703; *see* RSA 458-C:1, II (2004); *see also In the Matter of Dolan and Dolan*, 147 N.H. 218, 221-22, 786 A.2d 820 (2001). Allowing losses to carry over would violate the purposes of the child support guidelines because it would artificially decrease income in the years subsequent to the capital sale, even though the income available for child support in those subsequent years would not have decreased.

" The child support guidelines set forth in RSA chapter 458-C mandate that an obligor's entire income be considered." *Jerome*, 150 N.H. at 633 (quotation omitted). Moreover, " [o]ur case law is clear that trial courts should not employ income-averaging over a number of years to determine child support obligations." *Rattee v. Rattee*, 146 N.H. 44, 46, 767 A.2d 415 (2001). Instead, " child support should be determined on the basis of present income." *Id.* As Stone testified, allowing a carry-over of capital losses is a form of income averaging because it nets " losses from prior periods that have nothing to do with the gains that were realized in the current period" against one another. Accordingly, we conclude that the trial court correctly rejected the loss carry-over option to calculate investment income.

We likewise conclude that " investment income" for child support purposes should not be defined to permit deducting an excess capital loss from other categories of gross income in the year it is incurred. Under that option, capital losses could exceed income generated from other **[97 A.3d 1118]** sources, leaving a parent with " negative" income, regardless of whether the parent has actual income available for child support. As the parties agree, that approach would be against the best interest of the child.

Because neither party argues in favor of the fourth option, we need not decide whether to adopt the construction under which capital gains constitute income without regard to capital losses. *See* L. Morgan, Child Support Guidelines: Interpretation and Application § 4.07[H] at 4-47 to 4-48 (2d ed. 2013) (analyzing different courts' approaches to capital gains as income for child support purposes); *cf. Abercrombie v. Abercrombie*, No. E2003-01226-COA-R3-CV, 2004 WL 626713, at *8 (Tenn. Ct. App. Mar. 29, 2004) (declining to offset capital gain with capital losses).

Thus, we uphold the trial court's decision to give effect to capital losses only up to the amount of capital gains realized during the same year.

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First, we note that neither party argues that capital losses should not offset capital gains in the year that both are incurred. Thus, we need not decide here whether that treatment is permitted under our statutory scheme. Second, we agree that the definition of " investment income" limits the deduction of capital losses, at most, to the extent of any capital gains within the same year. The child support guidelines turn on the obligor parent's *income* available for support, and not on the parent's net worth. *See, e.g.*, RSA 458-C:3 (Supp. 2013) (establishing formula for calculation of child support based upon parents' incomes); *In the Matter of Woolsey & Woolsey*, 164 N.H. 301, 306, 55 A.3d 977 (2012) (" calculating a parent's ability to pay child support necessitates determining an actual ability to pay"). Given the guidelines' focus upon the obligor's actual ability to pay and the amount available for child support purposes, it is reasonable to limit a deduction of capital losses to the extent of any capital gains in one year.

Accordingly, as between the two approaches advanced by the parties, because the purposes of RSA chapter 458-C are better served by limiting the offset for capital losses to the extent of capital gains in the same year, as the trial court did, we affirm that ruling. If the legislature wishes to clarify the treatment of capital losses, it is of course free to amend the statute as it sees fit. *See Evans v. J Four Realty*, 164 N.H. 570, 576, 62 A.3d 869 (2013).

B. Income From Investments in Partnerships

The husband next argues that in determining his gross income, the trial court erroneously declined to deduct reasonable and necessary investment expenses from the revenues of his partnership investments. There is no dispute that his 2009 income included income from investments in eight partnerships. Maloney explained in his report:

[The husband] is a limited partner in eight limited partnerships. These partnerships generate a variety of types of income as well as expenses. Because these investments are partnerships, the specific category of income and expense is reported in different sections of the tax return rather than combined to determine the actual net income from a particular partnership. Solely because of the requirements of the Internal Revenue Code, the expenses related to the investment activity in

the partnership are not netted against the income for reporting purposes. Rather, the items of income are reported in determining gross income but the expenses are reported as itemized deductions.

[97 A.3d 1119]

The partnerships must file an information return (Form 1065). On Schedule K-1 of that return, the partnership separately identifies many items of income, deduction, capital gain, capital loss, credits,

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etc., with the remaining activity being summarized as 'ordinary business income (loss)'. Each partner reports these various items on his individual tax return. These items will be reported on separate schedules (Schedule A for expenses, Schedule B for Interest and Dividends, Schedule D for capital gains, Schedule E for ordinary business income or loss, etc.). In order to calculate the correct total income from a partnership, all these items must be considered.

Stone disagreed that " investment and portfolio expenses should be deducted" from income, reasoning " that such amounts are correctly categorized as expenses and as such should not be accounted for as a reduction of total income for child support purposes." Noting that the statutory definition of gross income includes the word " net" only as applied to rental income, the trial court accepted Stone's opinion " as the appropriate standard to apply."

The husband argues that the business expenses of the partnerships were the natural, necessary, and ordinary cost of investing in such partnerships, and maintains that these expenses must be deducted annually from the gains realized from the partnerships to determine the correct amount of " investment income." He explains that, like the Limited Liability Company (LLC) at issue in *Albert* or an S-corporation, the partnerships are " pass through" entities, requiring each investor to report the partnership's gains, losses, and expenses on his or her tax return. *See Albert* , 155 N.H. at 263-64. Citing *Woolsey*, 164 N.H. at 307, he argues that an obligor's support obligation should be measured by taking into account all of his income and deducting therefrom the losses incurred and expenses actually paid that were directly related to the production of that income. He asserts, however, that " it would be irrational and untenable to determine precisely how every partnership expense related to the income produced by the partnership." He further notes his lack of decision-making authority over the partnerships, highlighting his inability to shield income, manipulate the amount of money he received in order to reduce his child support obligation, or use the business to defray his personal expenses.

The wife counters that each source of income enumerated in RSA 458-C:2, IV, other than " net rental income," is intended to refer to that source in gross, citing *Albert*, 155 N.H. at 263. She also argues that including all of the husband's " investment income" in his gross income is more consistent with the goal of the child support guidelines to ensure that their son will enjoy a standard of living commensurate with that of the husband. Finally, she argues that the partnerships' expenses are the result of a " discretionary decision to employ a third party that charges management

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fees," and constitute " a personal expense incurred for management of an investment asset,"

rather than a business expense directly related to the production of income. We disagree with the wife's arguments on this point.

We first note that the statute's failure to refer to " net" investment income is not dispositive. We rejected a similar argument in *Woolsey*, 164 N.H. at 304-06. There, we considered the meaning of " self-employment income," which the legislature also did not qualify by the term " net," and found " implicit in RSA 458-C:2, IV that the term 'self-employment income' means self-employment income **[97 A.3d 1120]** net of legitimate business expenses incurred for the purpose of earning that income." *Woolsey*, 164 N.H. at 306. We reasoned that it was " improbable that the legislature intended the term 'self-employment income' in RSA 458-C:2, IV to mean the gross receipts of a sole proprietorship when a portion of that money is payable to others as legitimate business expenses, and is therefore unavailable for the payment of child support." *Id.* at 305.

We turn now to how an obligor parent's income from partnerships should be calculated. A partnership is subject to " pass through" taxation, similar to an S-corporation or an LLC. *See, e.g., Thill v. Thill*, 26 S.W.3d 199, 202 n.1 (Mo.Ct.App. 2000); 26 U.S.C. § § 701-709 (2013). The partnership itself does not pay tax, but its members are taxed on their distributive shares of the partnership's income, gain, loss, deduction, or credit. *See* 26 U.S.C. § 702. The parties agree that the husband's income from the partnerships should be considered " investment income" ; however, other states generally treat partnership income as in the nature of self-employment income. *See, e.g.*, Morgan, *supra* § 4.08, at 4-89 (" Income from self-employment, including rent, royalties, income from proprietorship of a business, and income from joint ownership of a partnership or closely held corporation is calculated by taking gross receipts minus ordinary and necessary expenses required to produce such income."); *Rein v. Rein*, No. FA 064021530S, 2012 WL 898774, at *2-3 (Conn. S.Ct. Feb. 27, 2012) (analogizing family partnership to self-employment for purposes of calculating parent's income, and concluding the parent's partnership earnings were " includable in gross income for child support purposes, but only after deduction of all reasonable and necessary business expenses" (quotation omitted)); *Roubanes v. Roubanes*, 2013-Ohio-5778, 2013 WL 6858958, at *2-3 (Ohio Ct. App. 2013) (interpreting statute defining " self-generated income" for child support purposes by focusing on amount of money actually available for child support purposes).

We agree with the logic analogizing self-employment, proprietorship of a business, and joint ownership of a partnership. *Cf. Opinion of the*

Justices, 123 N.H. 296, 308, 460 A.2d 93 (1983) (understanding legislative concern to be that proposed tax on business income " might have the practical effect of being a tax on the income of sole proprietors or partners, since the *personal* income of such individuals is essentially the net profit derived from their businesses' income"). As noted above, we have already determined that " self-employment income" in RSA 458-C:2, IV " means self-employment income net of legitimate business expenses incurred for the purpose of earning that income." *Woolsey*, 164 N.H. at 306. We reached this conclusion because " calculating a parent's ability to pay child support necessitates determining an actual ability to pay, and, therefore, ... presupposes the deduction of legitimate business expenses." *Id.*

The determination of a parent's partnership income " net of legitimate business expenses incurred for the purpose of earning that income," however, involves more than simply applying the figures reported on income tax returns. *See Woolsey*, 164 N.H. at 306; *see also Albert*, 155 N.H. at 264. " [T]o be deductible for purposes of determining 'self-employment income' under RSA 458-C:2, IV, business expenses must be actually incurred and paid, and reasonable and necessary for producing income." *Woolsey*, 164 N.H. at 307 (quotations and citations omitted). " It is for the **[97 A.3d 1121]** trial judge to determine whether claimed expenses meet those criteria." *Id.* Although a tax return may yield valuable *data* for a trial court's use in setting child support, *see Abercrombie*, *Id.* at *7, " income tax returns are an unreliable guide to the income *available for child support purposes*." *Woolsey*, 164 N.H. at 305 (quotation omitted).

The statute does not suggest that an obligor parent's status as a limited partner should result in the blanket deductibility of his share of the partnership's tax-reported expenses, without regard to whether those expenses are reasonable and necessary for the production of income. *See* RSA 458-C:2, IV. The husband argues that the " relevant calculus is whether the partnership expense is merely a mask for the personal expense of the obligor," asserting that the " stereotypical case" would be one in which an obligor who owns an interest in a closely held corporation makes minimal distributions to himself, while characterizing his personal living expenses as business expenses in order to avoid child support obligations. He contends that because he lacked decision-making authority over the partnerships, and therefore could not shield income or manipulate the amount of money he received in order to reduce his child support obligation or use the business to defray his personal expenses, the rationale for limiting deductions to only those that are reasonable and necessary for the production of income does not apply.

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Our reasoning in *Woolsey* does not support the husband's position. *See Woolsey*, 164 N.H. at 304-07. The justification for considering a parent's gross income to be less than the gross receipts of his business is that certain expenses must be paid from the business's receipts in order for the business to continue to function. *Id.* at 306 (" To embrace a rule that a child support obligation takes precedence over the self-employed obligor's business expenses could create the untenable situation that the expenses associated with the production of income be held in abeyance until the child support is paid." (quotation, ellipses, and brackets omitted)). It is only the reasonable and necessary business expenses, however, that may reduce a parent's gross income from self-employment. Thus, the parent who seeks to reduce his gross income must demonstrate why gross receipts from self-employment do not legitimately reflect income available for child support.

In so interpreting our statute, we admittedly place a risk on a parent who is a limited partner with no control over the partnership's expenses: The partnership may incur expenses that are not reasonable and necessary for the production of income, and thus not deductible from the parent's income for child support purposes, yet the parent may not receive any benefit from these expenses. However, this is a justifiable risk. As between a parent who chooses to participate in (or invest in) a partnership that might incur unnecessary expenses, and that parent's children, it is the parent who should bear the risk. Other investment vehicles that are not in the nature of self-

employment will not carry the same risk; however, with respect to income from a partnership, only those expenses that are reasonable and necessary for the production of income are deductible therefrom for the purposes of calculating child support. *See id.* at 306-07.

Whether to deduct reasonable and necessary expenses from the business's income distributions when calculating a parent's income for child support purposes is a highly fact-specific determination.

[97 A.3d 1122] *See In re Marriage of Brand*, 273 Kan. 346, 44 P.3d 321, 330 (Kan. 2002) (discussing treatment of income from an S-corporation). To the extent that the husband suggests that the burden is on the wife to establish that the charged expenses were *not* " actually incurred and paid, and reasonable and necessary for producing income," *Woolsey*, 164 N.H. at 307 (quotations and citation omitted), we hold that the burden of demonstrating the deductibility of such expenses is on him. *See, e.g., Reichert v. Hornbeck*, 210 Md.App. 282, 63 A.3d 76, 103 n.11 (Md. Ct. Spec. App. 2013). The burden is properly on the partner because he or she has the ability to obtain information to establish the propriety of the partnership's actions. *Cf. Zold v. Zold*, 911 So.2d 1222, 1233 (Fla. 2005) (placing burden on S-corporation shareholder spouse to prove " that the undistributed

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'pass-through' income was properly retained for corporate purposes rather than impermissibly retained to avoid alimony, child support, or attorney's fees obligations by reducing the shareholder-spouse's amount of available income").

Here, the wife characterizes the contested partnership expenses as nondeductible personal expenses; the husband, based upon Maloney's testimony, disagrees. The trial court did not determine whether the expenses were reasonable and necessary for the production of the partnerships' income, however, and the record does not allow such a conclusion as a matter of law. Maloney explained that he had generated the schedules for his report by taking the figures as reported by the partnerships to the husband -- that is, as they appeared in the tax returns. Stone likewise expressly disclaimed any knowledge as to whether the expenses were " actually incurred and paid, and reasonable and necessary for producing income." Because " [i]t is for the trial judge to determine whether claimed expenses meet [our established] criteria," *Woolsey*, 164 N.H. at 307, and the trial court did not address the claimed expenses in this case, remand is necessary for the trial court to make that determination. *Id.*

Accordingly, we reverse the trial court's ruling on this issue and remand for further proceedings consistent with this opinion.

III. Use of 2009 Income Figures

The wife asserts that the trial court erred when it calculated child support based upon the husband's 2009 income and tax return, despite the fact that his 2010 income figures and tax return were available and neither party questioned the reliability of the more current earnings data. She contends that, unless the most recent figures are misleading, as they were in *Feddersen*, 149 N.H. 194, 816 A.2d 1033 (2003), and *In the Matter of Crowe & Crowe*, 148 N.H. 218, 804 A.2d 455 (2002), the most current figures available should provide the basis for the court's determination of " present income." Here, she argues, the husband's 2009 income was abnormally low, compared

to the years before and after, and therefore the trial court unsustainably exercised its discretion when it based the husband's child support obligations on his 2009 income.

The husband responds that the trial court's decision to use his 2009 income figures was within its discretion, after hearing substantial testimony from both experts concerning the husband's income for both 2009 and 2010. He supports this argument with two policy considerations: first, that to require the court to consider only the most current information available would result in a cycle of discovery, expert preparation, and potentially strategic trial delay, leaving the figures (and thus the payment obligation)

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to depend upon the vicissitudes of court scheduling;

[97 A.3d 1123] and second, that the decision to use financial information from the date of filing is critical to preserving a moving party's right to modification, since a change in income before the petition is heard would obviate that party's right to an order setting child support at the amount commensurate with the party's need or ability to pay. He also contends that New Hampshire's child support statutory scheme and case law, providing for modification retroactive to the time of filing, reflects an intent to accurately reflect the obligor's ability to pay as that ability changes over time.

In its October 2011 order, the trial court stated: " [T]his case began in 2009 and the Court will utilize [the husband's] 2009 income for purposes of setting a child support payment." On reconsideration, the court further explained: " The Court utilized the income of 2009 because it found that the expert[s'] analysis, exhibits, and testimony were more beneficial to the Court's analysis of [the husband's] current income than the testimony relating to other years. Further, [the husband] filed for modification in 2010 based upon his 2009 income." However, in its analysis of the capital gains issue, the trial court acknowledged that New Hampshire cases, including *Rattee*, 146 N.H. at 46, and *Feddersen*, 149 N.H. at 196, " indicate that present income is the actual income that a party has available to it to utilize for itself or to benefit that party and to pay child support," and " ruled that the Court is required to determine present income utilizing RSA 458-C:2 to determine an appropriate child support payment." Thus, the issue is whether the court properly applied this precedent to calculate child support under the guidelines.

" Trial courts have broad discretion in reviewing and modifying child support orders." *Taylor*, 153 N.H. at 702. " Accordingly, we will set aside a modification order only if it clearly appears on the evidence that the court's exercise of discretion was unsustainable." *Feddersen*, 149 N.H. at 196 (quotation omitted).

It is undisputed that " child support should be determined on the basis of present income." *Rattee*, 146 N.H. at 46. " When calculating a parent's child support obligation, the court must first determine the parent's 'present income.'" *In the Matter of Gray & Gray*, 160 N.H. 62, 67, 993 A.2d 203 (2010). " It is up to the trial court to decide what income figures should be used based upon the facts presented at the hearing and the credibility and forthrightness of the noncustodial parent in disclosing income." *Id.* (quotations omitted). " This includes the use of past tax returns when the obligor provides 'misleading' information on the financial affidavit." *Id.* (quotation omitted). For example, in *Gray*, in which the only evidence of the obligor father's current income was an affidavit

he submitted, " the family division
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observed that the father's 'reported income and expenses as well as his attitude and demeanor' raised doubts about 'his credibility and forthrightness,' " and therefore " properly ordered the father to submit the past tax returns to aid in establishing his present income." *Id.* ; *see Feddersen*, 149 N.H. at 197; *Crowe*, 148 N.H. at 223. Here, however, the parties do not dispute the veracity of the information the husband provided in his 2009 and 2010 tax returns, but disagree only as to the application of that information. The trial court made no finding that the husband's 2010 information was misleading. Thus, this exception to the general rule that current information is the **[97 A.3d 1124]** best representation of " present income" is not implicated here.

The trial court's decision was based upon review of two full sets of financial data relating to the husband's 2009 income and 2010 income, with analysis by experts for both sides. The court explained that it " utilized the income of 2009 because it found that the expert[s'] analysis, exhibits and testimony were more beneficial to the Court's analysis of [the husband's] current income than the testimony relating to other years. Further, [the husband] filed for modification in 2010 based upon his 2009 income." The trial court did not explain what characteristics of the 2009 evidence, as compared to the 2010 evidence, made the older information " more beneficial" to an analysis of present income. Nor does the record support that conclusion. Furthermore, nothing indicates that the court's decision to use the 2009 figures was grounded in any concern raised in the husband's modification petition: He did not move to modify on the ground of a substantial change in circumstances, *see In the Matter of Duquette & Duquette*, 159 N.H. 81, 86, 977 A.2d 515 (2009); rather, he sought modification of the child support order without the need to show a substantial change of circumstances pursuant to RSA 458-C:7, I(a).

The husband argues that " [t]he decision to use financial information from the date of filing is ... critical to preserving a moving party's rights to modification." He asserts that if the obligor's financial circumstances warrant a modification when he moves for it, but change before the case is heard, then the obligor's right to modify his child support obligation to that commensurate with his ability to pay during the year in which he moved for hearing will be lost. He also points out that a court's order granting modification of a child support award is frequently retroactive to the date of the motion, indicating that the figures at the time of filing are intended to govern the modification. We agree that fairness concerns may be implicated when a parent's income fluctuates between the time of a request for modification and the time that the case is actually heard, resulting in either overpayment or underpayment for the period while the case is
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pending. However, the remedy for a parent who has made payments under an outdated support order cannot be a new support order based upon financial figures that are not current; such a resolution would be inconsistent with the child support guidelines.

" New Hampshire's child support guidelines shall be applied in all child support cases, including any order modifying a support order." *Duquette*, 159 N.H. at 86 (quotation and ellipsis omitted). " There is a rebuttable presumption that a child support award calculated under the guidelines is the correct amount of child support." *Id.* (quotation omitted). " The presumption may

be overcome and the trial court may deviate from the guidelines when it is shown by a preponderance of the evidence that the application of the guidelines would be unjust or inappropriate ... because of special circumstances." *In the Matter of Forcier & Mueller*, 152 N.H. 463, 465, 879 A.2d 1144 (2005) (quotations and citations omitted). " Pursuant to the legislative scheme, all items includable as 'gross income' must be used to determine the parties' total support obligation." *Feddersen*, 149 N.H. at 197. However, an item not includable as " gross income" may nonetheless be relevant to the computation of a child support award, by contributing to special circumstances that would make deviation appropriate. *See In the Matter of Fulton & Fulton*, 154 N.H. 264, 268, 910 A.2d 1180 (2006) (holding **[97 A.3d 1125]** that gifts are not included in definition of gross income, but that trial courts may consider impact of gifts on financial condition of the parties and that RSA 458-C:5's special circumstances standard is sufficiently flexible to address issue).

In the case of a parent's fluctuating income, the correct course of action is to calculate the parties' child support obligation under the guidelines, and then to explain what, if any, circumstances warrant deviation from that amount. *See Feddersen*, 149 N.H. at 198 (" The statutory scheme provides courts with the means to address income fluctuations. For instance, trial courts may adjust an award when applying the uniform child support guidelines would result in a 'confiscatory support order.'" (citation omitted)). Indeed, here, as the trial court noted in another context, " the legislature provided an avenue to address the [husband's] concern by providing the Court with discretion to lower any child support award it deems confiscatory." *See* RSA 458-C:4, II (2004); RSA 458-C:5 (Supp. 2013). Although the trial court may order modification effective as of the filing date of the petition to modify, *see* RSA 458-C:7; *Maciejczyk v. Maciejczyk*, 134 N.H. 343, 345, 592 A.2d 1140 (1991), " [w]e would strain the bounds of logic ... to hold that the court's authority to order a reduction mandated such a reduction, or limited the court's discretion to deny the reduction if the circumstances warranted denial." *Giles v. Giles*, 136 N.H. 540, 546, 618 A.2d 286 (1992). The statutory scheme is sufficiently flexible to allow trial courts to fashion a just

modification and repayment order, as necessary, in cases in which the application of the guidelines -- to either future payments or payments between the date of filing and the court's final order -- would be " unjust or inappropriate." RSA 458-C:4, II; *see* RSA 458-C:7; RSA 458-C:5, I (" special circumstances" allowing adjustments in application of support guidelines are *not* limited to the special circumstances enumerated in the provision).

Nor are we persuaded by the husband's argument that our holding will require endless delays in order to obtain the latest financial data and allow experts time to analyze that data. We do not hold that hearings must be delayed to allow the calculation and review of ever-newer financial data. Our holding today merely reaffirms our long-standing rule that child support awards are to be based upon the obligor's " present income." *See Hillebrand v. Hillebrand*, 130 N.H. 520, 526, 546 A.2d 1047 (1988); *see also, e.g., Feddersen*, 149 N.H. at 196.

We conclude that, on the record before us, the trial court erred by using the husband's 2009 income for purposes of calculating his " present income." Accordingly, we vacate the calculation of child support and remand for further proceedings consistent with this opinion.

IV. Reimbursement of Overpaid Child Support

The wife argues that the trial court lacked subject matter jurisdiction to order her to reimburse the husband for overpayment of support resulting from the modification of the support order. She maintains that the 2007 amendment to RSA 458-C:7, III, affects substantive rights because it provides that " the court *shall* order, absent a showing of undue hardship, the obligee to directly reimburse the obligor" (emphasis added) for any overpayment of support resulting from a modification of a support order. Therefore, she argues, because her divorce was finalized in 2006, application of the 2007 amendment to her is unlawful. *See In the Matter of Donovan & Donovan*, 152 N.H. 55, 62-63, 871 A.2d 30 (2005).

[97 A.3d 1126] Because we are remanding for redetermination of the child support amount, and the wife's argument regarding the trial court's authority to award reimbursement of any overage may again arise, we address the issue.

The wife's reliance upon *Donovan*, 152 N.H. 55, 871 A.2d 30, *Walker v. Walker*, 116 N.H. 717, 367 A.2d 211 (1976), and *Henry v. Henry*, 129 N.H. 159, 525 A.2d 267 (1987), for the proposition that a statutory change that affects substantive rights may be applied only prospectively is misplaced. To be sure, " [w]e have held previously that statutory changes affecting parties' rights to post-divorce financial support would not be applied retroactively to pre-existing divorce decrees." *Donovan*, 152 N.H. at 63. However, the amendment to RSA 458-C:7, III

addresses the procedure for an obligor spouse to recover overpayments in the wake of a successful motion to modify his or her child support obligation. It does not retroactively change child support orders made under divorce decrees. *Cf. Donovan*, 152 N.H. at 63 (contrasting prior statutory changes with substantive effect against procedural change from earlier amendment to RSA 458-C:7, which did not " mandate a change in child support but simply open[ed] up a new channel of inquiry into whether a modification is appropriate" (quotation omitted)). As noted above, the purpose of modification procedures is to ensure that the parties' obligations are commensurate with their respective needs and their respective abilities to meet them as of the time of the motion to modify and going forward. *See, e.g., Taylor*, 153 N.H. at 702; *see also Feddersen*, 149 N.H. at 195-96 (including in calculation of " gross income" significant increases between 1998, when motion to modify was filed, and 2002, when hearing was held).

Because the statutory amendment affects only modification procedures, it is the date of the motion to modify, rather than the date of divorce, that controls our retroactivity analysis. The husband's motion to modify was filed in 2010, after the effective date of the 2007 amendment to the modification procedures; the application of that amendment to the modification proceedings, therefore, cannot constitute a retrospective law. Laws 2007, 274:1 (effective January 1, 2008).

Because we are vacating the court's child support award and remanding, we do not address her argument that the trial court erred by failing to address whether the award would cause her " undue hardship."

Affirmed in part; reversed in part; vacated in part; and remanded.

Dalianis, C.J., concurred; Lynn, J., concurred specially.

CONCUR

Lynn, J., concurring specially.

I write separately to make explicit what I take to be implicit in section II(B) of Justice Conboy's opinion. I agree that, in the case of a pass-through entity like a limited partnership, it makes sense to impose upon the limited partner, here the husband, the burden of demonstrating that expenses claimed by the partnership are reasonable and necessary for the production of income. To the extent that the limited partner is unable to sustain this burden, reported expenses may not be used to offset the limited partner's reported gross income from the partnership. However, consistent with the core principle that the basis for determining an obligor's child support obligation must be the income available to pay child support, in the case of a limited partner who establishes **[97 A.3d 1127]** that he or she does not have control over the management of the partnership, I do not understand the court to suggest that the income

attributed to the limited partner can exceed the total of the amount actually distributed to the limited partner or used for his or her personal benefit during the period in question. Based on this understanding, I concur in the court's decision.

166 N.H. 564 (N.H. 2014), 2013-171, In the Matter of Maves & Moore /**/ div.c1 {text-align: center} /**/

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166 N.H. 564 (N.H. 2014)

101 A.3d 1

In the Matter of Janice E. Maves and David L. Moore

No. 2013-171

Supreme Court of New Hampshire

August 13, 2014

Argued April 3, 2014

2d Circuit Court -- Plymouth Family Division.

Vacated and remanded.

Upton & Hatfield, LLP, of Concord (*Marilyn B. McNamara*, *James A. O'Shaughnessy*, and *Sandra H. Kenney* on the brief, and *Ms. McNamara* orally), for the petitioner.

Martin, Lord & Osman, PA, of Laconia (*Judith L. Homan* on the brief and orally), for the respondent.

DALIANIS, C.J. HICKS, CONBOY, LYNN, and BASSETT, JJ., concurred.

OPINION

[101 A.3d 2]

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Dalianis, C.J. The petitioner, Janice E. Maves, appeals, and the respondent, David L. Moore, cross-appeals, the decision of the Circuit Court (*Rappa*, J.) modifying the respondent's child support obligation. We vacate and remand.

The trial court found, or the record supports, the following facts. The parties, who were divorced in 2004, are the parents of a son, who was fourteen years old at the time of the hearing on the petitioner's motion to modify child support. The son has a " solid relationship" with both parents, who share parenting time, alternating on a weekly basis. Under the initial child support order, the respondent paid $650 per month for the son's support. In 2008, his support obligation was increased to $950 per month. In addition, the respondent provides the son's health insurance and covers all uninsured medical expenses, pays for sports and academic summer camps, and furnishes the ski pass, clothing, and equipment for the son's ski racing.

As part of the property settlement in the parties' divorce, the respondent was awarded Squam Lakeside Farm, Inc. (SLF), a campground consisting of 119 sites with trailer hook-ups for water, electricity, and sewer. SLF is a Subchapter S corporation (S-corporation); the respondent is the sole shareholder. SLF's profits, losses, and capital gains are reported on the personal federal income tax returns of the respondent, as shareholder.

In 2010, the respondent altered his business plan and, after expending almost $400,000 in legal bills and surveying costs and obtaining the necessary permits from the State, began marketing the campsites as condominiums, rather than as seasonal rentals. Based upon the sale of many of the condominiums, the respondent reported capital gains of $1,000,389 on his 2011 personal tax return.

In 2011, the respondent restructured a loan that he owed to SLF, converting it to a line of credit. Since that time, he has used the line of credit for various expenses, both personal and business-related. At the time of the hearing, the respondent had borrowed $887,754 against the line of credit. The respondent has never made any payments toward the outstanding principal or interest.

[101 A.3d 3] In November 2011, the petitioner moved to modify child support, asserting that three years had passed since the previous support order and that circumstances had materially changed, warranting a new support order. *See* RSA 458-C:7 (Supp. 2013). In addition, the respondent filed two motions to modify orders regarding health insurance and medical expenses and miscellaneous expenses. A final hearing on all motions was held on August 10, 2012.

At the hearing, the parties disagreed about what comprised the respondent's " gross income" for the purpose of determining child support. Paul

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Buck, a certified public accountant who performs various financial services for the respondent and SLF, including preparing the individual and S-corporation tax returns, testified that because the capital gains from the condominium sales were not transferred from SLF to the respondent " in any way, shape or form," they were not available to the respondent. Rather, he testified that the respondent's " income" in 2011 should be limited to his $39,000 salary and the $2,750 monthly housing benefit for his residence in Holderness.

The trial court determined that the capital gains generated by the sale of the condominium units were " irregular" income that should be considered as part of the respondent's gross income for the purpose of establishing his child support obligation. *See* RSA 458-C:2, IV(c) (2004). To calculate the weekly child support obligation, the court used the adjusted gross income figure from the respondent's 2011 federal income tax return, resulting in a support amount of $2,411 per week. Accordingly, the court ordered the respondent, within sixty days, to pay $9,644 for the four weeks from the date of service of the request for modification, November 29, 2011, through the end of 2011. Upon reconsideration, however, the court amended its order to permit payment in monthly installments. The court also concluded that it needed to review the respondent's 2012 federal income tax return to calculate the amount of irregular income from capital gains for 2012. The trial court has held in abeyance further calculation of the respondent's on-going child support pending the outcome of this appeal.

Both parties appealed the support order. In her appeal, the petitioner argues that the trial court erred in: (1) failing to characterize a loan from SLF to the respondent as income for the purpose of child support; (2) failing to impute substantial " regular" income to the respondent as a result of that loan and the respondent's capital gains; (3) treating the capital gains as " irregular" income and calculating the associated arrearage as applicable only to a four-week period at the end of 2011; and (4) using the respondent's adjusted gross income figure, rather than gross income minus legitimate business expenses, to determine his 2011 income. In his cross-appeal, the respondent maintains that the trial court erred in: (1) considering capital gains income from SLF, given that the asset was awarded exclusively to him in the divorce decree and that the capital gains were received by the corporation and, though taxable to him, were not actually

distributed to him individually; (2) using his adjusted gross income figure to determine his income for 2011; and (3) arriving at a " grossly excessive" child support obligation based upon his 2011 capital gains income.

Child support is governed by RSA chapter 458-C (2004 & Supp. 2013), and, accordingly, resolution of the issues on appeal requires us to interpret this chapter. As we examine the statutory language, we do not merely look

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at isolated words or phrases, but instead we consider the statute as a whole. *In the Matter of* **[101 A.3d 4]** *Woolsey & Woolsey*, 164 N.H. 301, 304, 55 A.3d 977 (2012). In so doing, we are better able to discern the legislature's intent, and therefore better able to understand the statutory language in light of the policy sought to be advanced by the entire statutory scheme. *Id.* We review the trial court's statutory interpretation *de novo. Id.* at 303.

We must first determine whether capital gains from the sale of the condominium units should be included in " gross income" for the purpose of calculating the respondent's child support obligation. The statute provides:

" Gross income" means all income from any source, whether earned or unearned, including, but not limited to, wages, salary, commissions, tips, annuities, social security benefits, trust income, lottery or gambling winnings, interest, dividends, investment income, net rental income, self-employment income, alimony, business profits, pensions, bonuses, and payments from other government programs [ ] except public assistance programs ... .

RSA 458-C:2, IV. The petitioner asserts that the net profits from the sales of SLF condominium units are " gross income" for purposes of calculating child support. The respondent counters that, because several neighboring states include capital gains in the definition of " gross income," but New Hampshire does not, the legislature intended to exclude capital gains from " gross income" when calculating child support.

We agree with the petitioner. The statute expressly states that " gross income" means " all income from any source, whether earned or unearned," *id.*, and, therefore, it " includes, but is not limited to, the items listed therein, which allows the trial court to count as gross income items that are not specifically listed in the statute." *In the Matter of Albert & McRae*, 155 N.H. 259, 263, 922 A.2d 643 (2007). The statute's broad language evinces the legislature's intent to " minimize the economic consequences to children," RSA 458-C:1 (Supp. 2013), in domestic relations cases by " mandat[ing] that an obligor's entire income be considered." *In the Matter of Jerome & Jerome*, 150 N.H. 626, 633, 843 A.2d 325 (2004) (quotation omitted). Moreover, " [m]ost states that have considered the question classify realized capital gains as income for the purpose of child support computation." *In re Children of Knight v. Lincoln*, 2014 OK CIV APP 2, 317 P.3d 210, 214, 214 n.4 (Okla. Ct. App. 2013) (collecting cases). Accordingly, we conclude that capital gains from SLF are " gross income" for the purpose of determining child support.

We are not persuaded by the respondent's argument that, because some states include capital gains in the definition of " gross income" but New Hampshire does not, our legislature specifically intended to exclude them.

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Our task here is to interpret our child support statute, RSA chapter 458-C; the definition of " gross income" in other states' statutes does not control our analysis.

Furthermore, were we to exclude capital gains from " gross income," a person deriving substantial income *exclusively* from capital gains would pay no child support. The legislature could not have intended such an absurd result. *See Bank of N.Y. Mellon v. Cataldo*, 161 N.H. 135, 138, 13 A.3d 134 (2010) (refusing to construe statute to lead to absurd result).

The petitioner asserts that both the capital gains from the sales of the condominium units and the money available to the respondent through the line of credit should be included in " gross income." We reject this assertion. The capital gains were treated as SLF funds,
[101 A.3d 5] which, in turn, the respondent drew down as a line of credit. Including both in " gross income," therefore, would be double-counting the funds available to the respondent for the purpose of child support. Because " [w]e believe that calculating a parent's ability to pay child support necessitates determining an actual ability to pay," *Woolsey*, 164 N.H. at 306, we find no error in including the capital gains, but excluding the funds obtained through the line of credit, in determining " gross income."

The respondent asserts that because he was awarded SLF as part of the property settlement in the parties' divorce, the capital gains on the sales of the condominium units should not constitute " gross income" for the purpose of calculating child support. He maintains that " [t]he party who is awarded the property [as part of the division of marital assets] is entitled to develop, invest, sell or otherwise manage the property as his or her own for life."

" [P]roperty division and child support serve different functions and are governed by different requirements... . [T]he child of divorced parents receives nothing from the property division." *Jerome*, 150 N.H. at 633 (quotation omitted). Accordingly, " it is not necessarily 'double-counting' to treat the [S-corporation] as marital property, award it to [the respondent], offset the award to [the petitioner], and then use the income from the asset to determine the level of child support." *Rattee v. Rattee*, 146 N.H. 44, 49, 767 A.2d 415 (2001). We note that here we are dealing with capital gains generated in a business context, so we have no occasion to consider whether, for example, capital gains generated from the sale of a personal residence and reinvested in a new residence must be included in gross income for child support purposes.

We next address whether the trial court correctly calculated the " gross income" generated by the sales of the condominium units. To
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determine " gross income," the trial court used the adjusted gross income figure from the respondent's 2011 tax return. The petitioner contends that this was error, and we agree. " Few courts rely solely on personal income tax returns to determine the amount of income available for purposes of calculating child support." *Albert*, 155 N.H. at 264 (quotation omitted). Indeed, " how federal income taxation statutes define 'income' is of little relevance to [the] interpretation of gross income under the child support guidelines." *In the Matter of State & Taylor*, 153 N.H. 700, 704, 904 A.2d 619 (2006). Moreover, as the petitioner observes, the respondent's adjusted gross income for federal tax purposes does not reflect his " gross income" for child support purposes because it includes deductions for such things as depreciation, discretionary retirement

contributions for the respondent and his current wife, and nonbusiness-related rental property losses -- expenses that were not necessary for producing income. Accordingly, because the trial court erroneously relied upon the respondent's adjusted gross income, we vacate and remand for a redetermination of his child support obligation.

The petitioner contends that the proper measure of " gross income" is to deduct legitimate business expenses from business profits. We agree. SLF is an S-corporation; the respondent is the sole shareholder. Courts in other jurisdictions have decided that a sole shareholder of an S-corporation is considered to be self-employed. *See Glass v. Oeder*, 716 N.E.2d 413, 415, 416 (Ind. 1999); *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223, 231 (Neb. 2003); *see also In the Matter of Hampers and Hampers*, 166 N.H. __, __, 97 A.3d 1106, (decided June 24, 2014) **[101 A.3d 6]** (analogizing self-employment to joint ownership of partnership, which, like S-corporation, is subject to " pass through" taxation). In *Woolsey*, we held that self-employment income includable for the calculation of child support was gross receipts net of legitimate business expenses. *Woolsey*, 164 N.H. at 306. We explained that business expenses must be " actually incurred and paid" and " reasonable and necessary for producing income" in order to be deductible from self-employment income. *Id.* at 307 (quotations omitted). " It is for the trial judge to determine whether claimed expenses meet those criteria." *Id.* Consequently, the trial court should " scrutinize the self-employed parent's financial situation closely, and ... exclude as a business expense any expenditure which the court in its discretion finds will personally benefit the parent." *Merrill v. Merrill*, 587 N.E.2d 188, 190 (Ind.Ct.App. 1992). We note that " [i]n situations where the individual with the support obligation is able to control the retention and disbursement of funds by the [S-corporation], he or she will bear the burden of proving that such actions were necessary to maintain or preserve the business." *In re Marriage of Brand*, 273 Kan. 346, 44 P.3d 321, 327 (Kan. 2002); *cf. Hampers*, 166 N.H. at __

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(holding that limited partner has burden of demonstrating deductibility of partnership's expenses because partner has ability to obtain information to establish propriety of partnership's actions).

Because the respondent has raised the issue on appeal, on remand the trial court shall include written findings addressing whether special circumstances warrant deviation from the application of the support guidelines. *See* RSA 458-C:5, I (Supp. 2013) (requiring court, where the issue is raised by either party, to make written findings " relative to the applicability" of special circumstances). In light of our decision, we need not address the parties' remaining arguments. *Vacated and remanded.*

Hicks, Conboy, Lynn, and Bassett, JJ., concurred.

In re Doherty, 040116 NHSC, 2014-0812 /**/ div.c1 {text-align: center} /**/

IN THE MATTER OF HOLLY DOHERTY AND WILLIAM DOHERTY

No. 2014-0812

Supreme Court of New Hampshire

April 1, 2016

Argued: October 21, 2015

10th Circuit Court-Brentwood Family Division

Primmer Piper Eggleston & Cramer PC, of Manchester (Doreen F. Connor on the brief and orally), for the petitioner.

Shaheen & Gordon, P.A., of Manchester (Jared O'Connor on the brief and orally), for the respondent.

BASSETT, J.

The 10th Circuit Court–Brentwood Family Division (*Luneau*, M., approved by *LeFrancois*, J.) issued orders after the respondent, William Doherty (Husband), filed a petition to modify his child support and alimony obligations. Husband and the petitioner, Holly Doherty (Wife), both appeal. For the reasons that follow, we affirm in part, reverse in part, vacate in part, and remand.

The relevant facts are as follows. The parties divorced in January 2010. They had two minor children at that time. They entered into a stipulation, which was incorporated into the divorce decree that the trial court approved; in the stipulation, they agreed upon, among other things, the amount of monthly alimony and child support to be paid by Husband.

In July 2014, after one of the parties' children had reached majority, Husband filed a petition seeking a modification of his child support and alimony obligations. Thereafter, Wife filed a motion for contempt, in which she asserted that Husband had significant child support and alimony arrearages. Following a hearing in August 2014, the trial court issued the orders that are the subject of this appeal; in the orders, the trial court modified Husband's child support and alimony obligations and determined the amount of arrearages that he owed.

I. Wife's Appeal

Wife argues that the trial court erred by: (1) including foster care payments that she received in her gross income for the purpose of modifying Husband's child support and alimony obligations; (2) terminating Husband's ongoing alimony obligation; and (3) concluding that it, a family division court, lacked jurisdiction to enforce the parties' agreement to share equally in certain litigation costs. "We will uphold an order on a motion to modify a support obligation absent an unsustainable exercise of discretion." *In the Matter of Canaway & Canaway*, 161 N.H. 286, 289 (2010). We sustain the findings and rulings of the trial court unless they are lacking in evidentiary support or tainted by error of law. *Id.*

A. Foster Care Payments

Turning to Wife's first argument, we provide the following background. In their stipulation, the parties agreed that, each month, Husband would pay Wife approximately $3, 400 in child support and approximately $1, 600 in alimony, for a monthly total of $5, 000. They further agreed that alimony would continue for 15 years, and that if the child support obligation was reduced, alimony would be increased so as to maintain a total payment of $5, 000 per month.

When deciding whether to modify Husband's child support and alimony obligations, the trial court found that, at the time of the parties' divorce, Wife's employment income was approximately $17, 500 per month. However, at the time of the hearing in 2014, the trial court found that her monthly income comprised approximately $3, 600 in employment income and approximately $5, 700 that she received "as a care provider for [two] disabled adults who reside[d] in her household."

After deciding to include the foster care payments in Wife's current income, the trial court concluded that it would be "fair and equitable" for Husband to pay $968 per month in child support pursuant to the child support guidelines. The trial court further determined that, because there had been a "substantial and unforeseen change in circumstances, " a modification of alimony was justified. Given the change in the parties' incomes and expenses, a reduction in Wife's monthly mortgage payment, and Husband's inability to pay alimony in addition to child support and arrearage payments, the trial court decided to terminate Husband's ongoing alimony obligation. Both of these modifications were made retroactive to July 14, 2014 - the date that Wife filed an objection to Husband's petition for modification, in which she sought enforcement of Husband's child support and alimony obligations. *See* RSA 458-C:7, II (2004) ("Any child support modification shall not be effective prior to the date that notice of the petition for modification has been given to the [opposing party].").

On appeal, Wife argues that, because the foster care payments that she received were "use[d] to clothe, feed and shelter the disabled adults in her care, " those funds should not have been included in her gross income for the purposes of modifying Husband's child support obligations. In making this argument, she relies upon the definition of "gross income" under RSA 458-C:2, IV (2004), the definition of income under the federal tax code, and cases from other jurisdictions. Husband counters that the foster care payments were properly included in Wife's income because they constituted "gross income" under RSA 458-C:2, IV. Additionally, he asserts that the federal tax code's treatment of these payments has no bearing on whether they constitute "gross income" under New Hampshire law.

Resolving this issue requires us to engage in statutory interpretation, and, therefore, our review is *de novo*. *See In the Matter of Woolsey & Woolsey*, 164 N.H. 301, 303 (2012). We are the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole. *In the Matter of Hampers & Hampers*, 166 N.H. 422, 433 (2014). We interpret legislative intent from the statute as written, and we will not consider what the legislature might have said or add words that the legislature did not include. *Id.* We interpret statutes in the context of the overall statutory scheme and not in isolation. *Id.*

"Gross income" is defined, in relevant part, as:

all income from any source, . . . including, but not limited to, wages, salary, . . . and payments from other government programs (*except public assistance programs*, including aid to families with dependent children, *aid to the permanently and totally disabled*, supplemental security income, food stamps, *and general assistance received from a county or town*).

RSA 458-C:2, IV (emphases added). Wife asserts that the foster care payments that she received are excluded from the definition of "gross income" under RSA 458-C:2, IV as "aid to the permanently and totally disabled." We disagree.

RSA 167:6, VI (2014) states, in pertinent part, that:

[A] person shall be eligible for aid to the permanently and totally disabled who is between the ages of 18 and 64 years of age inclusive; is a resident of the state; and is disabled as defined in the federal Social Security Act, Titles II and XVI and the regulations adopted under such act, except that the minimum required duration of the impairment shall be 48 months, unless and until the department adopts a 12-month standard in accordance with RSA 167:3-j. In determining disability, the standards for "substantial gainful activity" as used in the Social Security Act shall apply, including all work incentive provisions including Impairment Related Work Expenses, Plans to Achieve Self Support, and subsidies. . . . No person shall be eligible to receive such aid while receiving old age assistance, aid to the needy blind, or aid to families with dependent children.

See also RSA 167:3-j (2014) (concerning minimum duration of impairment for aid to the permanently and totally disabled); *Petition of Kilton*, 156 N.H. 632, 634 (2007) (noting that the aid to the permanently and totally disabled program "is one of various public assistance programs administered by" the New Hampshire Department of Health and Human Services).

Here, Wife has not provided us with a record concerning the origins of the foster care payments. Thus, on the record before us, there is no evidence that the payments that she received were actually made under the aid to the permanently and totally disabled program; additionally, there is no evidence that the adults in her care met all of the statutory requirements to establish eligibility for such aid. *See* RSA 167:6, VI; *see also* RSA 167:3-j. Accordingly, we cannot conclude that those payments can be excluded from the definition of "gross income" under RSA 458-C:2, IV as "aid to the permanently and totally disabled." *See Bean v. Red Oak Prop. Mgmt.*, 151 N.H. 248, 250 (2004) (noting that it is the burden of the appealing party to provide this court with a record sufficient to decide issues on appeal). Given the state of the record, we also cannot conclude that the payments derived from a "public assistance program[], " constituted "general assistance received from a county or town, " or would otherwise fall within one of the other exceptions to "gross income" under RSA 458-C:2, IV. *See id.*

Accordingly, given the broad statutory definition of "gross income, " *see In the Matter of LaRocque & LaRocque*, 164 N.H. 148, 153 (2012), and because Wife has not demonstrated that the foster care payments are excluded from that definition, we conclude that the trial court properly included those payments in her "gross income."

Nevertheless, Wife asserts that, because the foster care payments are excluded from her gross income for tax purposes under the federal tax code, they should also be excluded from her gross income under RSA 458-C:2, IV. *See* 26 U.S.C. § 131(a) (2012) ("Gross income shall not include amounts received by a foster care provider during the taxable year as qualified foster care payments."). We disagree. We have repeatedly stated that how the "federal income taxation statutes define 'income' is of little relevance to our interpretation of gross income under the child support guidelines." *Hampers*, 166 N.H. at 434 (quotation omitted); *see also, e.g., In the Matter of Maves & Moore*, 166 N.H. 564, 569 (2014) (same); *In the Matter of State & Taylor*, 153 N.H. 700, 704 (2006) (same). "This is so because the objectives of the child support guidelines differ from the objectives of the federal income taxation statutes." *Hampers*, 166 N.H. at 435 (quotation omitted).

Moreover, we are not persuaded by Wife's reliance upon cases from other jurisdictions that have held that foster care payments received by a foster parent of children should be excluded from the foster parent's income. *See, e.g., In re Marriage of Dunkle*, 194 P.3d 462, 466 (Colo.App. 2008) (concluding that foster care payments were properly excluded from parent's gross income because, although received by parent, payments were children's income); *Matter of Paternity of M.L.B.*, 633 N.E.2d 1028, 1029 (Ind.Ct.App. 1994) (same); *Bryant v. Bryant*, 218 S.W.3d 565, 569 (Mo.Ct.App. 2007) (same). Our task here is to interpret our child support statute and determine whether, under that statute, the foster care payments in this case should be included in Wife's gross income; the treatment of foster care payments under the definition of income in other states' statutes does not control our analysis. *See Maves & Moore*, 166 N.H. at 567-68.

Finally, to the extent that Wife attempts to assert a distinct and additional argument that "gross income" for child support purposes should be treated differently than income for alimony purposes, *see* RSA 458:19, IV (2004) (listing factors for trial courts to consider when determining alimony, including the "amount and sources of income" of each party), we decline to address it because it was not adequately developed for appellate review, *see In the Matter of Thayer and Thayer*, 146 N.H. 342, 347 (2001).

B. Reducing Gross Income

Wife next asserts that the trial court erred by failing to: (1) account for the reduction in the payments that she received when one of the foster adults in her care was removed from her home; and (2) deduct expenses that she incurred relating to the care of the foster adults. We agree with Wife on both points.

Before the trial court issued its order on the parties' motions for reconsideration, Wife filed a motion in which she asserted that one of the two foster adults that she cared for no longer resided in her home, and, therefore, the foster care payments that she received each month were reduced from approximately $5, 700 to $2, 400. Although Husband did not dispute the payment reduction, the trial court never addressed the reduced payments. Under these circumstances, we conclude that Wife's gross income should have been adjusted to reflect the reduction in foster care payments. *Cf. Hampers*, 166 N.H. at 442 ("It is undisputed that child support should be determined on the basis of present income." (quotation omitted)). The trial court's failure to account for that reduction was, therefore, error.

Moreover, we agree with Wife that the trial court should have deducted from her monthly foster care payments, and, thus, from her gross income, the reasonable and necessary expenditures that she incurred in providing for the foster adult remaining in her care. As we have explained, "gross income" under RSA 458-C:2 means the total amount available to parents for paying child support. *See id.* at 434; *see also Woolsey*, 164 N.H. at 306 (explaining that "calculating a parent's ability to pay child support necessitates determining an actual ability to pay" and concluding that the term "self-employment income" in RSA 458-C:2, IV "presupposes the deduction of legitimate business expenses"). Thus, any portion of the foster care payments that were not "available" to Wife should not have been included in her gross income.

Accordingly, we vacate the trial court's determination of Wife's monthly gross income, and remand for the trial court to determine the extent of the foster care payments that remained

available to Wife, after deducting from the payments the reasonable and necessary expenses that Wife actually incurred and paid to care for the foster adult who remained in her home. *See Woolsey*, 164 N.H. at 307 (holding that, to be deductible for purposes of determining "self-employment income" under RSA 458–C:2, IV, business expenses must be "actually incurred and paid" and "reasonable and necessary" for producing income (quotations omitted)). Because we are vacating the trial court's determination of Wife's gross income figure, and because the trial court relied, in part, upon that figure when deciding to modify Husband's child support obligation, we also remand for the trial court to recalculate that obligation. *See In the Matter of Albert & McRae*, 155 N.H. 259, 265 (2007) (vacating trial court's determination of party's gross income and remanding for recalculation of child support obligation).

C. Modification of Alimony

Relying primarily upon our decision in *Laflamme v. Laflamme*, 144 N.H. 524 (1999), Wife next argues that the trial court erred by revisiting Husband's alimony obligation because there was not a "substantial or unforeseen change in circumstances." Wife claims that the "only substantial and unforeseen change in circumstances between the parties" has been her decrease in monthly income, which, she argues, is not sufficient to justify reexamining Husband's alimony obligation.

As we have stated, "[t]he party requesting an alimony modification must show that a substantial change in circumstances has arisen since the initial award, making the current alimony amount either improper or unfair." *Canaway*, 161 N.H. at 289 (quotation and brackets omitted). The trial court "must inquire into the changed circumstances of both parties, " *id.* at 290, and "must take into account *all* of the circumstances of the parties, including the terms of the stipulation, " *In the Matter of Arvenitis & Arvenitis*, 152 N.H. 653, 655 (2005) (quotation omitted). "Changes to a party's condition that are both anticipated and foreseeable at the time of the decree cannot rise to the level of a substantial change in circumstances sufficient to warrant modification of an alimony award." *Canaway*, 161 N.H. at 289 (quotation omitted).

In *Laflamme*, the trial court modified the defendant's alimony obligation based upon a finding that the defendant had sold assets and no longer had income to pay alimony due to his retirement. *Laflamme*, 144 N.H. at 528. On appeal, we reversed the trial court's decision because the sale of assets and the defendant's retirement were both foreseeable and anticipated at the time of the divorce decree. *Id.* at 528-29. Accordingly, although there may have been a change in circumstances following the divorce decree, we concluded that those changes did not "rise to the level of a substantial change in circumstances sufficient to warrant modification of [the] alimony award." *Id.*

Laflamme is readily distinguishable. First, as the trial court here observed in its order, the parties' incomes and expenses had changed significantly since the divorce decree. *See Canaway*, 161 N.H. at 290 (observing that trial court must inquire into changed circumstances of both parties). The trial court found that at the time of the divorce decree, Wife's monthly employment income was approximately $17, 500, and her monthly expenses totaled approximately $16, 300; Husband's monthly income was approximately $7, 700, and his monthly expenses were approximately $10, 100. By contrast, the trial court found that at the time of the final hearing on the petition for modification, Wife's monthly employment income was approximately $3, 600, and her

monthly expenses were approximately $11, 300; Husband's monthly income was approximately $7, 300, and his expenses were approximately $4, 600.

Moreover, unlike *Laflamme*, in which the trial court found that both the defendant's retirement and the sale of his assets were anticipated by the parties at the time of the divorce decree, *see Laflamme*, 144 N.H. at 528, here, there is nothing in the record that suggests that the changes to the parties' finances were anticipated or foreseeable. In fact, the trial court explicitly found that "[t]he parties . . . could not have anticipated the changes to their incomes and expenses at the time of the [f]inal [h]earing."

Furthermore, the parties' stipulation contemplated reconsideration of Husband's alimony obligation under certain circumstances. *See Arvenitis*, 152 N.H. at 655 (explaining that court must take into account all circumstances of parties, including terms of stipulations). The parties agreed that, if Wife was "successful in reducing the monthly mortgage payment" on the marital home, "the parties [would] re-evaluate the support obligations considering the reduction in the mortgage obligation." Wife concedes that she modified the terms of her mortgage, which had the effect of reducing her monthly mortgage payments; according to the trial court, her monthly mortgage payments were reduced from approximately $5, 700 to $3, 100.

Accordingly, in light of the trial court's finding that there had been unanticipated and unforeseeable significant changes in the parties' finances, the terms of the parties' stipulation, and the reduction in Wife's monthly mortgage payments, we conclude that the trial court sustainably exercised its discretion by revisiting Husband's alimony obligation.

Nonetheless, Wife asserts that, even if the trial court had the discretion to revisit and potentially modify the alimony award, it unsustainably exercised that discretion by eliminating Husband's alimony obligation. According to Wife, the significant decrease in her income supported continuation - rather than elimination - of alimony, and she also argues that the trial court erroneously cited Husband's inability to pay his child support and alimony arrearages as a reason to terminate alimony.

We, however, need not address whether the trial court's order eliminating alimony is unsupportable because of either the dramatic decrease in Wife's income or the trial court's reliance upon Husband's inability to pay certain arrearages. Because we are vacating for redetermination of Wife's gross income for child support purposes, and because the trial court relied, in part, upon that gross income figure when deciding to eliminate Husband's ongoing alimony obligation, we also vacate the alimony award and remand for redetermination of whether and to what extent ongoing alimony is warranted.

D. Jurisdiction of Trial Court

Wife next argues that the trial court, a family division court, erred by concluding that it lacked jurisdiction to enforce a provision in the parties' stipulation. The disputed provision states that the parties would be "equally responsible for payment of any and all legal fees incurred and/or judgments/settlements requiring them to compensate any party" in a separate and ongoing boundary lawsuit. Although the trial court acknowledged the parties' agreement to divide such legal fees, it concluded that it could enforce only "the part of the debt that was incurred as of the date of the Divorce Decree, " and that no part of the debt existed at that time. The trial court stated

that "[a]ny post-Decree debt to the firm the parties hired in the [boundary] lawsuit needs to be addressed in the context of the lawsuit, or in another forum."

Wife asserts that the trial court had jurisdiction to enforce the parties' agreement to share the legal fees associated with the ongoing boundary lawsuit because such litigation costs were part of the marital debt that it could properly consider when distributing the marital estate. Husband counters that the trial court "correctly held that its jurisdiction extends only as far as dividing the assets and debts of the parties as of the date of divorce, but not afterward, " because it has no "legal authority to assign post-divorce debt." We agree with Wife.

Our decision in *Maldini v. Maldini*, 168 N.H. 191 (2015), is instructive. In *Maldini*, the parties entered into a "side agreement" during their divorce mediation that allocated certain "yet-to-be-assessed tax liabilities." *Maldini*, 168 N.H. at 193 (quotation omitted). On appeal, we concluded that the family division had jurisdiction to interpret and enforce that side agreement. *Id.* at 194-96. We explained that "such unpaid tax liability falls within the broad category of marital debt that the family division can properly consider when distributing the marital estate." *Id.* at 195. We further explained that "[g]iven that the side agreement at issue concerned marital property, over which the family division has exclusive jurisdiction, that court - and not the superior court - remains the proper forum for addressing issues arising from the agreement." *Id.* at 196.

Like the side agreement in *Maldini* that addressed yet-to-be-assessed tax liability, here, the parties' agreement encompassed yet-to-be-assessed expenses associated with the ongoing boundary suit. Thus, as in *Maldini*, we conclude that these anticipated litigation expenses fall "within the broad category of marital debt that the family division can properly consider when distributing the marital estate." *Id.* at 195. Because the trial court, a family division court, concluded otherwise, we reverse this aspect of the trial court's order and remand.

II. Husband's Cross-Appeal

A. Retroactive Alimony Modification

Husband first argues that the trial court erred by failing to retroactively modify his alimony obligation to a date earlier than July 14, 2014. Although we have vacated the trial court's decision to eliminate his ongoing alimony obligation, we will address this issue because it is likely to arise upon remand. *See Figlioli v. R.J. Moreau Cos.*, 151 N.H. 618, 622 (2005).

In determining July 14 to be the effective date of the alimony modification, the trial court explained that, because it did not receive a return of service of Husband's petition for modification of child support and alimony, the earliest date to which it could retroactively modify the obligations was July 14 - the date that Wife filed an objection to the petition, thus evidencing receipt of Husband's petition. *See* RSA 458-C:7, II ("Any child support modification shall not be effective prior to the date that notice of the petition for modification has been given to the [opposing party]."). Husband concedes that, pursuant to RSA 458-C:7, II, the trial court cannot retroactively modify his *child support* obligation prior to July 14 - the date that notice of the petition for modification was provided to Wife. However, he argues that, because alimony differs from child support and each is governed by different statutes, the same limitation does not apply to alimony modifications. Thus, he argues, the trial court had the ability to modify his alimony to a date prior to July 14. We disagree.

Our decision in *In the Matter of Birmingham & Birmingham*, 154 N.H. 51 (2006), is controlling. In *Birmingham*, the respondent argued that the trial court erroneously denied his request to modify child support and alimony retroactive to a date before the petitioner received notice of the respondent's modification petition. *Birmingham*, 154 N.H. at 57. We, however, concluded that the trial court did not err. *Id.* at 57-58. We explained that, after our review of case law and statutes concerning child support and alimony, "the trial court correctly ruled that, pursuant to RSA 458-C:7, II, it had no discretion to modify any child support order beyond the date of notice to the petitioner." *Id.* at 58 (quotations and brackets omitted). Although we observed that "[t]here is no analogous statute that expressly limits the trial court's authority to grant a retroactive modification of alimony beyond the date of notice to the adverse party, " we determined that "our case law and our interpretation of the statutes governing the modification of alimony lead us to conclude that the trial court's authority to grant a retroactive modification of alimony beyond the date of notice to the adverse party is *similarly limited*." *Id.* (emphasis added).

Thus, based upon *Birmingham*, we conclude that the trial court in this case had no authority to grant a retroactive modification of alimony to a date earlier than the date Wife received notice of Husband's petition for modification. *See id.* Nonetheless, because we used the phrase "similarly limited" in *Birmingham* instead of "identically" limited, Husband contends that notice in the context of retroactive alimony modification is "broader" than notice in the context of retroactive child support modification. Therefore, Husband asserts, the trial court had the authority to grant a retroactive modification of alimony to the date of the parties' stipulation in 2010, which, he claims, provided Wife with actual notice that his alimony obligation would change once the monthly mortgage payments were reduced. We disagree.

Regardless of any ambiguity in the phrase "similarly limited, " our decision in *Birmingham* effectively imported into retroactive alimony modifications the same notice requirements that are applicable to retroactive child support modifications. *See id.* We also observe that, although in *Birmingham* we invited the legislature to clarify the statutes governing the trial court's authority to grant a retroactive modification of alimony, *id.*, the legislature has not amended those statutes, *see* RSA 458:14, :32 (2004). Thus, we assume that our holding in *Birmingham* conforms to legislative intent. *See Ichiban Japanese Steakhouse v. Rocheleau*, 167 N.H. 138, 143 (2014). Accordingly, we conclude that the trial court properly ruled that it could not retroactively modify Husband's alimony obligation to a date prior to the date that Wife received notice of Husband's petition for modification - July 14, 2014.

B. Child Support Arrearages

Husband next argues that the evidence presented to the trial court did not support the trial court's determination of the amount of his child support arrearages. At the hearing on the petition to modify, each party submitted records purporting to demonstrate the amount of child support that Husband had paid and still owed between the date of the parties' stipulation - in which Husband agreed to pay approximately $3, 400 per month in child support - and July 2014. According to Wife's records, Husband's child support arrearages amounted to approximately $73, 100. Husband's documents, however, purported to demonstrate an arrearage of approximately $47, 400. After reviewing the documents provided by the parties, the trial court concluded that Wife's

documents were "credible, " and that Husband owed approximately $73, 100 in child support arrearages.

On appeal, Husband argues that the trial court's decision is not supported by the documentary evidence presented at the hearing. According to Husband, when the trial court adopted Wife's arrearage amount, it erroneously "ignored" the allegedly more accurate records that he submitted, which included bank deposit receipts. In response, Wife contends that we should affirm the trial court's determination of child support arrearages because the trial court found the records that she submitted to be "credible." She argues that our task is not to reweigh the evidence presented to the trial court, and she asserts that, because the trial court's finding is supported by the documentary evidence that she submitted, we should defer to the trial court's finding. *See In re Guardianship of E.L.*, 154 N.H. 292, 296 (2006) (explaining that "we do not reweigh the evidence to determine whether we would have ruled differently, " and recognizing that the trier of fact "is in the best position to measure the persuasiveness and credibility of evidence" and that it "lies within the province of the trial court to accept or reject, in whole or in part, whatever evidence was presented" (quotations omitted)).

As a threshold matter, the parties dispute the applicable standard of review. According to Wife, we should review this matter under our unsustainable exercise of discretion standard. By contrast, Husband claims that, because the trial court decided this issue solely based upon documentary evidence, we should give less deference to the trial court's determination. *See Lawrence v. Philip Morris USA*, 164 N.H. 93, 96-97 (2012) (concluding that, because trial court "relied only upon a paper record and all of the documents from below are available for our perusal, we give less than ordinary deference to the trial court's factual findings" (quotation and ellipsis omitted)). We assume, without deciding, that Husband is correct that a less deferential standard applies.

Nonetheless, even under a less deferential standard, we cannot conclude that the trial court erred by ruling that Husband owes approximately $73, 100 in child support arrearages. First, many of the bank deposit receipts that Husband has submitted on appeal - which he claims provide "incontrovertible proof" that his child support arrearages total approximately $47, 400 - are illegible. *See Bean*, 151 N.H. at 250 (explaining that appealing party has burden of providing this court with a record sufficient to decide issues on appeal). Moreover, none of the bank deposit receipts that are legible indicates on its face that the money was actually paid for child support. Accordingly, under these circumstances, we disagree with Husband that the trial court was bound to use his records "as the sole credible source of information for purposes of determining the child support arrearage" and that the trial court erred by relying, instead, upon Wife's records. We, therefore, affirm the trial court's determination that Husband's child support arrearage amounted to approximately $73, 100.

Affirmed in part; reversed in part; vacated in part; and remanded.

DALIANIS, C.J, and CONBOY, J, concurred.

received from a county or town), including, but not limited to, workers' compensation, veterans' benefits, unemployment benefits, and disability benefits; provided, however, that no income earned at an hourly rate for hours worked, on an occasional or seasonal basis, in excess of 40 hours in any week shall be considered as income for the purpose of determining gross income; and provided further that such hourly rate income is earned for actual overtime labor performed by an employee who earns wages at an hourly rate in a trade or industry which traditionally or commonly pays overtime wages, thus excluding professionals, business owners, business partners, self-employed individuals and others who may exercise sufficient control over their income so as to recharacterize payment to themselves to include overtime wages in addition to a salary. In addition, the following shall apply:

(a) The court, in its discretion, may consider as gross income the difference between the amount a parent is earning and the amount a parent has earned in cases where the parent voluntarily becomes unemployed or underemployed, unless the parent is physically or mentally incapacitated.

(b) The income of either parent's current spouse shall not be considered as gross income to the parent unless the parent resigns from or refuses employment or is voluntarily unemployed or underemployed, in which case the income of the spouse shall be imputed to the parent to the extent that the parent had earned income in his or her usual employment.

(c) The court, in its discretion, may order that child support based on one-time or irregular income be paid when the income is received, rather than be included in the weekly, bi-weekly, or monthly child support calculation. Such support shall be based on the applicable percentage of net income.

IV-a. "Medical support obligation" means the obligation of either or both parents to provide health insurance coverage for a dependent child and/or to pay a monetary sum toward the cost of health insurance provided by a public entity, parent, or other person.

V. "Minimum support order" means an order of support equal to $50 per month, unless the court determines that a lesser amount is appropriate under the particular circumstances of the case.

VI. "Net income" means the parents' combined adjusted gross income less standard deductions published on an annual basis by the department of health and human services and based on federal Internal Revenue Service withholding table amounts for federal income tax, F.I.C.A., and Medicare, which an employer withholds from the monthly income of a single person who has claimed a withholding allowance for 2 people.

(a) Federal income tax;

(b) F.I.C.A.

VI-a. "Reasonable medical support obligation" means the amount established under RSA 458-C:3, V.

VII. "Obligor" means the parent responsible for the payment of child support under the terms of a child support order.

VIII. "Obligee" means the parent or person who receives the payment of child support under the terms of the child support order.

VIII-a. "Parental support obligation" means the proportional amount of the total support obligation allocated to each parent under RSA 458-C:3, II(b) and (c).

IX. "Percentage" means the numerical figure that is applied to net income to determine the amount of child support.

X. "Self-support reserve" means 115 percent of the federal poverty guideline for a single person living alone, as determined annually by the United States Department of Health and Human Services.

XI. "Total support obligation" means net income multiplied by the appropriate percentage derived from RSA 458-C:3.

Cite as RSA 458-C:2

History. Amended by 2013, 81: 2, eff. 6/19/2013.
Amended by 2013, 81: 1, eff. 6/19/2013.

Note:

1988, 253:1. 1989, 406:1. 1990, 224:1, 2, 5. 1995, 310:181. 1998, 242:1-3. 2004, 77:1, eff. May 7, 2004. 2006, 189:1, eff. July 29, 2006. 2007, 227:3 to 5, eff. June 25, 2007. 2008, 245:1, eff. June 24, 2008. 2010, 26:1, eff. Jan. 1, 2011; 71:1, eff. Jan. 1, 2011; 166:4, eff. June 17, 2010.

IN THE MATTER OF CAROLYN P. COTTRELL, DDS AND MOSTAFA EL-SHERIF, DMD

No. 2011-210

SUPREME COURT OF NEW HAMPSHIRE

163 N.H. 747*; *48 A.3d 896*; *2012 N.H. LEXIS 83

March 8, 2012, Argued
June 29, 2012, Opinion Issued

SUBSEQUENT HISTORY: Released for Publication August 21, 2012.

PRIOR HISTORY: [***1]
Manchester Family Division.

DISPOSITION: Affirmed.

HEADNOTES

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

1. Divorce--Division of Property--Valuation The property subject to division in a divorce is defined as "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." The court has previously defined the fair market value of property as the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts. The valuation of a professional practice is a question of fact to be determined by the trial court based upon the particular facts and circumstances. Determining the value of any given asset is left to the sound discretion of the trial court. Also a question of fact is the determination of the existence and value of goodwill. *RSA 458:16-a, I.*

2. Divorce--Division of Property--Particular Cases In a divorce case, the trial court properly valued husband's dental practice at $1,274,000. The husband's expert, who valued the business at $156,000, limited his analysis to the practice's net tangible assets and made no calculation of goodwill; the husband paid $410,000 for the business in 1996 and had run an unusually successful dental practice ever since; and it was proper to consider that a non-compete covenant would be included in the sales price if the practice were sold. *RSA 458:16-a.*

3. Labor--Employment Contracts--Noncompetition Covenants Non-compete covenants routinely accompany the sale of professional practices, and New Hampshire law recognizes such contracts as long as they are reasonable.

COUNSEL: *Hamblett & Kerrigan, P.A.*, of Nashua (*Andrew J. Piela* and *Kevin P. Rauseo* on the brief, and *Mr. Rauseo* orally), for the petitioner.

Sulloway & Hollis, PLLC, of Concord (*Patrick J. Sheehan* and *Ronna F. Wise* on the brief, and *Ms. Wise* orally), for the respondent.

JUDGES: LYNN, J. DALIANIS, C.J., and HICKS and CONBOY, JJ., concurred.

OPINION BY: LYNN

OPINION

[**897] [*748] LYNN, J. The respondent, Mostafa El-Sherif, DMD, appeals a divorce decree of the Manchester Family Division (*Emery*, J.), recommended by the Marital Master (*Lemire*, M.). He argues that the trial court erred when it adopted an appraisal valuing his business at $1,274,000 for the purposes of the final distribution of property. We affirm.

I

The trial court found, or the record supports, the following facts. After a twenty-three year marriage, the parties separated in February 2009 and divorced in February 2011. The petitioner, Carolyn P. Cottrell, DDS, was a practicing dentist until 1994 and, at the time of the divorce, worked as a clinical associate professor of dentistry at Tufts University. The respondent is also a dentist and operates a successful dental practice in Concord.

The divorce trial required the court to determine the fair [***2] market value of the respondent's dental practice. The company hired by the petitioner, Brayman, Houle, Keating, and Albright, PLLC, rendered a report opining that the fair market value was $1,274,000 as of December 31, 2009. Anthony Albright testified in support of that report, which was based upon a formula that seeks to determine the present value of the business by estimating [**898] its ability to generate future earnings -- the "capitalization of earnings" approach.

The respondent's expert, Dr. Stanley L. Pollock, estimated the business's value to be $156,000. To arrive at this figure, Pollock acknowledged at trial that he did not value the business based upon its transferable value because he knew that the respondent did not intend to sell the business. Thus, his estimate reflected only the business's net tangible asset value, including the value of the equipment and furniture used in the dental practice.

The trial court adopted the petitioner's estimate. Among other reasons for doing so, the court was "incredulous" of the testimony that the business was worth only $156,000 because the respondent paid $410,000 for it in 1996 and it had generated substantial income for him ever since. The [***3] court also noted that Albright's appraisal disregarded the respondent's highest earning years (tending to lower the value) and, unlike Pollock's appraisal, accounted for the "substantial goodwill as a business entity." The respondent appeals.

II

[1] *RSA 458:16-a, I* (2004) defines the property subject to division in a divorce as "all tangible and intangible property and assets, real or personal, [*749] belonging to either or both parties, whether title to the property is held in the name of either or both parties." We have previously defined the fair market value of property as "the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts." *In the Matter of Watterworth & Watterworth, 149 N.H. 442, 447, 821 A.2d 1107 (2003)* (quotations omitted). The valuation of a professional practice is a question of fact to be determined by the trial court based upon the particular facts and circumstances. *Id. at 450*; *see In the Matter of Chamberlin & Chamberlin, 155 N.H. 13, 16, 918 A.2d 1 (2007)* ("[D]etermining the value of any given asset is [***4] left to the sound discretion of the trial court."). Also a question of fact is the determination of the existence and value of goodwill. *Watterworth, 149 N.H. at 450*. We will not disturb the trial court's findings in this regard unless they are unsustainable on the record. *Id.*

The respondent argues that the trial court erred by attributing a value to his practice that included "professional goodwill" -- the intangible value of the dental practice that he asserts would not be transferable upon sale because it is attached to the respondent's own education and reputation. He concedes that the court was free to consider the value of the "practice goodwill" -- the goodwill that is severable from the professional reputation of the respondent and therefore transferable to a willing buyer.

[2] On the record before us, we conclude that the trial court sustainably exercised its discretion in adopting the petitioner's valuation of the business. The trial court was presented with two expert opinions to aid in its determination of the business's value. The court found that the respondent's expert, Pollock, vastly underestimated the fair market value of the business, especially in light of his concession [***5] that he limited his analysis to its net tangible assets only. When pressed on the value of the business were the respondent to sell it, Pollock stated that he would receive no more than $400,000, but did not arrive at a precise figure. Thus, it was clear that Pollock made no calculation of goodwill in his appraisal. Both Pollock's estimate of $156,000 and his alternative [**899] estimate of $400,000 were further undermined by the fact that the respondent paid $410,000 for the business in 1996 and had run an unusually successful dental practice ever since.

In contrast, the court found that the petitioner's expert, Albright, accurately assessed the business's fair market value. Instead of considering only the business assets, Albright employed an appraisal method based upon how the business assets are used to generate income over time. Albright's method discounted for the business's lack of marketability given [*750] its "liquidity issue" and disregarded the respondent's highest earning years, but accounted for the practice's "substantial goodwill as a business entity." The court noted that Albright believed the practice was "completely transferrable despite Respondent's extensive education and reputation." [***6] Thus, the court adopted Albright's estimate and distributed the marital property accordingly.

Having lost the battle of the experts, the respondent argues that the trial court's decision "failed to subtract the

portion attributable to professional goodwill" and, therefore, the matter must be remanded for an adjustment. The respondent contends that, because Albright did not determine the portion of his estimate attributable to professional goodwill, separate from practice goodwill, the trial court should have adopted a middle ground discounting for professional goodwill. The respondent cites no authority, however, to support the proposition that in a divorce proceeding the trial court must, on its own initiative, both determine the value of professional goodwill and discount it from the overall valuation of a business. Here, we need not decide the legal question of whether professional goodwill is marital property subject to equitable division in a divorce under *RSA 458:16-a*, for neither expert assigned a precise value, if any existed, to the professional goodwill of the respondent's practice. *Cf. Chamberlin, 155 N.H. at 16.* Had the respondent presented a plausible estimation of the [***7] value attributable to his reputation, the trial court could have accorded such evidence its due consideration -- further underscoring the factual nature of setting a value to a professional practice. Without having done so, the respondent ran the risk that the court would accept Albright's appraisal in its entirety. *Cf. Tzimas v. Coiffures By Michael, 135 N.H. 498, 501, 606 A.2d 1082 (1992)* (The trial court "is free to accept or reject an expert's testimony in whole or in part, when faced with conflicting expert testimony." (quotations omitted)). The court's decision, therefore, did not constitute an unsustainable exercise of discretion.

[3] Equally unavailing is the respondent's argument that the court erred in adopting Albright's appraisal on the grounds that it included a hypothetical covenant not to compete in its determination as to the fair market value of the dental practice. As noted above, the fair market value is what a willing buyer would pay a willing seller. Notably, both experts agreed that non-compete covenants routinely accompany the sale of professional practices, and New Hampshire law recognizes such contracts as long as they are reasonable. *ACAS Acquisitions v. Hobert, 155 N.H. 381, 388, 923 A.2d 1076 (2007).* [***8] The trial court was therefore entitled to rely upon both experts in considering that, were the respondent to sell his practice, the price would likely include an agreement not to compete. [*751]

III

We have reviewed the respondent's remaining arguments that the trial court should have made adjustments to Albright's [**900] appraisal based upon a misapplication of the approach he used, and we conclude that they warrant no extended consideration. *See Vogel v. Vogel, 137 N.H. 321, 322, 627 A.2d 595 (1993).*

Affirmed.

DALIANIS, C.J., and HICKS and CONBOY, JJ., concurred.

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THE SUPREME COURT OF NEW HAMPSHIRE

Portsmouth Family Division

No. 2002-240

IN THE MATTER OF BRADFORD WATTERWORTH AND

JULIE WATTERWORTH

Submitted March 5, 2003

Opinion Issued: April 30, 2003

Marshall Law, of East Kingston (Keri J. Marshall on the brief), for the petitioner.

John A. Macoul, of Salem, by brief for the respondent.

DALIANIS, J. The respondent, Julie Watterworth (Wife), appeals the orders of the Portsmouth Family Division (DeVries, J.) approving the final divorce decree recommended by the Marital Master (Stephanie T. Nute, Esq.). She objects to the trial court's calculation of child support and division of marital assets. We affirm in part, vacate in part and remand.

Wife married the petitioner, Bradford Watterworth (Husband), in September 1982. The parties separated in 1997 and have three school-aged daughters born in 1988, 1990 and 1994, respectively. Husband is an orthodontist. Since 1986, he has been a part owner of Pingree & Watterworth, P.A., an orthodontic practice. Over a five-year period, he purchased one-half of the shares of this professional association for approximately $21,000. Wife has an undergraduate degree in medical technology and has not worked outside the home since before the couple's first child was born.

Husband commenced no fault divorce proceedings in March 2000. Following a four-day hearing, the court issued a final divorce decree. The court awarded Wife $3,000 per month in alimony and required Husband to pay $4,000 per month in child support.

The court found that the total value of the marital estate was $1,402,260. It ruled that an equal distribution of the marital estate was equitable. It awarded assets valued at $807,708 to Husband and assets valued at $594,552 to Wife and required Husband to pay Wife the sum of $106,578 to equalize the distribution. As a result, each party received $701,130 in assets. Among the assets Wife received were the equity in the marital home ($410,000), which is unencumbered by a mortgage, and significant cash assets, including her individual retirement account ($33,656), money market account ($22,000), checking account ($20,000), and investment account ($85,125).

Among the assets Husband received was the value of his interest in the orthodontic practice, which the court, accepting the testimony and report of Husband's expert witness, valued at $75,148. Husband was also awarded the value of his pension account in the orthodontic practice's defined contribution pension plan, which the court valued at $450,382 as of the date of the final hearing. Husband also received the value of his profit-sharing account in the orthodontic practice's profit-sharing plan, which the court valued at $41,445 as of the date of the final hearing.

Wife moved for reconsideration. Following an additional hearing, the court modified the final divorce decree in ways that neither party challenges on appeal and otherwise denied Wife's motion. This appeal followed.

"We afford trial courts broad discretion in determining matters of property distribution, alimony and child support in fashioning a final divorce decree. We will not overturn the trial court's decision absent an unsustainable exercise of discretion." In the Matter of Crowe & Crowe, 148 N.H. 218, 221 (2002) (citation omitted).

I. Child Support

Wife first argues that the court miscalculated the child support award. RSA chapter 458-C governs the calculation of child support awards. To determine the total support obligation of the parties, the trial court must multiply their net income by a percentage that corresponds to the number of children they have. See RSA 458-C:3 (Supp. 2002). Net income is the parents' "combined adjusted gross income" less certain statutorily described deductions. RSA 458-C:2, VI (Supp. 2002). Adjusted gross income is gross income less: (1) court-ordered or administratively-ordered support "actually paid to others, for adults or children"; (2) 50% of "actual self-employment tax paid"; (3) "[m]andatory, not discretionary, retirement contributions"; (4) "[a]ctual state income taxes paid"; and (5) "[a]mounts actually paid by the obligor for allowable child care expenses or medical insurance coverage for the minor children to whom the child support order applies." RSA 458-C:2, I (Supp. 2002).

When calculating child support, the trial court excluded from Husband's gross income contributions the orthodontic practice made on his behalf to his pension and profit-sharing accounts. The court found that these plans were "mandatory" and thus subject to exclusion under RSA chapter 458-C. Wife argues that this was error. We agree.

In matters of statutory interpretation, we are the final arbiter of legislative intent as expressed in the words of the statute considered as a whole. See Crowe, 148 N.H. at 224. We first examine the language of the statute and ascribe the plain and ordinary meanings to the words used. See id. "[W]hen a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we refuse to consider what the legislature might have said or add language that the legislature did not see fit to incorporate in the statute." In re Baby Girl P., 147 N.H. 772, 775 (2002). "Furthermore, we interpret statutes in the context of the overall statutory scheme and not in isolation." In the Matter of Coderre & Coderre, 148 N.H. 401, 403 (2002) (quotation omitted).

We assume, without deciding, that both the pension and profit-sharing plans were "retirement" plans. We note, however, that RSA 458-C:2, I, does not distinguish between retirement plans that are "mandatory" or "discretionary." Rather, it refers to retirement plan contributions that are either "mandatory" or "discretionary." In context, we hold that the phrase "[m]andatory, not discretionary, retirement contributions" refers to contributions the divorcing party has made to a retirement plan, not contributions that the party's employer has made on the party's behalf. All of the amounts to which RSA 458-C:2, I, refers are those that the obligor "actually paid," not amounts that were paid on his or her behalf. In context, an obligor's gross income and corresponding child support obligation is lowered only by mandatory retirement contributions. In

this way, the legislature ensured that an obligor could not avoid or diminish his or her child support obligation by making large discretionary contributions to retirement.

Both the pension and profit-sharing plans provided by the orthodontic practice to Husband and other employees are funded entirely by the practice. Because Husband did not contribute out-of-pocket to either his pension or profit-sharing account, it was error for the trial court to deduct from his gross income the practice's contributions to these accounts.

Wife asserts that the trial court also excluded from Husband's gross income $3,000 he received annually from the practice for medical expense reimbursement. Husband counters that this point is "moot" because he included the $3,000 as income in his support affidavit and the trial court accepted his income figures. We cannot resolve this factual dispute on appeal and direct the trial court to resolve it on remand.

Wife also argues that the trial court impermissibly deviated from the child support guidelines. RSA 458-C:5 (Supp. 2002) permits the trial court to adjust a child support award upon finding special circumstances. Among the special circumstances the statute recognizes is "[t]he opportunity to optimize both parties' after-tax income by taking into account federal tax consequences of an order of support." RSA 458-C:5, I(f).

The trial court calculated the amount due under the uniform child support guidelines as $6,125 per month, but deviated from the guidelines by allocating some of the child support to alimony to achieve tax benefits. Accordingly, the trial court reduced Husband's monthly child support obligation to $4,000 and ordered him to pay $3,000 in monthly alimony. This too was error.

Just as "[a]limony should not be awarded under the guise of child support," child support should not be awarded under the guise of alimony. Coderre, 148 N.H. at 406. Alimony and child support serve different public policies, are governed by different statutes, are awarded based upon different factors, and are terminated for different reasons. See id.; see also RSA 458:17, :19 (Supp. 2002). Because we hold that the trial court erroneously allocated child support to the alimony award, we vacate both awards and do not address Wife's argument that the alimony award was insufficient under RSA 458:19.

II. Property Division

Wife next argues that the court inequitably divided the parties' assets by valuing Husband's interest in the orthodontic practice pursuant to a "buy-out" provision in the shareholders' agreement (Agreement) between Husband and Dr. Pingree, and valuing Husband's pension and profit-sharing plans as of the date of the final hearing. Wife further contends that an equal distribution of assets was not equitable, and asserts that the court should have awarded her a greater percentage of the parties' assets.

A. Orthodontic Practice

Both parties submitted expert testimony as to the fair market value of Husband's interest in the orthodontic practice. "Fair market value is defined as the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts." G. Skoloff et al., Valuation and Distribution of Marital Property § 29.05[2] (2003); see Rattee v. Rattee, 146 N.H. 44, 50 (2001). Both experts assumed that the practice would continue as a going concern.

Wife's expert valued Husband's interest in the practice according to the "capitalization of excess earnings" method. This method "involves first valuing the tangible assets of the subject enterprise, then adding a value for goodwill by capitalizing any earnings in excess of a reasonable return on the tangible assets." G. Skoloff et al., supra § 29.05[3][c]. Generally, the capitalization of excess income approach in professional practices

involves

> initially comparing the average income of the subject professional to the average income of a salaried professional with equivalent education, experience, skill, etc. Second, a fair return on the professional's invested capital in the practice is ascertained and is deducted from the professional's average earnings as are the average earnings of the salaried professional. The difference, if any, constitutes the excess earnings which are capitalized and then constitute the value of goodwill.

Id.

Using this approach, Wife's expert valued the practice's tangible assets at $63,056. The expert determined that the average salary for two orthodontists would be $320,000 per year. The expert calculated the excess earnings as $297,035 and, selecting a capitalization rate of 33 1/3%, determined that the value of goodwill was $891,194. By adding together the value of goodwill ($891,194) and the value of the tangible assets ($63,056), the expert calculated the total value of the practice to be $954,250.

Wife's expert also used two other methods by which to estimate the value of the practice and then averaged all three methods to determine Husband's share. Based upon the average of the three methods, Wife's expert estimated that the total fair market value of the practice was $951,489 and that Husband's 50% share was worth $475,745.

While Wife's expert did not consider the Agreement between Dr. Pingree and Husband, Husband's expert regarded the Agreement as "the single most important factor influencing the fair market value" of Husband's interest in the practice. The Agreement provides that, in the event of a shareholder's death, disability, retirement or termination of employment, the practice must buy the shareholder's stock at the price derived from the Agreement's purchase price formula. The price of the shareholder's stock is equal to a percentage of the practice's net worth as of the last day of the most recently ended fiscal year preceding the shareholder's death, disability, retirement or termination of employment. The percentage corresponds to the proportion that the number of shares to be purchased bears to the total number of shares issued and outstanding as of the last day of the most recent fiscal year.

The net worth of the practice is the net value set forth in the practice's books and records, as determined by a certified public accountant, with certain adjustments. One of the adjustments to the practice's net value is that "[n]o allowance of any kind shall be made for good will, trade name, or any similar intangible asset of the Corporation unless previously recorded on its books."

The Agreement provides that the purchase price formula is "binding and conclusive upon all parties." It further provides that a shareholder

> may not, during his lifetime, sell, exchange, pledge, assign, mortgage, hypothecate or otherwise in any manner whatsoever dispose of or encumber any of the shares of Stock of Corporation which he now owns or hereafter at any time shall acquire, without the prior written consent of the Corporation and all of the other Shareholders.

The Agreement also prohibits the shareholders, individually or collectively, from selling or transferring their stock other than in accordance with the Agreement.

Husband's expert applied the pricing formula to determine the practice's net worth as of last day of the most recently ended fiscal year, which he then multiplied by 50% to determine the fair market value of Husband's equity interest in the practice. Using this formula, Husband's expert assessed the fair market value of the

shareholders' equity as of the date of his opinion (June 19, 2000) as $150,295. He assessed the fair market value of Husband's 50% share as $75,148.

Husband's expert excluded goodwill from his analysis. He noted that goodwill has two components – professional and practice goodwill. He defined "professional goodwill . . . [a]s that intangible value which is created by and associated with the individual [orthodontist]." In his opinion, professional goodwill is personal to the holder of it and has no exchange value in the open market separate from the holder.

According to Husband's expert, practice goodwill, on the other hand, "is that intangible value which is created by and attributable to the excess earnings capacity associated directly with the Practice as a business entity, as opposed to the value of any individual [orthodontist]'s reputation." Because the Agreement specifically excludes practice goodwill from the valuation formula, Husband's expert excluded it from his analysis as well.

Wife argues first that the trial court erroneously relied upon Husband's expert's valuation because it was based exclusively upon the Agreement. Relying upon Drake v. Drake, 809 S.W.2d 710, 713 (Ky. Ct. App. 1991), she argues that "the majority position on this issue" is that a buy-sell agreement for a closely held corporation which provides a method for setting value on its shares for purposes of distribution is not binding; rather, it is to be weighed with other factors in determining value. She contends that, by relying upon Husband's expert's valuation, the trial court erroneously found the buy-out provision in the Agreement to be conclusive for valuation purposes.

We do not share Wife's interpretation of the trial court's ruling. Neither the trial court nor Husband's expert opined that the Agreement's buy-out provision was "conclusive." Husband's expert asserted that the Agreement was the "single most important factor influencing the fair market value," not that it was "conclusive" as to fair market value. Husband's expert relied upon information in addition to the Agreement to determine the practice's fair market value, such as the corporate tax returns of the practice for the tax years 1995 through 1999, "various internal bookkeeping and revenue summaries [and] information concerning personnel and job responsibilities."

The trial court did not rely only upon Husband's expert's valuation in determining Husband's interest in the practice. See In the Matter of Letendre and Letendre, 149 N.H. ___, ___, 818 A.2d 938, 944 (2002). The court heard testimony from both parties' experts and received documentation, including corporate tax returns and financial statements. See id.

As in Letendre, the trial court could have found the price calculated pursuant to the buy-out provision "particularly reliable" because it was based upon current values. See id. The Agreement "provides a formula of sorts for ascertaining a current monetary value. . . . In other words, upon departure, a [shareholder] would realize monetary worth which bore some relation to the firm's current accounts." Butler v. Butler, 663 A.2d 148, 153 (Pa. 1995). Because the substantive rights of the shareholders consist only of those specified in the Agreement, the trial court committed no error by viewing it as the preeminent factor in estimating the fair market value of those rights. See McCabe v. McCabe, 575 A.2d 87, 89 (Pa. 1999).

Wife next argues that the trial court's valuation was erroneous as a matter of law because, by crediting Husband's expert's report, the trial court failed to calculate a value for goodwill. She observes that "the vast majority of courts which have ruled on the question" have held that the goodwill of a practice is property of value which should be included in the amount of assets distributed upon the dissolution of marriage. Poore v. Poore, 331 S.E.2d 266, 271 (N.C. Ct. App. 1985).

We decline to rule as a matter of law that when assessing the value of a professional practice, the trial court must always calculate a value for goodwill. The valuation of a professional practice is a question of fact, not a question of law. See In re Marriage of Huff, 834 P.2d 244, 255 (Colo. 1992). The determination of the

existence and value of goodwill is also a question of fact, not law. Poore, 331 S.E.2d at 271; In re Marriage of Hall, 692 P.2d 175, 180 (Wash. 1984). As Wife's expert conceded, "[T]here is no single best approach to valuing a professional association or practice." Poore, 331 S.E.2d at 270. Valuation of each individual practice depends on its particular facts and circumstances. Id. We will not disturb the trial court's findings in this regard unless they are unsustainable on the record. See Crowe, 148 N.H. at 221.

We conclude that the trial court's exercise of discretion in crediting the Husband's expert's valuation over the Wife's expert's valuation was sustainable. See In the Matter of Gordon and Gordon, 147 N.H. 693, 695-96 (2002). The trial court could have reasonably determined that it was inappropriate to place a value on the goodwill of the practice where the Agreement does not require Husband to execute a covenant not to compete upon sale of stock. "Apart from a negotiated non-competition agreement, . . . Husband would be free to compete by opening an office down the street." Theilen v. Theilen, 847 S.W.2d 116, 121 (Mo. Ct. App. 1992). Under these circumstances, the trial court reasonably could have concluded that it was "doubtful any purchaser would pay for any intangible factors in order to purchase Husband's interest." Id.

The trial court also could have reasonably decided to disregard the valuation by Wife's expert because it failed to consider the restrictions set forth in the Agreement. Cf. Rattee, 146 N.H. at 50-51. Although there is "no uniform rule for valuing stock in closely held corporations," In re Marriage of DeCosse, 936 P.2d 821, 825 (Mont. 1997) (quotation omitted), "[w]hatever method is used . . . must take into consideration inhibitions on the transfer of the corporate interest resulting from a limited market or contractual provisions," Amodio v. Amodio, 509 N.E.2d 936, 936-37 (N.Y. 1987). When an expert fails to consider the restrictions set forth in the shareholder agreement of a closely-held corporation, the trial court may properly disregard the expert's opinion and rely upon the stock price value set forth in the shareholder agreement as evidence of the corporation's actual value. See Decosse, 936 P.2d at 825; Amodio, 509 N.E.2d at 937.

B. Pension and Profit-Sharing

While acknowledging that the trial court has "wide discretion in determining the date on which a value should be placed on marital assets," Gordon, 147 N.H. at 696 (quotation omitted), Wife argues that by valuing Husband's pension and profit-sharing accounts as of September 30, 2001, the court accepted "artificially low values" for these accounts. Wife does not provide an alternative valuation date, but argues instead that the trial court should have distributed both of these assets "in kind" between the two parties.

Courts are free to exercise their sound discretion to establish an appropriate valuation date for the equitable distribution of marital assets. Hillebrand v. Hillebrand, 130 N.H. 520, 524 (1988). The trial court's decision to value Husband's pension and profit-sharing accounts as of September 30, 2001, the last date of the most recently ended fiscal year for the orthodontic practice, is sustainable.

Wife argues that because the profit-sharing and pension accounts each suffered sudden and unexpected diminution in value following the terrorist attacks on September 11, 2001, dividing the accounts between the parties would have been "more appropriate." We disagree. A trial court has "no duty to divide each asset equally"; rather, its only responsibility is to "look at the assets as a whole and propose an equitable distribution" of them. Dombrowski v. Dombrowski, 131 N.H. 654, 660 (1989). In this case, the trial court determined that an equal division of assets was equitable and, rather than dividing each asset in half, the court awarded each spouse assets with comparable value. Thus, for instance, while Husband received the full value of his pension and profit-sharing accounts, Wife received the full value of the marital home. We fail to see how it would have been "more appropriate" for the trial court to have awarded Wife one-half of Husband's pension and profit-sharing accounts rather than assets of equivalent value.

Wife's reliance upon Hodgins v. Hodgins, 126 N.H. 711, 715-16 (1985) (superseded on other grounds by RSA 458:16-a, I (1992)), is misplaced. Hodgins does not require division of a pension account, when, as here, the value of that account is ascertainable. Id. at 715. In Hodgins, "we established a formula for equitably

apportioning pension benefits when the actual and contingent values are unascertainable." In the Matter of Sutton & Sutton, 148 N.H. 676, 680-81 (2002). Accordingly, the Hodgins formula calculates a percentage to be paid to an employee's former spouse by dividing the number of months the employee was employed during the marriage and prior to the commencement of the divorce by the total number of credits the employee will have earned toward the pension as of the date benefits commence and awarding half of this amount to each spouse. See Hodgins, 126 N.H. at 716.

The Hodgins formula is designed to help trial courts avoid "the problem of valuation" when the value of the pension "is, by its nature, impossible to determine at the time of divorce." Rothbart v. Rothbart, 141 N.H. 71, 74 (1996) (quotation omitted). The formula does not apply when the value of the pension is ascertainable.

Husband's pension was a defined contribution plan, not a defined benefit plan. "A defined contribution pension is essentially an annuity funded by periodic contributions and the interest therefrom. At the employee's retirement, the accumulated funds purchase an annuity for the remainder of the employee's life . . . ." G. Skoloff et al., supra § 23.02[1][b]. Unlike the value of a defined benefit plan, which may be speculative, "[a] defined contribution pension always has an ascertainable cash value, whether or not it currently can be reached by the employee." Id. Thus, in this case, there was no need for the trial court to resort to the Hodgins formula to ascertain the actual value of Husband's pension account.

C. Overall Distribution

Wife asserts that the court's distribution of assets, while ostensibly equal, was inequitable. She argues that she was entitled to receive a larger portion of the parties' assets than Husband received. We uphold the trial court's determination that an equal distribution was equitable.

"RSA 458:16-a, II . . . creates a presumption that equal distribution of marital property is equitable." Hoffman v. Hoffman, 143 N.H. 514, 520 (1999). Absent special circumstances, the court must make the distribution as equal as it can. See id. "The statute enumerates various factors for the court to consider, such as the length of the marriage, the ability of the parties to provide for their own needs, the needs of the custodial parent, the contribution of each party during the marriage and the value of property contributed by each party." Crowe, 148 N.H. at 221; see RSA 458:16-a, II (Supp. 2002). The court need not consider all of the enumerated factors or give them equal weight. See Crowe, 148 N.H. at 221.

The trial court considered the statutorily enumerated factors and determined that an equal distribution of assets was equitable. The record supports the trial court's determination. The parties were married for more than fifteen years. Both are college educated with significant job skills. Wife supported Husband by maintaining the marital home and raising the parties' children. Husband supported Wife financially, enabling her to stay at home with the parties' children. Neither party alleged fault in the breakdown of the marriage. Under these circumstances, we cannot say that an equal division of assets was so inequitable as to constitute an unsustainable exercise of discretion. See id. at 221-22.

Wife further argues that the court failed to specify written reasons for its distribution of the parties' property. To the contrary, in addition to issuing two narrative orders, the trial court ruled upon over 200 requests for findings and rulings, which adequately support its order. See In the Matter of Valence and Valence, 147 N.H. 663, 669-70 (2002).

Because Wife did not brief the remaining issue raised in her notice of appeal, we deem it waived. See Herman v. Monadnock PR-24 Training Council, 147 N.H. 754, 758 (2002).

Affirmed in part; vacated in part; and remanded.

BROCK, C.J., and BRODERICK, NADEAU and DUGGAN, JJ., concurred.

THE SUPREME COURT OF NEW HAMPSHIRE

Merrimack

No. 98-314

DEBRA RATTEE

v.

STEVEN RATTEE

February 15, 2001

McSwiney, Semple, Bowers & Wise, P.C., of Concord (Patrick J. Sheehan on the brief and orally), for the plaintiff.

Stein, Volinsky & Callaghan, P.A., of Concord (Robert A. Stein and Heather E. Krans on the brief, and Ms. Krans orally), for the defendant.

BROCK, C.J. The defendant, Steven Rattee, appeals and the plaintiff, Debra Rattee, cross-appeals the terms of their divorce decree recommended by the Master (Nancy J. Geiger, Esq.) and approved by the Superior Court (McGuire, J.). We affirm in part, reverse in part, and remand.

The parties married in 1974. Throughout the marriage, the defendant worked for Capitol Fire Protection Company, Inc. (the company), a business founded by his father in 1963. He is the company's president and owns 49.6% of its stock. His mother owns the controlling interest of 50.4%. The defendant has earned income ranging from a high of $577,800 in 1990 to a low of $255,636 in 1996. The plaintiff stayed at home during the marriage with the parties' three children, born in 1975, 1978, and 1982.

The parties separated in October 1994, and the plaintiff filed a libel for divorce in May 1995. In July 1995, the parties entered into a temporary stipulation, pursuant to which the defendant agreed to pay child support of $1,531 per week for the two minor children. This amount was consistent with New Hampshire child support guidelines. See RSA ch. 458-C (1992 & Supp. 2000).

The defendant later moved for a further temporary hearing on child support on the ground that the middle child was emancipated. In response, the plaintiff filed a motion for payment of alimony. In March 1997, the Superior Court (Manias, J.) approved the Master's (Nancy J. Geiger, Esq.) recommendation to reduce the defendant's child support obligation to $4,525 per month and awarded temporary alimony of $3,000 per month. It calculated these awards based on the defendant's average annual income from 1993 through 1996, which was $326,098. The court also stated that it would consider at the final hearing whether there should be an adjustment downward in child support due to the defendant's significantly high income.

In its final decree dated December 3, 1997, the Superior Court (McGuire, J.) approved the Master's (Nancy J. Geiger, Esq.) recommendation to award $4,525 per month in child support. For purposes of determining child support, the trial court considered the defendant's income from 1990 to 1997, excluding the high and low years and averaging the remaining years. This resulted in an annual income of $369,000. The court also awarded alimony to the plaintiff. For purposes of determining alimony, the court considered the defendant's income to be $100,000 because his income over $100,000 had already been taken into account in valuing his interest in the company.

On appeal, the defendant argues that the trial court erred in: (1) averaging his income to determine his child support obligations; (2) failing to depart from the child support guidelines on account of his significantly high income; and (3) "double-counting" a portion of his income by using the same income both to value the company and to calculate his child support payment obligations. The plaintiff argues that the trial court erred in reducing the value of the parties' interest in the company: (1) by 28.5% because the defendant was a minority shareholder in the company, a closely held corporation; and (2) by $79,144 to account for a debt owed by the defendant for which he provided no evidence or explanation.

We afford trial courts broad discretion in divorce matters. Fabich v. Fabich, 144 N.H. 577, 579 (1999). We will not disturb the trial court's rulings regarding property settlement or child support absent an abuse of discretion or an error of law. Hillebrand v. Hillebrand, 130 N.H. 520, 523 (1988).

I. Child Support

A. Determination of Income for Purposes of Child Support Obligation

The defendant argues that the trial court improperly determined his income for purposes of his child support obligation by averaging his income over several years. The plaintiff contends that because the defendant's income fluctuates constantly, it is impossible to determine his income without averaging it.

Our case law is clear that trial courts should not employ income-averaging over a number of years to determine child support obligations. See id. at 526. Rather, child support should be determined on the basis of present income. See id. Thus, the trial court erred by averaging the defendant's income over several years to determine his child support obligation. On remand, the trial court should base the defendant's child support obligation on his present income. We note that this does not leave the plaintiff without recourse when the defendant's income changes. Either party may seek an adjustment in child support by petitioning "for a modification of support payments at any time a change of circumstances warrants it." Id. at 526; see RSA 458:32 (1992).

B. Departure from Child Support Guidelines Due to Significantly High Income

The defendant also contends that the trial court erred by failing to depart from the child support guidelines due to his significantly high income. See RSA 458-C:5, I(b) (1992). The purpose of the child support guidelines is "to promote uniformity in child support awards. Accordingly, there is a rebuttable presumption that the amount of the award resulting from the application of the guidelines is the correct amount of child support." Wheaton-Dunberger v. Dunberger, 137 N.H. 504, 508 (1993) (citation omitted). The court may make adjustments in the application of the guidelines, however, due to special circumstances. RSA 458-C:5 (1992). One such circumstance is the "[s]ignificantly high or low income of the obligee or obligor." RSA 458-C:5, I(b).

Because we are remanding this case to the trial court for a recalculation of the income upon which the child support award was based, we need not address whether a deviation from the child support guidelines was warranted. If the defendant should raise this issue on remand, the trial court can consider it.

II. Property Division

The parties requested that the trial court make an equal division of their property, but disagreed about the valuation of various assets. On appeal, both parties challenge certain aspects of the trial court's valuation of the parties' 49.6% interest in the company. We affirm the trial court's valuation of the company.

A. Use of Defendant's Income to Value the Company

When it valued the parties' interest in the company, the trial court attributed the defendant's salary in excess of $100,000 to the company, thereby increasing the company's value. The defendant asserts that because he was awarded the parties' interest in the company, the plaintiff was awarded the majority of the parties' real property. The defendant argues that the trial court erred by effectively assigning him a $100,000 salary when it valued the company, while assigning him a much higher salary when it calculated child support. According to the defendant, this resulted in impermissible "double-counting." He does not contend that to remedy the "double-counting" the court should reduce his income for child support purposes. Rather, he argues that the court should remove the "excess income" from the valuation of the company. The defendant cites no authority to support this argument.

The experts for both parties considered the salaries of the company's two officers, the defendant and his mother, when they valued the company. The experts explained that their respective valuation methods would require adjustments to the underlying calculations if the company's officer(s) had been granted inflated salaries. In fact, both experts adjusted their calculations for the defendant's mother's salary. Only the plaintiff's expert, however, made an adjustment for the defendant's salary. The defendant's expert explained that he had decided against doing so to avoid any "confusion or double counting as to the amount by which [the defendant's] salary was reduced."

In adopting the plaintiff's expert's approach and attributing the defendant's income in excess of $100,000 to the company, the trial court implicitly found that the defendant's income over $100,000 exceeded reasonable compensation for his services. Therefore, consistent with the principle that adjustments are necessary to account for inflated officer salaries when valuing a closely held corporation, the court attributed the defendant's excess salary to the company's earnings. Apparently to avoid "double-counting" the same income, the court then assigned a $100,000 income to the defendant when it calculated alimony. Contrary to the defendant's contention, this ruling does not compel the conclusion that the trial court "double-counted" the defendant's income when it used the defendant's income over $100,000 to calculate child support, but refused to exclude this "excess income" from the valuation of the company.

Alimony and property division are governed by separate statutory provisions. See RSA 458:16-a (1992 & Supp. 2000); RSA 458:19 (1992 & Supp. 2000). However, the two are closely related, and may be considered together. Indeed, one factor a court must consider in determining the amount of alimony is the property awarded. See RSA 458:19, IV(b) (1992 & Supp. 2000). In contrast, the property division statute, pursuant to which the court valued the company, is unrelated to the child support guidelines. As the defendant concedes, the child support guidelines set out in RSA chapter 458-C mandate that an obligor's entire income be considered. In this case, the trial court's attribution of the defendant's "excess income" for the purposes of valuing the company did not reduce the income actually paid to the defendant. Therefore, it should have no effect on the defendant's income for purposes of calculating his child support obligation.

Furthermore, the defendant has not cited, nor have we found, any case from any jurisdiction which suggests that "double-counting" occurred in this case. The "double-counting" rule, adopted in some jurisdictions, has been applied to bar consideration of a divided asset for the purposes of calculating alimony. See Cook v. Cook, 560 N.W.2d 246, 251 (Wis. 1997) (refusing to apply rule in child support context). It appears to be most often applied where an income-producing asset, such as a pension fund, is divided "in-kind" when the payments fall due. See In re Marriage of White, 237 Cal. Rptr. 764, 767 (Cal. Dist. Ct. App. 1987) (refusing

to apply rule). We are unpersuaded that the rule should be adopted and applied in this case.

As one court has observed, it is not necessarily "double-counting" "to treat a pension as marital property, award it entirely to the earner spouse (with an offsetting award of marital property to the nonearner spouse) and then to take the earner spouse's receipt of pension benefits into account in determining whether there should be any alimony award to either spouse." White, 237 Cal. Rptr. at 767 (quotations omitted). Similarly, it is not necessarily "double-counting" to treat the parties' share of the company as marital property, award it to the defendant, offset the award to the plaintiff, and then use the income from the asset to determine the level of child support.

Finally, we find persuasive the Wisconsin Supreme Court's reasoning in Cook, 560 N.W.2d 246, where the court held that the rule against "double-counting" does not bar consideration of a pension both as property for purposes of property division and as income in calculating child support. Id. at 252. In so holding, the court stated:

> The property division is an allocation of assets between the parents; each spouse receives something from the division. . . .
>
> In contrast, the child of divorced parents receives nothing from the property division. A child support order gives the child fair support from the non-custodial parent's income including pension proceeds such as military retired pay. Thus, when a . . . court treats a pension which was subject to property division as income for child support purposes, the pension is counted for the first time between the parent and the child. As between the parent and the child, the pension is not being counted twice.

Id. Similarly, as between the defendant and his child, the "excess" income the defendant receives is not being counted twice.

Accordingly, we conclude that the trial court acted within its discretion when it considered the defendant's entire income when calculating child support, but only $100,000 when calculating alimony.

B. Reduction in Value of the Parties' Minority Interest in the Company

After determining the fair value of the defendant's interest in the company, the trial court found that because the company is a "closely held family company and [the defendant] does not have a controlling interest, . . . it [is] appropriate to adjust the fair value into a fair market value figure by reducing [the defendant's] share by 28.5%." 28.5% is the net discount calculated by the plaintiff's expert. On appeal, the plaintiff does not contest the amount of the reduction. She argues that the trial court abused its discretion in making this reduction because the defendant "controls" the company and neither he nor his mother, the controlling shareholder, intends to sell the business. We disagree. Neither fact, even if true, supports a conclusion that the trial court abused its discretion when it applied the discounts the plaintiff's own expert used to calculate fair market value.

To determine an appropriate division of marital property, including shares in a closely held corporation, courts generally look to the fair market value of the assets. Cf. Super. Ct. R. 158 (model form Support Affidavit); Shafmaster v. Shafmaster, 138 N.H. 460, 470 (1994) (Thayer, J., dissenting); 3 A. Rutkin Family Law and Practice § 36.10, at 36-44 (2000) ("the goal of valuation of the closely held corporation is to find a value that approximates market value"). Fair market value is the price a willing buyer and a willing seller would probably arrive at through fair negotiations, "taking into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining." State v. 3M Nat'l Advertising

Co., 139 N.H. 360, 362 (1995) (quotation omitted).

Courts have recognized the need for reducing the value of stock both where there is no ready market for the stock and where a party owns only a minority interest in the corporation. See, e.g., In re Marriage of Muelhaupt, 439 N.W.2d 656, 660 (Iowa 1989); Hayes v. Hayes, 756 P.2d 298, 300 (Alaska 1988). The nonmarketability discount accounts for the fact that the lack of a ready market for closely held stock makes it a less attractive investment to a prospective purchaser. See Walzer & Gabrielson, Valuation of Stock in Closely Held Corporations at the Time of Marriage Dissolution, 1 J. Am. Acad. Matrim. Law 1, 10 (1985). The minority discount recognizes that a minority interest is more difficult to sell because a minority shareholder does not control the corporation. See Rutkin, supra § 36.11[3][d]; Walzer & Gabrielson, supra at 12-13.

The plaintiff argues that the minority interest and nonmarketability reductions were inappropriate because the defendant actively participates in the company's management. We disagree. The plaintiff's own expert accounted for the defendant's management role in the company when he calculated the discounts. He specifically noted that the defendant possesses certain elements of control over the company and is responsible for much of the company's management, but nevertheless arrived at a 28.5% discount that takes into account both a minority interest discount and a lack of marketability discount.

We also disagree that the discounts were inappropriate because there was no evidence that the defendant planned to sell his interest. The fact that an actual sale of the defendant's interest in the company was not contemplated at the time of the final hearing is irrelevant to the concept of fair market value.

Accordingly, we conclude that the trial court did not abuse its discretion when it applied a 28.5% discount to the "fair value" of the parties' shares in the company to arrive at their fair market value.

C. Reduction in Value of the Parties' Interest in the Company to Account for a Debt

The plaintiff argues that the trial court erred in reducing the value of the parties' interest in the company "by $79,144 to account for a `loan' which is on the books of [the company], but which the trial court admitted it could not explain." We disagree. In its final decree, the trial court stated that although it was uncertain what the $79,144 was used for, it would be added to the debt the defendant owed the company because it "was incurred well in advance of the parties' separation." We conclude that the trial court did not abuse its discretion in adding the $79,144 to the debt the defendant owed the company. See Fabich, 144 N.H. at 579.

We have reviewed the parties' remaining arguments and find them to be without merit and warranting no further discussion. See Vogel v. Vogel, 137 N.H. 321, 322 (1993).

Any remaining issues raised in the notice of appeal but not briefed are waived. See State v. Mountjoy, 142 N.H. 648, 652 (1998).

Affirmed in part; reversed in part; remanded.

THAYER, J., sat for oral argument but resigned prior to the final vote; BRODERICK, J., concurred; HORTON, J., retired, specially assigned under RSA 490:3, concurred.

THE SUPREME COURT OF NEW HAMPSHIRE

Derry Family Division
No. 2005-168

IN THE MATTER OF REBECCA HARVEY AND PAUL E. HARVEY, JR.

Argued: January 19, 2006
Opinion Issued: April 26, 2006

Wiggin & Nourie, P.A., of Manchester (Doreen F. Connor on the brief and orally), for the petitioner.

Brennan, Caron, Lenehan & Iacopino, of Manchester (William E. Brennan and Jaye L. Rancourt on the brief, and Ms. Rancourt orally), for the respondent.

DALIANIS, J. The petitioner, Rebecca Harvey, appeals from a final divorce decree recommended by a Marital Master (Bruce F. DalPra, Esq.) and approved by the Derry Family Division (Sadler, J.). The respondent, Paul E. Harvey, Jr., cross-appeals certain provisions of the decree. We affirm in part, vacate in part, and remand.

I. Background

The following facts were found by the trial court or are supported by the record. The parties married in August 1989 and have four children, all under the age of eighteen. The parties began living apart in October 2002.

Prior to the marriage, the petitioner was employed in Virginia as a legislative assistant. When she and the respondent became engaged, they discussed her role in the marriage and decided that she would be the primary caretaker for their children. After the parties married, the petitioner earned a law degree. Although she had no intention of practicing law, she took and passed the New Hampshire bar examination. The petitioner remained at home during the marriage to care for the children and run the household. She planned all appointments, activities and events for the children. She also planned social events for family and friends, and volunteered with several organizations in the Portsmouth area. At the time of the divorce, she was employed as a part-time teacher's aide and cafeteria monitor, and occasional substitute teacher. She was also being treated for depression and anxiety as a result of the divorce proceedings.

The respondent is the sole shareholder of a dental practice. His father, Paul Harvey Sr., had established the practice and continues to work there. Harvey Sr. controls all financial aspects of the practice, including salaries. At the time of the divorce, the respondent was earning an annual salary of approximately $190,000, plus bonuses. The respondent received exceptionally large bonuses in 2000 and 2001 compared to previous years.

The parties owned numerous parcels of real estate. Prior to the marriage, the respondent and his mother, Caroline Harvey, purchased property at 48 Ball Street in Portsmouth. The respondent paid a deposit of $25,000 and his parents contributed an additional $50,000. The original understanding was that the respondent and his parents would build homes on the property. At the time of the purchase, a dilapidated cottage and a detached garage occupied the property. The respondent's parents paid $21,000 to renovate the cottage. After the parties married, they lived in the renovated cottage. The parents again expressed their intent to build a home on the property, but, upon the objection of the petitioner, the respondent asked his parents not to build there. His parents agreed and continued to assist the respondent in making mortgage payments on the property through December 1994, for a total contribution, including the $50,000 down payment, of $275,000.

In December 1997, the parties received a construction loan to build their home at 48 Ball Street. Caroline Harvey removed her name from the deed, a requirement of the bank in order to close the loan. Prior to and during the construction phase, the parties lived in a house on Newcastle Avenue in Portsmouth. The respondent had purchased the Newcastle Avenue property prior to the marriage. He used savings as a down payment and financed the balance. After the parties were married, the property was rented and the rental income was used to pay its mortgage and expenses.

The respondent and his brother also owned, as tenants-in-common, rental properties at 77 Middle Road and 815 Middle Street in Portsmouth.

Prior to the parties' marriage, the respondent's parents and grandparents had provided the down payments for these properties. The mortgages were paid off during the course of the marriage. At times, the respondent's portion of the rental income was used to pay household expenses. The respondent was responsible for paying the bills on the properties and his brother was responsible for collecting and depositing the rental income. At some point, the respondent began to deposit the rental income into investment accounts established to defray the children's future college expenses.

Before the parties' marriage, the respondent also purchased a condominium and two timeshares near Attitash Mountain in Bartlett. He paid off all three mortgages either prior to or during the course of the marriage. Finally, in 1999 and 2000, the respondent acquired from Harvey Sr. an 8.2% interest in 610 Islington Street in Portsmouth, the real estate that houses the dental practice.

On December 2, 2004, the trial court approved a final divorce decree. It awarded the parties joint legal custody of the children, with the petitioner to have primary physical custody. The trial court also ordered the respondent to pay monthly child support in the amount of $6,606, in accordance with the child support guidelines, as well as forty-five percent of his net annual bonus. It ordered the parties to use the value of the children's investment accounts for future college expenses. It also awarded the petitioner monthly alimony in the amount of $3,000 for a period of three years, as she would "require a reasonable period of time to refrain [sic], seek employment and enter the work force."

The trial court valued the marital estate at approximately $2.9 million and awarded fifty-five percent, or approximately $1.6 million, to the petitioner, due to the length of the marriage, her role as the primary caretaker of the family throughout the marriage, her role post-divorce as primary custodial parent, and her relatively modest earning capacity and ability to acquire capital assets.

The respondent was awarded, among other things, the rental properties on Middle Road and Middle Street, the condominium and the timeshares near Attitash Mountain, his interest in the dental practice and the building that houses the dental practice, certain stock interests, and an approximate one-half interest in the retirement accounts. The petitioner was awarded, among other things, $34,000 in proceeds from a joint checking account, and an approximate one-half interest in the retirement accounts.

In addition, under the decree, the respondent was permitted to pay to the petitioner her remaining portion of the property settlement in monthly installments over a fifteen-year period. Her remaining portion of the property settlement was approximately $300,000 or $800,000, depending upon whether

the respondent exercised his option to acquire the petitioner's equity in the marital home on Ball Street and transfer to her the unencumbered interest in the property on Newcastle Avenue. The trial court granted the respondent thirty days to exercise this option. The trial court also ordered the parties to reimburse the respondent's parents $275,000 for their contributions. The trial court denied the petitioner's motion to reconsider.

On March 29, 2005, the trial court acknowledged a mathematical error in its computation of marital assets awarded to the petitioner. Instead of increasing the amount of the monthly property settlement payment, as requested by the petitioner, the trial court extended the payment schedule from fifteen years to twenty-three years. The trial court denied the petitioner's motion to reconsider the payment extension. This appeal and cross-appeal followed.

On appeal, the petitioner argues that the trial court erred by: (1) awarding her alimony that was inadequate in duration and amount; (2) permitting the respondent to pay her remaining portion of the property settlement over a twenty-three year period; and (3) ordering the parties to reimburse the respondent's parents for their financial contributions to the equity of the marital home. The respondent argues on cross-appeal that the trial court erred by: (1) including certain property in the marital estate; (2) failing to award an unequal property settlement in his favor; and (3) declining to discount his interest in certain real estate holdings.

II. Standard of review

The trial court is afforded broad discretion in determining matters of property distribution and alimony in fashioning a final divorce decree. In the Matter of Sutton & Sutton, 148 N.H. 676, 679 (2002). We will not overturn a trial court's decision on these matters absent an unsustainable exercise of discretion. See id.

III. Issues on appeal

A. Alimony

We first address whether the alimony award was inadequate in duration or amount. The trial court awarded the petitioner monthly alimony of $3,000 for a period of three years. RSA 458:19, I (Supp. 2005) provides that the trial court shall award alimony if: (1) the party in need lacks sufficient income, property, or both to provide for his or her reasonable needs, considering the style of living to which the parties have become accustomed during the marriage; (2) the payor is able to continue to meet his or her own reasonable

needs, considering the style of living to which the parties have become accustomed during the marriage; and (3) the party in need cannot be self-supporting through appropriate employment at a standard of living that meets reasonable needs, or is the custodian of the parties' child, whose condition or circumstances make it appropriate that the custodian not seek employment outside the home.

In determining the amount of alimony to be awarded, a trial 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; and, the federal tax consequences of the order. RSA 458:19, IV(b). Further, the court may consider the economic contribution of each party to the value of their respective estates, as well as the non-economic contributions to the family unit. See RSA 458:19, I(d).

The petitioner first contends that she is entitled to alimony for her lifetime, or, at a minimum, until the parties' youngest child reaches the age of eighteen, because: (1) the parties agreed that the petitioner would forego employment outside the home to raise the children; (2) she will be forty-four years of age at the time that the alimony award expires in 2007; (3) she has been absent from the workforce since 1989; (4) all four children will be under the age of eighteen at the time the award expires; (5) she will have difficulty finding any employment that would permit her to accommodate the ongoing needs of her children; and (6) her mental health issues affect her ability to obtain and maintain employment. We disagree.

In making the alimony award, the trial court considered the factors enumerated above. It considered explicitly: the education, vocational skills, occupation and previous employment history of the petitioner; the parties' agreement that the petitioner would be the primary caregiver for the children; and the continued need for the petitioner to be available for the children given the custodial schedule in the decree. While the trial court acknowledged that "employment as an attorney was not an option," it found that the petitioner possessed the skills and intelligence to perform several tasks in the legal field, including title work, research and brief-writing. The trial court also considered the testimony of Mary Sheffer, Esq., the Assistant Dean for Career Services at Franklin Pierce Law Center, who opined that the petitioner would have an opportunity to obtain a job in the legal field if she followed a "four-step plan" that included continuing education classes and volunteer legal work. She further opined that it could take three or four years to implement such a plan and obtain suitable employment. Upon that basis, the trial court concluded that, "with training, the Petitioner w[ould] be able to become gainfully employed and eventually support herself."

The trial court also considered the testimony of Timothy Breitholtz, M.D., a forensic psychiatrist, who testified that the petitioner's ability to work was severely impaired due to her mental health issues. The trial court found, however, that her mental health condition "[wa]s not expected to be long term and was classified more as situational given the state of the divorce proceedings."

We have recognized that the primary purpose of alimony is rehabilitative. In the Matter of Fowler and Fowler, 145 N.H. 516, 520 (2000). "Rehabilitative" alimony is based upon the theory that spouses are equally able to function in the job market and to provide for their own financial needs. Id. Alimony, therefore, is designed to encourage the recipient to establish an independent source of income. Id. We have held that the rehabilitative principle is not controlling, however, where the supported spouse suffers from ill health and is not capable of establishing an individual source of income, or where the supported spouse in a long-term marriage lacks the requisite job skills to independently approximate the standard of living established during the marriage. Id.

The petitioner relies primarily upon In the Matter of Letendre & Letendre, 149 N.H. 31 (2002), to argue for a lifetime alimony award. In Letendre, the parties were married for seventeen years, during which time the husband served as president of a corporation and earned an annual salary of $134,000. Id. at 32, 39-40. The wife, by contrast, worked very little during the marriage, as she did not have a high school diploma, and she devoted most of her time to maintaining the parties' household and caring for their children. Id. at 39. The wife also suffered from dyslexia, which affected her ability to obtain and maintain employment. Id. The trial court recognized that, as a result of the husband's maltreatment of the wife, which caused the breakdown of the marriage, she suffered from depression, anxiety and panic attacks, requiring medical attention. Id. The trial court awarded her monthly alimony in the amount of $3,000 until she either died or remarried. Id. On appeal, we held that the trial court did not commit an unsustainable exercise of discretion in light of its consideration of the length of the marriage, fault of the parties, and the wife's age, level of formal education, modest job history and significant learning disability. Id.

The petitioner's reliance upon Letendre, however, is misplaced. Unlike the wife in Letendre, the petitioner has a law degree and has passed the New Hampshire bar examination. The trial court found that the petitioner could become gainfully employed and eventually support herself. The record also supports the trial court's order of alimony for a three-year period as there was evidence that it could take three to four years for the petitioner to obtain law-related employment. Moreover, the trial court found that the petitioner's health issues were temporary and that the respondent's treatment of the

petitioner was not the primary cause of the breakdown of the marriage. We, thus, conclude that the trial court did not unsustainably exercise its discretion in awarding alimony for a period of three years.

We also note that the petitioner has the right to petition for renewal of the alimony award upon its termination in 2007. See RSA 458:19, VII (2004). RSA 458:19, VII provides, in pertinent part: "In cases where the court issues an order for . . . 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 . . . alimony order."

The petitioner next argues that the monthly alimony amount of $3,000 was insufficient for her to maintain a standard of living comparable to the one the parties had enjoyed during the course of their marriage and also failed to account for the disparate monthly income of the parties. She contends that, because of her reduced monthly income, she has had to maintain part-time employment as a cafeteria monitor and has eliminated certain expenses incurred by the children, including their cellular telephones and various extracurricular activities. While the trial court did not make findings explicitly relating to the standard of living during the parties' marriage, it acknowledged that the parties had accumulated significant assets during the marriage.

We have previously held that "it is essential that the amount of alimony awarded be sufficient to cover the wife's needs, within the limits of the husband's ability to pay." Murphy v. Murphy, 116 N.H. 672, 675 (1976). In considering the respondent's ability to pay, the trial court found that the respondent earned a salary of approximately $21,000 per month exclusive of bonuses and rental income. It also found, however, that the "extraordinarily high bonuses paid in 2000 and 2001 were a result of a manipulation of [Harvey] Sr.'s salary . . . and not a true reflection of the respondent's share of the profits for those two years," but it ordered the respondent to pay as child support forty-five percent of any net bonus.

While it is unclear whether the trial court considered the respondent's child support obligations in deciding the amount of alimony, we have previously held that a trial court has the discretion to consider child support in determining the obligor's resources for purposes of establishing alimony. In the Matter of Crowe & Crowe, 148 N.H. 218, 224 (2002). After subtracting his monthly alimony and child support obligations, the respondent had an approximate monthly income of $11,000, exclusive of bonuses and rental income. Petitioner concedes that her monthly income will be approximately $11,550 during the three years that she will be receiving alimony in the event that she obtains part-time employment ($3,000 alimony, $6,606 child support, and $1,950 of anticipated part-time income).

To support her argument that the alimony award is insufficient the petitioner relies upon Fowler, where we held that the amount of alimony was insufficient to provide the supported former spouse a standard of living comparable to the one that the parties had enjoyed during the course of their marriage. Fowler, 145 N.H. at 521. In Fowler, the parties were married for twenty-four years, during which time the husband attended chiropractic college and joined a chiropractic practice, earning between $130,000 and $160,000 per year. Id. at 517. The wife, by contrast, had only a high school diploma and did not work during the marriage, as she was discouraged from doing so by her husband. Id. at 521. At the time of the divorce, she intended to work as a switchboard operator and would have earned only $800 per month. Id. at 517. Under the property settlement, she received a total cash payment of approximately $111,000. Id. at 518. The trial court also awarded the wife weekly alimony in the amount of $300 for six years, upon the condition that she complete a bachelor's degree during that period. Id. at 518. On appeal, we held that the alimony award was inadequate in light of the length of the marriage, the marital standard of living, the wife's modest job history, her non-economic contributions to the marriage and the husband's ability to pay additional alimony. See id. at 520-21.

Fowler is factually distinguishable, however, from this case. The alimony award here was substantially greater in amount than that awarded in Fowler, and, unlike the wife in Fowler, the petitioner possesses a law degree and many skills which could assist her in obtaining employment. In addition, she was awarded a substantial property settlement in the amount of $1.6 million.

Finally, we note that expenses concerning the children are included in the child support award so her claim that she had to deny her children cellular telephones and certain extracurricular activities carries no weight on this issue. In the Matter of Coderre & Coderre, 148 N.H. 401, 406 (2002). In light of these considerations, we conclude that the trial court did not unsustainably exercise its discretion by awarding to the petitioner monthly alimony in the amount of $3,000.

B. Property settlement

1. Extended payment schedule

The petitioner next argues that the trial court unsustainably exercised its discretion by permitting the respondent to pay her a significant portion of her interest in the marital estate over a twenty-three year period. The trial court valued the marital estate at $2.9 million and awarded fifty-five percent, or approximately $1.6 million, to the petitioner. Under the decree, the respondent was permitted to pay to the petitioner her outstanding share of the property settlement over a fifteen-year period, but the trial court later extended the property distribution schedule from fifteen to twenty-three years to account for

a mathematical error in its computation of the marital assets awarded to the petitioner. Her remaining portion of the property settlement was approximately $300,000 or $800,000, depending upon whether the respondent exercised his option to acquire the petitioner's equity in the marital home on Ball Street.

The petitioner contends that the extended payment schedule prevents her from exercising the investment opportunities that would otherwise accompany a substantial property settlement, and that it seriously affects her ability to "start a new life" following the dissolution of the marriage. She further contends that the trial court awarded the respondent sufficient property, the sale of which would produce a substantial portion of the amount owed to her. RSA 458:16-a (2004), entitled "Property Settlement," provides that "[w]hen a dissolution of a marriage is decreed, the court may order an equitable division of property between the parties." RSA 458:16-a, II. The statute further states that "the court shall presume that an equal division is an equitable division . . . unless the court decides that an equal division would not be appropriate or equitable after considering one or more of [fifteen statutory factors]." Id. The statute is silent, however, as to the considerations that should guide a trial court in awarding a property settlement payable by installment over time and in fashioning the length of such a payment schedule.

We have yet to address these issues. We are aware of one case in which the trial court approved a stipulation between the parties providing that the husband would pay the wife her property settlement award of $240,000 in monthly installments over the course of a twenty-year period, regardless of a future change of circumstances. Lawton v. Lawton, 113 N.H. 429, 430 (1973). Lawton, however, affords us little guidance, as the parties stipulated to the lengthy payout. Id. Furthermore, we were called upon in Lawton only to address whether the property settlement amount could be subject to modification; we were not requested to address the propriety of such a lengthy payout scheme. Id. at 430-31.

The respondent cites no relevant authority in support of such an extended payment schedule. Our review of case law from other jurisdictions reveals that certain States have approved extended payment schedules where there were substantial non-liquid marital assets and a lump-sum cash payment would create a serious financial hardship for the obligor. Compare, e.g., Bettinger v. Bettinger, 396 S.E.2d 709, 716-18 (W. Va. 1990) (upholding a trial court award that ordered the husband to pay the wife her sizable marital share of the husband's illiquid interest in corporate stock in monthly installments over a ten-year period), Dodge v. Dodge, 435 A.2d 407, 408 (Me. 1981) (upholding a trial court order that allowed the husband to pay the wife her $100,000 marital share over a ten-year period where the husband's major asset was his illiquid business interest), and Phillips v. Phillips, 464 P.2d 876, 880 (Colo. 1970) (finding a five-year period insufficient for the husband to pay the wife her marital share of $300,000 where the husband could not

immediately liquidate his major financial asset without likely becoming bankrupt and he could not obtain a loan), with Hertz v. Hertz, 657 P.2d 1169, 1173 (N.M. 1983) (disallowing a trial court order that permitted the husband to pay the wife her marital share over a ten-year period where there was no showing that the husband was unable to make financial arrangements to pay the wife outright). Our review of case law outside New Hampshire, however, did not reveal any case where a court of last resort approved a property settlement scheme that allowed payment of such a significant share of the marital estate over an exceedingly protracted period of time, as in this case.

We acknowledge the frustration and inconvenience that may occur when one former spouse must sell part of his or her assets to make the payments required by a divorce judgment. It is an inevitable result of virtually every property division, however, that a former spouse who is required to turn over assets to the other at the termination of the marriage has fewer assets after the division than before. See Lien v. Lien, 278 N.W.2d 436, 442 (S.D. 1979).

Furthermore, we recognize the desirability, where practicable, of granting each spouse complete and immediate control over his or her share of the marital estate in order to ease the transition of the parties after dissolution. Property settlements should be interpreted so as to avoid future conflicts between parties. See Bonneville v. Bonneville, 142 N.H. 435, 438 (1997). Any court order that postpones distribution, thereby financially linking the parties to one another following a judgment of dissolution, invites future strife when one of the parties seeks to enforce the order. In addition, the spouse awaiting distribution could find him or herself deprived of, or forced into further litigation concerning, the ordered share of marital property by intervening events such as the obligor's bankruptcy, fraudulent transfer of assets, or untimely death. As such, a trial court should award a property settlement to be effected immediately where practicable. In the event that there is no other recourse than to order a property settlement to be paid by installment, the trial court should consider, when fashioning the duration of such distribution, among other things, the liquidity of marital assets, the obligor's ability to borrow and the threat of serious financial hardship for the obligor.

While the trial court did not articulate its rationale for awarding payout over twenty-three years, it did find that the respondent was only a partial owner of several real estate assets subject to the marital estate and that Harvey Sr. still had financial control over the dental practice. The respondent contends that he is not in the position to liquidate these assets immediately to satisfy his financial obligations under the decree. We conclude, nonetheless, that the length of the ordered payout is unreasonable and we agree with the petitioner that it both jeopardizes her ability to maximize her investment potential and impedes the transition of the parties following dissolution of the marriage. Accordingly, we hold that the trial court unsustainably exercised its discretion by allowing the respondent to pay a substantial portion of the

petitioner's share of the marital estate over a twenty-three year period. Upon remand, the trial court should consider a property settlement payable by an immediate division of assets or lump-sum payment if practicable; if not, the trial court should consider deferred installment payments over a reasonable period of time in the light of the considerations articulated above.

2. Payment to respondent's parents

Next, the petitioner argues that the trial court erred by ordering the parties to pay $275,000 to the respondent's parents. In light of the financial contributions that the respondent's parents made to the Ball Street property, the trial court found it "equitable to reimburse them for their direct contribution to the equity in the real estate, which consisted of $225,000 of mortgage payments . . . plus $50,000.00 which went directly to the equity in the property." The trial court did not find, however, that either party had an enforceable legal obligation to reimburse the respondent's parents for these financial contributions.

We have recognized that a "moral" obligation for repayment cannot properly be characterized as a debt chargeable to the marital estate. Azzi v. Azzi, 118 N.H. 653, 656-57 (1978). In Azzi, the University of New Hampshire paid the husband a sum of approximately $12,000 while he was on sabbatical from his teaching position at the university. Id. at 656. When the husband did not return to teaching at the end of the sabbatical, the university demanded reimbursement. Id. Although the husband believed the university's claim unsupportable, he decided to repay the money rather than jeopardize his relationship with the university. Id. In his divorce action, the husband argued that he should be credited with one-half of $12,000 in the property settlement since he would eventually have to repay that amount. Id. We affirmed the trial court's rejection of that argument since the husband's eventual repayment of the $12,000, if it occurred, would not "represent the satisfaction of a legal obligation but rather a moral one." Id. at 656-57.

We agree with the petitioner that, to the extent that the respondent intends to reimburse his parents for their contributions to the equity of the Ball Street property, he would be doing so gratuitously and not as a result of an enforceable legal obligation. Accordingly, the trial court unsustainably exercised its discretion in ordering such a reimbursement and reducing the marital estate by $275,000.

IV. Issues on cross-appeal

A. Inclusion of certain interests in the marital estate

On cross-appeal, the respondent argues that the trial court committed an unsustainable exercise of discretion by including in the marital estate his

Attitash condominium and two timeshares, his rental properties on Middle Street and Middle Road, and his interest in the dental practice and the building occupied by the practice. He contends that these assets were either acquired prior to the marriage or acquired by gift during the marriage. With respect to these assets, the trial court stated that it "shall and must consider their values in the overall distribution of assets." We agree.

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. See RSA 458:16-a, I. In addition, the statute does not exclude property gifted to one spouse during the course of the marriage. See id.; see also Weeks v. Weeks, 124 N.H. 252, 256 (1983). Regardless of the source, all property owned by each spouse at the time of divorce is to be included in the marital estate. Crowe, 148 N.H. at 222; see also Hoffman v. Hoffman, 143 N.H. 514, 522 (1999). Given the broad definition of "marital property," we conclude that the trial court did not unsustainably exercise its discretion by classifying the respondent's interest in certain real estate parcels, timeshares and the dental practice as marital property.

In the alternative, the respondent contends that the trial court erred by failing to award an unequal distribution of the marital estate in his favor. In a divorce proceeding, marital property is not to be divided by some mechanical formula but in a manner deemed "just," based upon the evidence presented and the equities of the case. Letendre, 149 N.H. at 35. The trial court has broad discretion in determining an equitable distribution of the marital estate. In the Matter of Jones and Jones, 146 N.H. 119, 123 (2001).

In accordance with RSA 458:16-a, III, the trial court made written findings in support of the property division. It found the division equitable for the following reasons: (1) the length of the marriage; (2) the petitioner's post-divorce role as the primary physical custodian of the children; (3) the respondent's ability to acquire capital assets being greater than that of the petitioner; (4) the respondent's current and future earning capacity far outweighing that of the petitioner; and (5) the petitioner was not employed outside of the home during the marriage, as her primary role was to care for the children and support the respondent in the development of his career. Notwithstanding these factors, the respondent argues that the trial court erred by failing to consider that he owned certain contested assets prior to the marriage, that no marital assets were used to enhance their value, and that the rents, where applicable, were not used to enhance the parties' standard of living during the course of the marriage. We disagree.

closely-held business or corporation. In support of its ruling, the trial court stated:

> The real estate appraiser testified that such an analysis was used in hearings involving the IRS estate taxes, gift taxes and lawsuits between family members. This court finds a divorce proceeding is distinguished from the aforementioned issues. Specifically, this court is required to find a market value solely to arrive at an equitable distribution of property. To apply a "discount" to the Respondent's interest is not realistic. To do so also invites needless litigation and injects yet another element of extreme uncertainty for the parties, trier of fact and on appeal.

Trial judges have wide discretion in the admission or exclusion of expert opinion and we will uphold the trial court's ruling unless there is a clear unsustainable exercise of discretion. See Tullgren v. Phil Lamoy Realty Corp., 125 N.H. 604, 609 (1984); cf. State v. Lambert, 147 N.H. 295, 296 (2001) (explaining unsustainable exercise of discretion standard).

The record reflects that the respondent's expert could not identify actual market evidence upon which to base his opinion. The respondent also concedes that there is no case law in New Hampshire to support the "discounting" of fractional interests in real estate to value property in the divorce context. In light of these factors, we conclude that the trial court did not commit an unsustainable exercise of discretion by refusing to allow the respondent to present this expert testimony.

Affirmed in part; vacated in part; remanded.

DUGGAN and GALWAY, JJ., concurred.