

State of New Hampshire Supreme Court

NO. 2013-0790

2014 TERM

JUNE SESSION

In the Matter of Susan R. Wallack and Peter N. Floros

**RULE 7 DISCRETIONARY APPEAL OF FINAL DECISION
OF THE SALEM FAMILY COURT**

BRIEF OF APPELLANT PETER N. FLOROS

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Handbook, CCH FEDERAL BANKING LAW REPORTER, 2011 WL 159156 (March 1998). 30

QUESTIONS PRESENTED

- I. Did the court err in allowing the parties' child to intervene in her parents case to enforce the parents' divorce stipulation when one of the parents was available to enforce it?
Preserved: OBJECTION TO MOTION TO INTERVENE (July 11, 2011), *Appx.* at 6.
- II. Did the court arbitrarily arrive at the parties' incomes?
Preserved: RESPONDENT'S MOTION FOR RECONSIDERATION AND CLARIFICATION ON CHILD SUPPORT DECREE (July 8, 2013), *Appx.* at 132; RESPONDENT'S MOTION FOR RECONSIDERATION AND CLARIFICATION ¶13 (Nov. 1, 2013), *Appx.* at 165; RESPONDENT'S ANSWER AND OBJECTION TO PETITIONER'S MOTION FOR CLARIFICATION AND RECONSIDERATION (Nov. 1, 2013), *Appx.* at 144.
- III. Did the court err in not using cash flow analysis to determine how much Peter Floros could pay, for purposes of child support and college contribution, and therefore err in its calculation of both?
Preserved: RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS INTERVENOR'S PETITION FOR CONTEMPT AND RESPONDENT'S PROPOSED DECREE (Sept. 19, 2011) at 7, *Appx.* at 22; RESPONDENT'S MOTION FOR RECONSIDERATION AND CLARIFICATION ON CHILD SUPPORT DECREE (July 8, 2013), *Appx.* at 132.
- IV. Did the court err in its calculation of the proportion by which the parents should share college contributions?
Preserved: RESPONDENT'S MOTION FOR RECONSIDERATION AND CLARIFICATION ¶13 (Nov. 1, 2013), *Appx.* at 165; RESPONDENT'S ANSWER AND OBJECTION TO PETITIONER'S MOTION FOR CLARIFICATION AND RECONSIDERATION (Nov. 1, 2013), *Appx.* at 144.

STATEMENT OF FACTS

Peter Floros appears to be a successful landlord and real estate entrepreneur. But given the economy, he has little money in his pocket. The question here is whether, for child support and college contribution, the court may surrender to the appearance of wealth, or indeed must calculate the actual cash flow associated with his business.

I. Peter, Susan, Violet, Their Relationships, and Their Money

Peter Floros and Susan Wallack¹ were married for twenty years and were divorced in 2003.² INTERVENOR'S FINDINGS AND RULINGS (June 5, 2013) at ¶ 1, *Appx.* at 103; *Dec. 5, 2011 hrg.* at 55. Both remain single. PETER'S FINANCIAL AFFIDAVIT (Feb. 1, 2013) at 3, *Appx.* at 364; SUSAN'S FINANCIAL AFFIDAVIT (Jan. 22, 2013) at 2, *Appx.* at 339. They have three children: at the time of the most recent hearings, Niki was in her mid-twenties, Violet was 24, and Nicholas was 17 and living with Susan. *Dec. 5, 2011 hrg.* at 4, 55-56; MOTION TO INTERVENE (May 20, 2011), *Appx.* at 4; SUSAN'S FINANCIAL AFFIDAVIT (Jan. 22, 2013) at 2, *Appx.* at 339.

Peter's and Susan's divorce stipulation provided, in part:

The parties agree that the children shall be afforded the advantage of such post high school education ... consistent with the financial abilities and resources available to each party. To the extent they then may be financially able (in view of their then existing income, assets, needs and obligations) at the time such educational expenses arise, the parties shall contribute proportional to their then income and assets, to the cost of such education, including tuition, room and board, application and registration fees; and reasonable transportation. The parties shall make reasonable efforts to provide such educational expenses up to four years for each child.

¹Because of shared last names of some of the participants in this case, first names are used herein. No disrespect is intended.

²The decree was entered on October 27, 2003 just three months before the February 2, 2004 effective-date of New Hampshire's statute barring orders requiring a parent to contribute to an adult child's education expenses beyond completion of high school. *See In re Donovan*, 152 N.H. 55, 61 (2005) (quoting then RSA 458:17, XI-a); *In re Poulin*, 164 N.H. 41, 43 (2012) (noting identical statutory language recodified as RSA 461-A: 14, V).

PERMANENT STIPULATIONS (Oct. 3, 2003) ¶6, *quoted in* INTERVENOR’S FINDINGS ¶ 3.

The parties’ middle child, Violet Floros, was educated at Green Mountain College in Vermont, and in her junior year participated in a semester study program at Prescott College in Arizona; she was an interdisciplinary studies major with a primary focus in sociology and anthropology, and a secondary in adventure education. *Dec. 5, 2011 hrg.* at 4, 16, 23. Violet graduated *cum laude* in May 2013, INTERVENOR’S FINDINGS ¶ 4; PHOTO, Exh. 17Q, (June 12, 2012) (not in appendix), currently lives in Portsmouth, New Hampshire, and is planning on going to graduate school for either art therapy or commodities trading.³ *Dec. 5, 2011 hrg.* at 16; VIOLET’S FINANCIAL AFFIDAVIT (Jan. 10, 2013), *Appx.* at 353. At the time of the 2013 hearing, she reported few assets, minor earnings, and \$15,450 in student debt. VIOLET’S FINANCIAL AFFIDAVIT (July 6, 2011), *Appx.* at 347; VIOLET’S FINANCIAL AFFIDAVIT (Jan. 10, 2013), *Appx.* at 353.

Susan lives in Portsmouth and does not work. SUSAN’S FINANCIAL AFFIDAVIT (Jan. 22, 2013) at 2, *Appx.* at 339. Peter is a self-made and self-employed landlord. His business, PNF Realty, Inc., is a corporation that has ownership interests in properties throughout seacoast New Hampshire and southern Maine, and an office and a staff in Portsmouth. *Dec. 5, 2011 hrg.* at 72, 78, 97. He estimates he has “a couple of hundred” rental units, which he manages in a “very hands on” manner. *Dec. 5, 2011 hrg.* at 77-78. *See* LIST OF REAL ESTATE HOLDINGS, Resp. Exh. B, (Dec. 31, 2012) at 2, *Appx.* at 201 (totaling 199 rental units).

Peter’s and Violet’s relationship has been rocky. Violet testified that “[m]y relationship with my father has been pretty tumultuous throughout my entire adolescence.” *Dec. 5, 2011 hrg.*

³Violet testified she may intend to seek a “CTA certificate to be a banker.” *Dec. 5, 2011 hrg.* at 16. Although not in the record, it is assumed “CTA” refers to Commodity Trading Advisor, a professional licensure by the National Futures Association. *See* <<http://www.nfa.futures.org/nfa-registration/cta/index.html>>.

at 23. But Peter testified that when she first started college, “I thought it was pretty good.” *Dec. 5, 2011 hrg.* at 84. Peter acknowledged that in April 2011 they had “falling out” or a “miscommunication,” and have not spoken since, *Dec. 5, 2011 hrg.* at 100, leaving their relationship “extremely strained.” *Dec. 5, 2011 hrg.* at 84. Peter says he has no expectations regarding their communications. *Dec. 5, 2011 hrg.* at 99. Violet says there is no point in trying to make up because “I don’t like to do that,” *Dec. 5, 2011 hrg.* at 23, and “think that if I had gone over to his office he wouldn’t have opened the door for me.” *Dec. 5, 2011 hrg.* at 24. The court opined that relationships between fathers and daughters are often difficult, and hopes they will be “able to rekindle.” *June 12, 2013 hrg.* at 116-17.

In 1994 and 2001, when the three children were young, Peter created two irrevocable trusts naming them as beneficiaries, and also made them limited partners of a real estate partnership. INTERVENOR’S FINDINGS ¶ 12. While the court declined find specific values, INTERVENOR’S FINDINGS ¶ 27-29, Peter testified there is both cash and real estate in the trusts, that he placed in trust those parcels with the highest value at the time they were created, and that their current estimated value is around \$3 million. *Dec. 5, 2011 hrg.* at 81. Peter says it is his “hope and dream” that the trust assets will pass to his children when they turn 35, “[w]hether they speak to me or not.” *Dec. 5, 2011 hrg.* at 84; *June 12, 2013 hrg.* at 93. It is not clear from the record the extent to which the beneficiaries are entitled to information regarding the trust or its assets. *Compare* INTERVENOR’S MEMORANDUM ON COLLEGE EXPENSES (Sept. 23, 2011) at 1, *Appx.* at 30 (Violet claims entitled to information) *and* LETTER FROM ATTORNEY SUSAN DENENBERG TO TRUSTEE, Petr’s Exh. 2, (Apr. 4, 2011), *Appx.* at 383 *and* LETTER FROM ATTORNEY SUSAN DENENBERG TO PETER FLOROS (Apr. 4, 2011) (purporting to quote trust documents and statutes), *Appx.* at 385 *with* INTERVENOR’S FINDINGS ¶ 13 (court denies finding that Violet is entitled to information). The trustee is a close friend of Peter’s who is also a

prominent Seacoast real estate entrepreneur. *Dec. 5, 2011 hrg.* at 82. The trustee pays PNF Realty, Inc., a ten percent annual fee to manage the trust properties, which is within the standard range property owners typically pay for management services, and which covers showing apartments to prospective renters, collecting rents, bookkeeping, and maintaining, repairing and cleaning the properties. *Dec. 5, 2011 hrg.* at 82-83, 105-06.

In April 2011, Violet, through a lawyer, sent letters to Peter and to the trustee of the trust requesting an accounting. INTERVENOR'S FINDINGS ¶ 13; LETTER FROM ATTORNEY SUSAN DENENBERG TO TRUSTEE, Petr's Exh. 2, (Apr. 4, 2011), *Appx.* at 383; *Dec. 5, 2011 hrg.* Although there is no indication in the record whether Violet ever asked for this information in person, she testified both her parents had generally been reticent about sharing financial information. *Dec. 5, 2011 hrg.* at 23-24 (“[I]t was just never acceptable in my family growing up to talk about money, ask about money.”); INTERVENOR'S PROPOSED ORDER ¶ 9 (Sept. 12, 2011), *Appx.* at 16; INTERVENOR'S MEMORANDUM ON COLLEGE EXPENSES (Sept. 23, 2011) at 1, *Appx.* at 30. Because he had been approached so formally, Peter responded in kind, and suggested Violet talk to his lawyer. *Dec. 5, 2011 hrg.* at 98-99. While Violet and Susan believe this contributed further to their estrangement, *Dec. 5, 2011 hrg.* at 23-24, the court denied the connection. INTERVENOR'S FINDINGS ¶¶ 13-15.

Despite these difficulties, Peter was steadily paying Violet's living costs. He pays for her and the other children's health insurance as a condition of his divorce decree, *Dec. 5, 2011 hrg.* at 84-85, which costs him \$1,100 per month, ANTHEM RENEWAL BENEFITS LETTER, Resp. Exh. T (Apr. 1, 2013), *Appx.* at 405, as well as Violet's uninsured health bills and co-payments. *Dec. 5, 2011 hrg.* at 86; INTERVENOR'S FINDINGS ¶ 11; RESPONDENT'S ANSWER TO INTERVENOR'S MOTION FOR CONTEMPT, AND CROSS-MOTION TO ENFORCE FINAL DECREE ¶ 26 (Aug. 18, 2011), *Appx.* at 9. Peter has also routinely paid for Violet's food, rent, and living expenses,

INTERVENOR'S FINDINGS ¶ 11; RESPONDENT'S ANSWER TO INTERVENOR'S MOTION FOR CONTEMPT, AND CROSS-MOTION TO ENFORCE FINAL DECREE ¶ 25 (Aug. 18, 2011), *Appx.* at 18; *Dec. 5, 2011 hrg.* at 86-87, 100, including providing her a car, along with its insurance, maintenance and repair. *Dec. 5, 2011 hrg.* at 21, 86, 101; INTERVENOR'S FINDINGS ¶¶ 11, 17-18; RESPONDENT'S ANSWER TO INTERVENOR'S MOTION FOR CONTEMPT, AND CROSS-MOTION TO ENFORCE FINAL DECREE ¶ 26 (Aug. 18, 2011).

Until their falling out, it is undisputed Peter routinely paid for half Violet's tuition and college expenses. *Dec. 5, 2011 hrg.* at 8, 18, 69, 86, 91-92; INTERVENOR'S FINDINGS ¶¶ 6, 11; STUDENT ACCOUNT, Interv's Exh. 1A (Nov. 22, 2012), *Appx.* at 397; INTERVENOR'S PROPOSED ORDER ¶ 5, 10 (Sept. 12, 2011), *Appx.* at 16; INTERVENOR'S ANSWER TO CROSS-MOTION ¶ 1 (Aug. 24, 2011), *Appx.* at 14; RESPONDENT'S ANSWER TO INTERVENOR'S MOTION FOR CONTEMPT, AND CROSS-MOTION TO ENFORCE FINAL DECREE ¶ 14 (Aug. 18, 2011), *Appx.* at 9. The amount Peter paid was half because he told Violet he would, *Dec. 5, 2011 hrg.* at 84, the original split of assets was half-and-half, and by mutual neglect the parties never exchanged information as envisioned by their stipulation. PERMANENT STIPULATIONS (Oct. 3, 2003) ¶6 (Reasonably in advance of the children's application for admission ... the parties shall consult ..."); *June 12, 2013 hrg.* at 96-97. Peter had likewise paid for half the college expenses for the oldest daughter. *Dec. 5, 2011 hrg.* at 91-92.

Since their falling out, for the last several semesters of Violet's education, Susan paid the college bills. INTERVENOR'S FINDINGS ¶¶ 19-21; *Dec. 5, 2011 hrg.* at 58-59; RESPONDENT'S ANSWER TO PETITIONER'S PETITION TO BRING FORWARD AND MODIFY CHILD SUPPORT (June 13, 2013) at 2, *Appx.* at 117; INTERVENOR'S PARTIAL OBJECTION TO MOTION FOR RECONSIDERATION OF REMAND ORDER AND FOR FURTHER TELEPHONE CONFERENCE ¶ 9 (Dec. 21, 2012), *Appx.* at 85; STUDENT ACCOUNT, Interv's Exh 1A (Nov. 22, 2012), *Appx.* at 397.

II. Susan's Assets and Income

Peter and Susan divorced pursuant to a stipulation which divided their property assets evenly, giving each about \$4.6 or \$4.7 million. INTERVENOR'S FINDINGS ¶ 1; *Dec. 5, 2011 hrg.* at 67. Peter testified he relinquished to Susan those properties "with little to no mortgages" and took the encumbered ones. *Dec. 5, 2011 hrg.* at 81.

Susan sold hers and has since lived since off the proceeds. *Dec. 5, 2011 hrg.* at 69-71. Her assets are mainly her two homes and cash investments accounts, INTERVENOR'S FINDINGS ¶ 31; *Dec. 5, 2011 hrg.* at 14, 54, 89, leaving her with total assets of about \$4.5 million, including cash investments of about \$2.7 million at the time of these proceedings. *Dec. 5, 2011 hrg.* at 54, 89, 94; INTERVENOR'S FINDINGS ¶ 31; SUSAN'S FINANCIAL AFFIDAVIT (June 16, 2011) at 1, *Appx.* at 333; SUSAN'S FINANCIAL AFFIDAVIT (Jan. 22, 2013) at 1, *Appx.* at 339; SUMMARY OF ASSETS PLUS TRUST UPDATED JUNE 2013 (Interv's Exh. 19S) (Dec. 31, 2012), *Appx.* at 403; INTERVENOR'S PROPOSED ORDER ¶ 23 (Sept. 12, 2011), *Appx.* at 16. This provided Susan an income of \$121,593 in 2011, and \$154,374 in 2012. SUSAN'S FINANCIAL AFFIDAVIT (Jan. 22, 2013), *Appx.* at 339; 2011 TAX RETURN, Interv's Exh. 8H (Dec. 31, 2011), *Appx.* at 419; 2012 TAX RETURN FOR SUSAN WALLACK, Interv's Exh. 11K (Dec. 31, 2012), *Appx.* at 421.

III. Peter's Assets and Income

Peter, however, took his half and continued investing in real estate, *Dec. 5, 2011 hrg.* at 89, and as of the end of 2012 had interests in two dozen parcels. LIST OF REAL ESTATE HOLDINGS; *Dec. 5, 2011 hrg.* at 72-73 (discussing document); PETER'S FINANCIAL AFFIDAVIT (Sept. 6, 2011) at 1, 2, *Appx.* at 357; PETER'S FINANCIAL AFFIDAVIT (Feb. 1, 2013) at 1, *Appx.* at 364; FORM 1040 SCHEDULE E, SUPPLEMENTAL INCOME AND LOSS, Resp. Exh. O (Dec. 31, 2012) at 8, line 23c, *Appx.* at 203. Collectively they have a gross tax-assessment value of about \$11 million, with total mortgages of about \$4 million, *id.* prompting agreement among Violet's accountant-expert, Peter's accountant-expert, and the court, that Peter owns assets worth about \$7 million. LETTER FROM COLIN MCGEE TO ATTORNEY DENENBERG, Interv's Exh 22V, (June 3, 2013), *Appx.* at 393; *June 12, 2013 hrg.* at 70; INTERVENOR'S FINDINGS ¶ 34; *June 12, 2013 hrg.* at 70. In 2012 Peter's mortgage bill was \$43,625 monthly, well over a half-million dollars annually. LIST OF REAL ESTATE HOLDINGS. Though it does not appear on any tax form because it is not a tax item, this figure includes \$266,116 in mortgage principal. CASH FLOW ANALYSIS PER RENTAL PROPERTY, Resp. Exh. N (Dec. 31, 2012) at 2, *Appx.* at 211.

Peter's creditors are a variety of banks and money lenders. PROMISSORY NOTE, Resp. Exh. H (Oct. 16, 2007), *Appx.* at 213; MULVEY PROMISSORY NOTE, Resp. Exh. K (Dec. 1, 2008), *Appx.* at 217; MULVEY PROMISSORY NOTE, Resp. Exh. L (Dec. 1, 2008), *Appx.* at 222; GMAC MORTGAGE LOAN STATEMENT, Resp. Exh. G (Nov. 1, 2012), *Appx.* at 227; GMAC MORTGAGE STATEMENT, Resp. Exh. C (Nov. 1, 2012), *Appx.* at 240; PEOPLES UNITED BANK LOAN STATEMENT, Resp. Exh. M (Nov. 14, 2012), *Appx.* at 252; FEDERAL SAVINGS BANK LOAN STATEMENT, Resp. Exh. E (Nov. 15, 2012), *Appx.* at 263; PROVIDENT BANK LOAN STATEMENT, Resp. Exh. D (Dec. 31, 2012), *Appx.* at 276; PROVIDENT BANK LOAN STATEMENT, Resp. Exh. F (Dec. 31, 2012), *Appx.* at 289.

A. Cash Flow Analysis – Methodology

As a self-employed landlord, Peter's living is generated by collecting gross rents, paying expenses, and enjoying as income the difference. *June 12, 2013 hrg.* at 53-54. Gross rents and some expenses are reflected on federal income tax forms, but some are not. To derive cash flow from tax forms, three adjustments are made.

There are several adjustments that need to be made to a rental property's taxable income in order to reflect reality, which for a rental property is cash flow. First, depreciation expense, a non-cash expense, must be added back. Second, principal reduction on mortgages secured by the property must be subtracted as they are not considered a tax expense. Finally, capitalized improvements made to each property during the year must be subtracted as they too are not considered a tax expense.

LETTER FROM JERRY KARCHER, CPA, TO ATTORNEY MOELLER, Resp. Exh. A (Jan. 29, 2013), *Appx.* at 392; LETTER FROM JERRY KARCHER, CPA, TO ATTORNEY MOELLER, Exh. 1 (Sept. 8, 2011), *Appx.* at 389; *June 12, 2013 hrg.* at 53-55, 62-66 (explanation of the methodology by Peter's expert); *Dec. 5, 2011 hrg.* at 76-77, 106-08 (same); RESPONDENT'S MOTION FOR RECONSIDERATION AND CLARIFICATION ¶13 (Nov. 1, 2013), *Appx.* at 165; RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS INTERVENOR'S PETITION FOR CONTEMPT AND RESPONDENT'S PROPOSED DECREE (Sept. 19, 2011) at 7, *Appx.* at 22; RESPONDENT'S ANSWER TO PETITIONER'S PETITION TO BRING FORWARD AND MODIFY CHILD SUPPORT (June 13, 2013) at 2, *Appx.* at 117. Violet's expert described the calculations similarly:

What we do as tax preparers when we look at cash flow, or essentially, normalizing income, if you will, one of the things that we don't see on the tax return is principal paid out on mortgages, and I think that that's part of Mr. Karcher's letter is to express the concern over principal payments and the fact that there's cash going out of Mr. Floros' accounts that isn't accounted for in the tax return. We also need to add back depreciation. The timing of when cash actually moves in real life has little to do with what's on the tax return in

depreciations. So there are various adjustments that need to be made to realize the real flow of cash....

June 12, 2013 hrg. at 13-14 (paragraphing altered).

There is no dispute regarding validity, appropriateness, usefulness, and methodology of Peter's cash flow analysis for its purpose. *Dec. 5, 2011 hrg.* at 43-44, 50 (testimony of Violet's expert). *June 12, 2013 hrg.* at 14, 34-35, 44, 45 (Violet's expert repeatedly expressing approval); *Dec. 5, 2011 hrg.* at 43-44 (same). The court indicated it understood income reported on Peter's tax forms was not an accurate representation of the cash he had available for personal spending. INTERVENOR'S FINDINGS, finding ¶¶ 24, 25, 50 & ruling ¶ 5; *Dec. 5, 2011 hrg.* at 91. Violet's expert acknowledged that the figure Peter reported on his tax forms and which formed the basis for his cash flow analysis "certainly appear to be reasonable." *June 12, 2013 hrg.* at 15.

B. Cash Flow Analysis – Application to Peter's 2012 Financial Situation

In 2012 Peter collected rent from most tenants in his commercial properties, for a total of about \$1,486,000 in gross rents.⁴ LIST OF REAL ESTATE HOLDINGS (\$1,486,147.51); SCHEDULE E at 8, line 23a (\$1,486,565.00); *June 12, 2013 hrg.* at 64.

⁴For Peter's cash-flow analysis, three documents are referenced (included in the sealed appendix to this brief) which operate in sequence.

1. LIST OF REAL ESTATE HOLDINGS, Resp. Exh. B (Dec. 31, 2012), *Appx.* at 201. This is a list of Peter's commercial real estate. It shows information on each parcel regarding valuation, associated mortgages, and *gross income*.
2. FORM 1040 SCHEDULE E, SUPPLEMENTAL INCOME AND LOSS, Resp. Exh. O (Dec. 31, 2012), *Appx.* at 203. This is also a list of Peter's commercial real estate. It shows the tax analysis for each parcel, taking the *gross income* on the top line and producing the *taxable income* on the bottom line.
3. CASH FLOW ANALYSIS PER RENTAL PROPERTY, Resp. Exh. N (Dec. 31, 2012), *Appx.* at 211. This is also a list of Peter's commercial real estate. It shows the elements of the cash flow analysis added and subtracted for each parcel, taking the *taxable income* on the top line and producing the monthly *cash flow* on the bottom line.

These three documents function together, and in sequence show, for each parcel in 2012, the transition from gross rental income, to taxable income, to actual spendable income.

To calculate cash flow, depreciation is added to gross rent because, while it is a deduction for federal income tax purposes, it does not actually result in the expenditure of any money in the current tax year – it is a “non-cash expense.” *Dec. 5, 2011 hrg.* at 107, 108. INTERVENOR’S FINDINGS ¶ 50. Peter deducted from his taxes in 2012 depreciation in the total amount of about \$170,000. SCHEDULE E at 8, line 23d (\$170,085); CASH FLOW ANALYSIS at 2 (cash flow adjusted for depreciation is \$170,154). It is added as “add back depreciation” on Peter’s cash flow analysis. *Id.*

Next, mortgage principal is subtracted because, while interest on commercial real estate loans is deductible and therefore shown on federal tax forms, *see* SCHEDULE E at 8, line 23c, principal on those same loans has no tax implications and therefore is not. *June 12, 2013 hrg.* at 13; *Dec. 5, 2011 hrg.* at 45. Though not on any tax forms because it is not a tax item, in 2012 Peter paid his various creditors \$266,116 in mortgage principal. CASH FLOW ANALYSIS at 2. Principal is subtracted as “less debt reduction” on Peter’s cash flow analysis. *Id.*; *June 12, 2013 hrg.* at 53-54; *see also* VENDOR QUICK REPORT, Resp. Exh. J (Dec. 19, 2012), *Appx.* at 302 (2012 PNF Realty checkbook register showing payments of principal and interest to various mortgage holders).

Finally, money spent in improving commercial properties must be subtracted. This is because day-to-day repairs are deductible in the current year and are reflected on federal tax forms, but improvements (which nonetheless represent actual cash expenditures) are capitalized and therefore are not. *June 12, 2013 hrg.* at 54-55; *Dec. 5, 2011 hrg.* at 44, 108. In 2012 Peter spent \$68,235 on capital improvements, CASH FLOW ANALYSIS at 2, the reasonableness of which was not disputed. *June 12, 2013 hrg.* at 15, 54; *Dec. 5, 2011 hrg.* at 109; IMPROVEMENTS TO PROPERTIES, FEDERAL ASSET REPORTS, Resp. Exh. P (Jan. 29, 2013), *Appx.* at 304. Improvements are subtracted as “less improvements” on Peter’s cash flow analysis. CASH FLOW ANALYSIS at 2.

C. Cash Flow Example – The State Street Saloon

To take an example, the property at 266-268 State Street/82 Pleasant Street in Portsmouth is the location of the State Street Saloon. In 2012 Peter collected gross rent of \$80,390. LIST OF REAL ESTATE HOLDINGS at 1, line 2.

The property had a number of deductible cash and non-cash expenses, including federal tax depreciation of \$3,025, SCHEDULE E at 1 line 18, producing a total taxable income of \$30,511. SCHEDULE E at 1, line 21; CASH FLOW ANALYSIS at 1, column 2.

The mortgage payment attributable to the property⁵ included \$11,942 in annual interest, and \$14,312 in annual principal. SCHEDULE E at 1, line 12; CASH FLOW ANALYSIS at 1, column 2.

Peter did not make capitalized improvements to this property in 2012, so no adjustments needed to be made for that item. CASH FLOW ANALYSIS at 1, column 2.

The cash flow analysis for this property is shown in the chart. It indicates that while the net income on the tax return was \$30,511, the amount of spendable money in Peter’s pocket produced from it was \$19,224 for the year, or \$1,602 per month.

State Street Saloon	
Gross Income	\$80,390
Taxable Income	\$30,511
Plus Depreciation	\$3,025
Minus Principal	(\$14,312)
Minus Improvements	(\$0)
Total Cash Flow Adjustments	(\$11,278)
Annual Cash Flow	\$19,224
Monthly Cash Flow	\$1,602

The actual available cash produced by a particular property in a particular year can vary significantly from the taxable income, depending on depreciation, improvements, and principal debt costs. *June 12, 2013 hrg.* at 54-55 (noting idiosyncracies of improvements in historic zones).

⁵The loan on the State Street Saloon parcel is part of a blanket loan that also encumbers several other of Peter’s commercial properties.

In some cases, taxable income is greater than cash flow, as with the State Street Saloon, *supra*, and sometimes it is less. *Compare* 270-278 State Street, Portsmouth, CASH FLOW ANALYSIS at 2, column 2 (net income/loss per tax return of \$51,843, and cash flow of \$41,444) *with* 547-549 State Street, Portsmouth, CASH FLOW ANALYSIS at 1, column 3 (net income/loss per tax return of \$33,644, and cash flow of \$34,942) *and with* 237 Edmund Avenue, Portsmouth, CASH FLOW ANALYSIS at 2, column 8 (net income/loss per tax return of \$8,582, and cash flow of \$16,564).

While the parcel used in this example had a positive cash flow, others were negative. *See id.* at 1, columns 1 & 9, and at 2, columns 4, 5, 6, 7 & 9. The cash flow analysis for all of Peter's properties taken together in 2012 calculated to a cash flow of negative \$24,000, or a monthly cash flow of negative \$2,000. *Id.* at final column.

Violet's accountant expert understood that for a landlord entrepreneur, Peter's unfortunate state of affairs is possible, and that at the end of 2012 Peter "would be out \$28,403." *June 12, 2013 hrg.* at 44. Peter's accountant testified that the losses meant Peter "ha[d] to, in essence, inject into the rentals to keep them whole." *June 12, 2013 hrg.* at 55.

D. Cash Flow Analysis Shows Peter Has Little Spendable Income

At the time of the divorce, the economy was doing well, and Peter acknowledged "I was king of the hill. I was raking in probably 200-to \$220,000 a year net profit." *Dec. 5, 2011 hrg.* at 81. Now, however, "I think it's a depression in real estate." *Dec. 5, 2011 hrg.* at 80. "Financially," Peter testified, "I think I'm in a disaster. I have been for probably three or three-and-a-half years now." *Dec. 5, 2011 hrg.* at 74. Violet offered evidence that the value of Peter's real estate holdings declined from 2010 to 2012. COMPARATIVE REAL ESTATE HOLDINGS, PETER N. FLOROS, 24 PROPERTIES, Interv's Exh. 21U (Jan. 31, 2012), *Appx.* at 396. Peter understands he lost \$120,000 in 2010, between \$60,000 and \$70,000 in 2011, and between \$20,000 and \$25,000 in 2012. *June*

12, 2013 hrg. at 88.

It appears Peter's situation may be improving, in that his negative cash flow in 2012 was less than in 2010, and rents are up generally; but his cash flow is still negative. *June 12, 2013 hrg.* at 51, 56; *Dec. 5, 2011 hrg.* at 114.

While Peter blames the economy, he recognizes his situation is partly his fault: "I've been at this racket for 40 years, and I've been trying to stay alive for the last six years with some bad choices and decisions I've made." *June 12, 2013 hrg.* at 88.

Peter had income of \$10,400 as an employee of PNF Realty, Inc. for 2010 through 2012, 2012 TAX RETURNS FOR PETER FLOROS, Pet's Exh. 4 (Mar. 14, 2013), *Appx.* at 491; 2011 TAX RETURN FOR PETER FLOROS, Resp. Exh. Q (Jan. 22, 2013), *Appx.* at 423; *Dec. 5, 2011 hrg.* at 75, which is identical to the \$866 monthly income reported on his financial affidavit. PETER'S FINANCIAL AFFIDAVIT (Feb. 1, 2013), *Appx.* at 364; *see Dec. 5, 2011 hrg.* at 91.

Whatever his income, in terms of liquidity – "the ability to have liquid assets to pay for things that are currently due" – because Peter's income is from "rental real estate holdings," it is not immediately available as cash. *June 12, 2013 hrg.* at 39-40. Moreover, Peter's income is highly variable, fluctuating greatly year to year. INTERVENOR'S FINDINGS ¶ 43.

As a result, Peter has been struggling to make necessary payments. He owes the IRS \$16,000, *June 12, 2013 hrg.* at 88, and several town assessors about \$118,000 of unpaid real estate taxes. PETER'S FINANCIAL AFFIDAVIT (Feb. 1, 2013), *Appx.* at 364; PETER'S FINANCIAL AFFIDAVIT (Sept. 6, 2011), *Appx.* at 357; *June 12, 2013 hrg.* at 57, 73; *Dec. 5, 2011 hrg.* at 51, 87-88; CITY OF PORTSMOUTH, UNPAID REAL ESTATE TAXES, Exh. 2 (July 29, 2011), *Appx.* at 326; CITY OF DOVER, NOTICE OF IMPENDING TAX LIEN, Exh. 2 (Aug. 25, 2011-08-25), *Appx.* at 328. With Peter's negative cash flow, his accountant testified that the only way he can stay in

business is to use personal assets or borrow. *Dec. 5, 2011 hrg.* at 110-11. Violet's lawyer suggested bankruptcy, but Peter's accountant had no knowledge. *June 12, 2013 hrg.* at 62.

Peter testified, and both Peter's and Violet's expert agreed, that he has little available cash with which to pay for college or child support. *Dec. 5, 2011 hrg.* at 88, 92; *June 12, 2013 hrg.* at 44-45, 59. Although he expressed lingering hesitation, Peter said that if he could pay he might. *Dec. 5, 2011 hrg.* at 88-89.

IV. Susan Accuses Peter of Depraved Morals and Nefarious Tactics

Susan's response to Peter's financial troubles has been to accuse him of depraved morals and nefarious tactics.

She says Peter has a "contentious personality" whose "temperamental behavior" is "extremely punitive" and causes "emotional distress." *June 12, 2013 hrg.* at 86, 100-101. She says he "uses his wealth to manipulate and control people in his sphere," *June 12, 2013 hrg.* at 83, is using the court process to "punish his daughter," *June 12, 2013 hrg.* at 84, has forced Violet into court, SUSAN'S FINANCIAL AFFIDAVIT (Jan. 22, 2013) at 6, *Appx.* at 339, and threatened Susan's former attorney with disbarment. *June 12, 2013 hrg.* at 100-101. Susan says that "[w]hen [Violet] requested information about her own interest, displaying a mind of her own, that was in direct opposition to the controlling personality of her father," *June 12, 2013 hrg.* at 86, and that "[h]e routinely reacts this way to anyone challenging his authority, just plays dead." *June 12, 2013 hrg.* at 85.

Echoing, Violet says Peter cut her off because of her inquiries about the trust, *Dec. 5, 2011 hrg.* at 10, and that her litigation was necessitated by Peter's "vindictive attitude." INTERVENOR'S PROPOSED ORDER ¶ 38 (Feb. 1, 2013), *Appx.* at 94.

The court denied these allegations. INTERVENOR'S FINDINGS ¶ 15.

Susan accused Peter of a variety of wrongdoings, which were either denied by the court or uncorroborated by evidence:

- Susan alleges he has assets greater than disclosed. MOTION FOR CLARIFICATION AND RECONSIDERATION (July 7, 2013) at 2; INTERVENOR'S MEMORANDUM ON COLLEGE EXPENSES (Sept. 23, 2011) at 6.
- Susan alleges several saloons that operate on real estate Peter owns are all-cash establishments and Peter enters and takes "cash bags" whenever he wishes, *Dec. 5, 2011 hrg.* at 60-61, 118, but the court denied such finding. INTERVENOR'S FINDINGS ¶ 49.

- Susan alleges that to hide income, personal expenses are paid by “[h]is company, corporation, hocus pocus,” *June 12, 2013 hrg.* at 85, which the court did not grant. INTERVENOR’S FINDINGS ¶ 51 (court grants finding that income would be higher “if” personal expenses are paid by the business).
- Susan alleges that Peter hides money by making end-of-year expenditures, *Dec. 5, 2011 hrg.* at 44, LETTER FROM COLIN MCGEE TO ATTORNEY DENENBERG, Interv’s Exh. 22V, (June 3, 2013), *Appx.* at 393, but which both experts said is a common type of advice accountants provide to businesses. *June 12, 2013 hrg.* at 12; *Dec. 5, 2011 hrg.* at 111.
- Susan alleges that a \$12,000 bookkeeping error corrected shortly after it was made was actually a clandestine payment. BANK REGISTER FOR FLOROS REALTY TRUST, Pet’s Exh. 5 (Dec. 31, 2012) at 2, *Appx.* at 401 (showing both transfer and re-transfer).
- Susan alleges that the cash flow analysis is an “accounting trick.” *Dec. 5, 2011 hrg.* at 112 (Peter’s expert, denying allegation).
- Susan alleges that Peter and his accountant conspired to take actions for the purpose of hiding income. *Dec. 5, 2011 hrg.* at 112-13 (Peter’s expert, denying allegation); *Dec. 5, 2011 hrg.* at 111, 115 (Peter’s expert, testifying that financial information received from Peter’s office generally accurate and reliable).
- Susan alleges that Peter generally manipulates money to reduce the appearance of income. *Dec. 5, 2011 hrg.* at 33, 44, 45, 46, 49.
- Susan alleges that Peter makes repairs and improvements to his real estate as a way to hide money. *June 12, 2013 hrg.* at 45.
- Susan alleges that Peter’s property tax bills are not high as Peter claims, but only after Peter paid down over \$100,000 in late taxes. *Dec. 5, 2011 hrg.* at 63, 87-88.
- Susan alleges that a 2010 conviction for shoplifting showed Peter had the character to engage in the various nefarious acts she described. CERTIFIED COMPLAINT (May 19, 2010), *Appx.* at 329; *Dec. 5, 2011 hrg.* at 101-102 (court allowing exhibit, but noting it deserved little evidentiary weight).
- Susan alleges that Peter’s cash-flow is not a problem, but rather Peter “just became unwilling” even though “his financial star continues to rise.” *June 12, 2013 hrg.* at 86.
- Susan alleges that Peter uses or commingles trust income as his own, *June 12, 2013 hrg.*

at 24-28, 29-30, 32-33, 74-76; *Dec. 5, 2011 hrg.* at 37, 39, that the fee the trust pays to Peter's corporation for property management services is a sham, *May 21, 2013 hrg.* at 26; INTERVENOR'S PROPOSED ORDER ¶ 18 (Sept. 12, 2011), *Appx.* at 16; *Dec. 5, 2011 hrg.* at 32, 37-38, and that therefore its income should be included in Peter's income. *Dec. 5, 2011 hrg.* at 34-35, 47. Peter says he treats his work for the trust at arms length and answers to the trustee, *Dec. 5, 2011 hrg.* at 82, 93, 95, 96; *May 21, 2013 hrg.* at 13; *June 12, 2013 hrg.* at 76-77, which his accountant corroborated. *June 12, 2013 hrg.* at 60, 70. The court denied Susan's and Violet's allegations, and denied inclusion of trust assets in Peter's income. INTERVENOR'S FINDINGS ¶¶ 26, 44; *June 12, 2013 hrg.* at 22-23, 23-24, 30-32.

V. Susan's Opinion of Peter's Cash Flow

Susan and Violet allege that Peter has more liquidity than he claims, *June 12, 2013 hrg.* at 16-18, 72-73; *Dec. 5, 2011 hrg.* at 32-34, 45, 53, but Violet's accountant-expert acknowledged that while "the bulk of Susan's assets are in ... a liquid investment account," *June 12, 2013 hrg.* at 39, 40-41, Peter's is in real estate, making Peter and Susan in "a substantially different situation." *June 12, 2013 hrg.* at 42, 43. In the alternative, they allege that Peter will have liquidity soon because they believe he is generally a financially successful man. *Dec. 5, 2011 hrg.* at 45 ("And I see nothing but success, really, going forward with Mr. Floros."); LETTER FROM COLIN MCGEE TO ATTORNEY DENENBERG, Interv's Exh 22V, (June 3, 2013), *Appx.* at 393.

To the extent Peter does not have ready cash for college costs and child support, Susan and Violet take the position that he should liquidate assets. *June 12, 2013 hrg.* at 12, 35. They suggest he could sell some property, *June 12, 2013 hrg.* at 34-35, 40, 59; LETTER FROM COLIN MCGEE TO ATTORNEY DENENBERG, Interv's Exh 22V, (June 3, 2013), *Appx.* at 393; INTERVENOR'S MEMORANDUM ON COLLEGE EXPENSES (Sept. 23, 2011) at 6, *Appx.* at 30, raise cash by borrowing against property he already owns, *June 12, 2013 hrg.* at 16; *Dec. 5, 2011 hrg.* at 94, save cash by not spending money on repairs and improvements, *June 12, 2013 hrg.* at 45, or develop cash from expiring mortgages. LETTER FROM COLIN MCGEE TO ATTORNEY DENENBERG, Interv's Exh 22V, (June 3, 2013), *Appx.* at 393.

Peter noted that forcing any sales in a down economy would be a poor business decision, *Dec. 5, 2011 hrg.* at 118-119, that he could not incur debt even if he wanted to because being in the real estate business, "I have leprosy right now. It's pretty tough to get money out there," *Dec. 5, 2011 hrg.* at 94; *June 12, 2013 hrg.* at 59, and that the mortgages do not necessarily expire, but rather balloon. *June 12, 2013 hrg.* at 37, 20-21.

STATEMENT OF THE CASE

When Peter and Susan were divorced in 2003 they entered a stipulation regarding college payments.⁶ In 2011, when Violet was in college and Peter stopped paying half the costs, Violet filed a motion to intervene in her parents divorce as a third-party beneficiary of the stipulation. MOTION TO INTERVENE (May 20, 2011), *Appx.* at 4; INTERVENOR'S PROPOSED ORDER ¶ 2 (Sept. 12, 2011), *Appx.* at 16. Susan assented, ASSENT TO MOTION TO INTERVENE (June 24, 2011), *Appx.* at 5, but Peter objected on grounds that Violet had no standing, OBJECTION TO MOTION TO INTERVENE (July 11, 2011), *Appx.* at 6, and that Susan, already a party, was capable of requesting repayment of what she had spent on Violet's education. *Id.* July 11, 2011 hrg. at 8. Susan testified that the reason she had not pursued college-cost reimbursement under the stipulation was because she had accepted that Peter would pay half, because "I don't want to waste my life being at the opposite end of [Peter's] wrath," and because "I take the path of least resistance when it comes to Mr. Floros." *Dec. 5, 2011 hrg.* at 69-70.

The court granted Violet intervention. NOTICE OF DECISION (July 28, 2011), *Appx.* at 8; MOTION TO INTERVENE (May 20, 2011) (handwritten "granted," July 11, 2011), *Appx.* at 4; *July 11, 2011 hrg.* at 7 (court granting intervention, but expressing distaste for the procedure).

Violet sought payment by Peter of a list of fees and costs allegedly comprising her college expenses. STUDENT ACCOUNT, Interv's Exh 1A (Nov. 22, 2012), *Appx.* at 397. After subtracting

⁶In March 2012 the family court held the college expense provision unenforceable. ORDER (Mar. 13, 2012). A discretionary appeal was accepted by this Court, *In the Matter of Wallack & Floros*, N.H. Sup.Ct. No. 2012-0388 (mandate Sept. 25, 2012), and then held in abeyance pending resolution of *In the Matter of Poulin & Wall*, 164 N.H. 41 (2012), see *In the Matter of Wallack & Floros*, N.H. Sup.Ct. No. 2012-0388 (order July 12, 2012), and later remanded for enforcement. *In the Matter of Wallack & Floros*, N.H. Sup.Ct. No. 2012-0388 (mandate Sept. 25, 2012). The college costs portion of this appeal grew out of that remand, whereupon the family court acknowledged it was enforceable, ORDER (Oct. 22, 2013), *Appx.* at 154; INTERVENER'S FINDINGS ¶ 2, and conducted the proceedings now on review.

some, the court found that the total amount of college costs in dispute is \$45,301. ORDER (Oct. 22, 2013) at 3, *Appx.* at 154.⁷

Violet also requested, as a third party beneficiary of the stipulation, that Peter be held in contempt, MOTION FOR CONTEMPT OF COURT (May 20, 2011), *Appx.* at 1, to which Peter objected on the grounds that the stipulation and its enforcement were unclear, and that he had no ability to pay. RESPONDENT'S MOTION TO DISMISS INTERVENOR'S PETITION FOR CONTEMPT AND OTHER RELIEF (Dec. 5, 2011), *Appx.* at 37; RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS INTERVENOR'S PETITION FOR CONTEMPT AND RESPONDENT'S PROPOSED DECREE (Sept. 19, 2011), *Appx.* at 22. The court denied contempt because it found the stipulation's college contribution clause ambiguous. ORDER (Oct. 22, 2013) at 4, *Appx.* at 154; INTERVENOR'S FINDINGS ¶ 52.

Susan later requested a proportionate reimbursement of what she had paid for Violet's college costs. FINANCIAL DOCUMENTATION OF PAID EXPENSES, Pet's Exh. 1 (June 12, 2013), *Appx.* at 406; *Dec. 5, 2011 hrg.* at 58, 63-64.

Separately, Susan also asked for an increase in child support for their then-minor son from \$224 per month to \$6,353 per month. PETITION TO CHANGE COURT ORDER (Nov. 28, 2012), *Appx.* at 66; MOTION FOR RECONSIDERATION OF CHILD SUPPORT (Dec. 3, 2012), *Appx.* at 66; CHILD SUPPORT GUIDELINES WORKSHEET (June 5, 2013), *Appx.* at 102.

The court held two hearings on the issue of the parties' relative ability to pay college costs,⁸ *Dec. 5, 2011 hrg., passim; June 12, 2013 hrg., passim*, and also heard evidence regarding child

⁷The court denied Violet's request for attorney's fees, INTERVENOR'S FINDINGS ¶ 54, an issue not on appeal.

⁸The later hearing was necessitated by the remand from this Court because by that time the family court deemed the earlier evidence stale. ORDER (May 23, 2013), *Appx.* at 99; *May 21, 2013 hrg., passim*.

support during the second.

The court found that Peter's gross income was roughly equal to Susan's in the relevant period. ORDER (Oct. 22, 2013) at 3, *Appx.* at 154; INTERVENOR'S FINDINGS ¶ 43; INTERVENOR'S MEMORANDUM ON COLLEGE EXPENSES (Sept. 23, 2011) at 6, *Appx.* at 30; SUMMARY OF COMPARATIVE INCOME FOR PETER FLOROS AND SUSAN WALLACK, Interv's Exh. 20T) (June 12, 2013), *Appx.* at 418; *June 12, 2013 hrg.* at 12, 39-40, 42. The court also found that although both parties have some non-liquid assets, Peter's "are primarily in this category." ORDER (Oct. 22, 2013) at 3.

The court declined to use the suggested cash flow analysis to calculate either college expenses or child support. ORDER (Oct. 22, 2013) at 3. It found that "for child support calculation purposes ... [Susan] has monthly income in the amount of \$8,000.00 and [Peter] has monthly income in the amount of \$9,000.00." *Id.* In making these findings of income, the court stated:

The Court finds based on the evidence submitted that [Susan]'s monthly income for child support purposes is \$8,000 and that [Peter]'s monthly income for child support purposes is \$9,000. These figures are based on the evidence produced during the hearing, along with a review of the financial affidavits filed by each party, including, but not limited to, the reported monthly expenses and those expenses which are not contained on [Peter]'s personal financial affidavit but which are provided as a benefit to him from another entity.

ORDER (June 26, 2013), *Appx.* at 121. The court then used those figures in a statutory child support calculation, CHILD SUPPORT CALCULATOR REPORT (Oct. 17, 2013), *Appx.* at 149, arriving at a \$1,058 per month child support obligation. UNIFORM SUPPORT ORDER (Oct. 22, 2013), *Appx.* at 159.

Noting that the stipulation on college was based on both income and assets, the court found Susan "held 39% (\$4,564,865.00) of the parties' combined assets and investments" and

Peter “held 61% (\$7,209,901.00) at or about the time the educational expenses were incurred.” ORDER (Oct. 22, 2013) at 3, *Appx.* at 154. The court then used those percentages to apportion college costs. *Id.* at 4.

Reconsideration was denied, ORDER (Oct. 17, 2013), *Appx.* at 150; NOTICE OF DECISION (Dec. 10, 2013), *Appx.* at 179, and this appeal followed.

SUMMARY OF ARGUMENT

Peter Floros first points out that his former wife, Susan Wallack, having paid for some of Violet Floros's college education, was fully available to enforce the stipulation if she wished, and that therefore their adult child Violet should not have been granted intervenor status.

He then notes the court used income figures for both he and Susan that appear nowhere in the record, and argues they are therefore reversibly arbitrary. Peter Floros argues that as a landlord and real estate entrepreneur, his income is measured by how much is left after all obligations are paid, and submits that the court erred in not using cash flow to determine his income for both child support and college contribution.

ARGUMENT

I. Intervention Should Have Been Denied Because Susan was Available to Enforce Agreement

The family court allowed the parties' adult child, Violet, a recent college graduate, to intervene in her parents' divorce as a third party beneficiary, to enforce the college-contribution provision of their stipulated decree.

It is clear that children do not have any right to intervene in their parents' divorce, for good reason:

Divorce litigation would be complicated exponentially by the involvement of children as parties. If children were allowed to intervene, they could participate in discovery, depose and cross-examine witnesses, and appeal the court's ruling. Should siblings disagree among themselves, they could each hire their own attorney to advocate for their individual preferences. We need not further detail the chaos that would ensue if we were to hold that every mature minor has a due process right to intervene in their parents' divorce litigation.

In re Stapleford, 156 N.H. 260, 265 (2007) (child sought intervention in custody determination) (quotations and citations omitted).

When children have an interest in their parents' divorce, but no party is willing or able to represent it, the child may be granted intervention. This Court's prior jurisprudence states both sides of the rule. In *Stapleford*, despite the preferences of the teen children to live with their father, the GAL for well-stated reasons recommended they live with their mother. This Court held that the children had no right to intervene because their interests were adequately represented by the GAL. *Stapleford*, 156 N.H. at 263. Likewise, in *In re Goodlander*, 161 N.H. 490 (2011), the adult children had shares in the family businesses, but one of the parents illicitly withdrew money from the children's custodial accounts. This Court allowed them intervention "for the purpose of protecting their direct financial interests," *Goodlander*, 161 N.H. at 506, because due to deception by one of the parents, there was nobody available to represent them.

Together *Stapleford* and *Goodlander* show that intervention by a child in her parents' divorce will be allowed only when: 1) the child has a direct interest, and 2) the interest is not represented by any party. The New York court stated the principle:

[I]t is preferable to have a mother, who is a direct party to a separation agreement and to whom payments for the support of infant children in her custody are to be made, enforce it. But children are often the actual third-party beneficiaries of provisions in separation agreements between the parents; and in cases of disability of one kind or another of one spouse to enforce his own legal rights against the other, some procedural facility for enforcement should be available to the children.

Forman v. Forman, 217 N.E.2d 645, 647 (N.Y. 1966). Lower New York courts have applied the principle in cases directly on point here. In *Bethune v. Bethune*, 60 A.D.2d 588, 399 N.Y.S.2d 902 (N.Y. App. Div. 1977) *reversed on other grounds*, 46 N.Y.2d 897, 387 N.E.2d 1220 (1979), the parents were divorced by a separation agreement which provided that the father would defray the education expenses of the child. The court allowed the child to enforce the agreement when the mother refused. Conversely, in *Adams v. Adams*, 320 N.Y.S.2d 636 (N.Y. Sup. Ct. 1971), based also on separation agreement providing for college support, the court barred enforcement by the child because the mother had already tried.

Here, Susan was available to enforce the agreement between her and Peter. Although she initially hesitated because she did not “want to waste my life,” within a month of Violet’s request for intervention, Susan joined Violet’s effort, making Susan a willing and able party to enforce the stipulation.

Allowing intervention here suggests intervention in a multitude of unexceptional cases where children might like to enforce agreements made between their parents. Thus the court should have allowed Susan to enforce the agreement she made with Peter, and not permitted Violet to intervene. See *Brzica v. Dartmouth College*, 147 N.H. 443, 446 (2002) (Supreme Court

will overturn trial court's decision on intervention when "we are persuaded that the court's exercise of discretion is unsustainable.").

II. Arbitrary Arrival at Income Amount

The process for calculating child support in New Hampshire is straightforward:

In calculating child support, the trial court must first determine each parent's present income. The court makes the final decision as to what income figures should be used in the calculation based upon the facts presented at the hearing.

In re Crowe, 148 N.H. 218, 222-23 (2002) (quotations and citations omitted).

For the purpose of child support here, the court found that Peter's income was \$9,000 per month and Susan's was \$8,000. These figures, however, appear nowhere in the record. Although the court recited that they were derived from "the evidence produced during the hearing," "a review of the financial affidavits," and Peter's personal expenses "which are provided as a benefit to him from another entity," the court stated no details and did no math. ORDER (June 26, 2013), *Appx.* at 121. Multiplying \$9,000 as Peter's monthly income times 12 months equals \$108,000, and multiplying \$8,000 as Susan's monthly income times 12 months equals \$96,000, figures which also appear nowhere in the record. Although the court appears to have been persuaded that Peter enjoys some personal expenses paid by the business, it did not calculate an amount or make any findings on which an income calculation can be made.

Thus it is unknown and unknowable from where the court's numbers were derived. It is also unknown what year or time period the court considered, what inputs were used to calculate them, or what calculations were made. The court's income findings are therefore arbitrary.

Even where income calculations are based on difficult estimates, in all known reported New Hampshire cases the family court has stated the basis for its child support calculations. *In re Crowe*, 148 N.H. 218 (2002), provides a convenient example. There the court doubted the veracity of a party's reporting of income from a trucking business, so made its own detailed

findings as to income for each year. *Crowe*, 148 N.H. at 223. Where the family court has not provided sufficient details, this Court has vacated and remanded. *In re Dolan*, 147 N.H. 218, 223 (2001) (value of stock options); *see also*, *In re Jerome*, 150 N.H. 626 (2004) (inclusion of annuity as income for child support); *In re Feddersen*, 149 N.H. 194 (2003) (use of prior years' tax forms to estimate present income, where current financial affidavit unreliable).

Because the court's findings of income are arbitrary, and unsupported by the record, they are an unsustainable exercise of discretion and should be reversed.

III. Cash Flow is the Measure of a Landlord's Income

Cash Flow answers the question: How much money does a businessperson have in his pocket on a day-to-day basis to spend on personal goods and services. *Tax returns* show how much a taxpayer earned during the taxable year. Tax returns do not reflect, for instance, that in 2012 Peter paid his creditors \$266,116 in mortgage principal, and that if he failed to make the payment he would face foreclosure and the destruction of his only source of income. The only reason tax returns are useful in this context is that they are a convenient and credible source of raw income data.

Because the issue here is how much money Peter can afford to pay, cash flow, not taxable income, is the relevant question. This Court has already noted that the federal definition of income “is of little relevance” to actual income and what a person can afford. *See In re Albert*, 155 N.H. 259, 263-64 (2007).

Accordingly, cash flow analysis is widely accepted as a method of measuring income for landlords. *See, e.g. Attorney General v. Brown*, 511 N.E.2d 1103, 1109 (Mass. 1987) (negative cash flow is appropriate business reason to avoid allegation of discrimination after rejecting tenant in otherwise protected class); *Brunetti v. Borough of New Milford*, 350 A.2d 19 (N.J. 1975) (rent control statute allows hike in rent upon landlord showing sufficiently low cash flow); *Scholtz Partnership v. D.C. Rental Accommodations Comm'n*, 427 A.2d 905 (D.C. 1981) (same); *see generally*, Thomas F. Kaufman, *Understanding Real Estate Economics: Commercial Real Estate As an Investment Is Primarily Driven by Its Economics*, PRAC. REAL EST. LAW. (January 2014) § 3 at 35; Handbook, CCH FEDERAL BANKING LAW REPORTER, 2011 WL 159156 (March 1998) (“A discounted cash flow analysis is appropriate for estimating the value of income-producing real estate collateral.”).

Here, the evidence was undisputed, even by Violet’s accountant-expert, that Peter’s income was accurately represented by the cash flow analysis, and that his income for several years including 2012 was negative. While Susan disparaged the cash flow method, the numbers Peter used to calculate it, and the bottom-line negative net, her basis was only conjecture and accusation, which the court largely rejected. *In re Albert*, 155 N.H. 259, 262 (2007) (a finding that a witness “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”).

Thus cash flow analysis stands as the only reliable basis on which to gauge income, and the court erred in not using cash flow to establish Peter’s.

It does not help to suggest, as Violet and Susan have, that Peter should liquidate assets. That would help him develop cash, but it is a poor business and family decision. While he is losing money on his investments now, everyone involved expects Peter will turn a profit as the economy rebounds. Selling at low desperate prices would lead to a steady shrink of his business model, leaving him with less to contribute to his family in the future.

A. Cash Flow is the Measure of Income for Child Support

The child support statutes counts as “income”:

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.

RSA 458-C:2 (emphasis added).

As noted, it is unknown from where the court derived Peter’s income. To the extent the court surmised income from assets, assets are not included in the statute, and that was error. *In re Plaisted*, 149 N.H. 522, 526 (2003) (“The use of assets for child support does not fall within

the variety of circumstances set forth in [the statute], and, therefore, assets are not a relevant circumstance that may be considered when adjusting a child support obligation.”).

To the extent that the court used gross income, rather than “net rental income,” that was also error. *In re Albert*, 155 N.H. 259, 262 (2007).

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. This is so because the objectives of the child support guidelines differ from the objectives of the federal income taxation statutes. 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.

The facts of this case demonstrate why income tax returns are an unreliable guide to the income available for child support purposes. ...Our point is this: the fact that [the business]’s payments of principal are not deductible on [obligor]’s income tax return does not make the money used to make those payments available to him for paying child support.

Albert, 155 N.H. at 263-64 (quotations and citations omitted); *In re Marriage of Brand*, 44 P.3d 321, 328 (Kan. 2002) (“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.”) (cited with approval in *Albert*, 155 N.H. at 264).

Thus the cash flow analysis stands as the only reliable income basis on which to gauge Peter’s child support obligation. While the court suggested that the cash flow analysis Peter urged “is better suited, although not dispositive, on the issue of child support,” ORDER (Oct. 22, 2013) at 3, *Appx.* at 154, it ignored its own advice. By imputing an income of \$9,000 unconnected to Peter’s actual cash flow, the court appears to have based child support either on his assets, or on his taxable income, thus duplicating the errors this Court already corrected in *Plaisted* and *Albert*.

Accordingly, this Court should reverse and remand for recalculation of child support.

B. Cash Flow is the Measure of Ability to Afford College Contribution

The stipulation proportionally split college contributions between the parents based on “their then income *and* assets” to “the extent they then may be financially able.” PERMANENT STIPULATIONS ¶ 6.

The word “and” is the conjunctive, meaning that both conditions must be satisfied. *See Opinion of the Justices*, 113 N.H. 141, 146 (1973) (“In our opinion it is clear from the use of the conjunctive ... that the legislature intended that only acting as a single board should the Governor and Council be authorized to” to take certain actions.). Thus the court must consider both *income and assets*, and not one alone.

Peter acknowledged, “I certainly have the assets, I don’t have the income.” *Dec. 5, 2011 hrg.* at 92. Yet to arrive at a college contribution, the court totaled Peter’s assets, totaled Susan’s assets, and calculated their respective percentages. It made no effort to base the contribution on income. By ignoring income – and in this case negative income – the court vastly overstated Peter’s capacity to contribute to college costs.

The stipulation also provided that the parties would contribute to college, “[t]o the extent they then may be financially able (in view of their then existing income, assets, needs and *obligations*.)” PERMANENT STIPULATIONS ¶ 6 (emphasis added). Net income is calculated by subtracting obligations from gross income. Thus the inclusion of “obligations” in the stipulation intends using net, not gross, income as the measure of the party’s ability to pay.

Moreover, the inclusion of “obligations” means that Peter’s lack of liquidity matters. The court acknowledged that while Susan’s income is from cash investments and therefore readily available, Peter’s is locked into real estate, much of it mortgaged, making it illiquid and largely inaccessible for personal spending.

Finally, the stipulation provided that the parties would contribute to college, “*proportional* to their then income and assets.” PERMANENT STIPULATIONS ¶ 6 (emphasis added). Because the court did not accurately calculate income, nor include obligations associated with assets, its apportionment was not proportional, and thus in error.

Because Peter was not financially able to pay in the amount the court concluded, this Court should remand for recalculation of college contribution based on both income and assets, in the fashion the stipulation directs. In that way the family court will be able to lawfully determine the extent to which Peter is financially able.

CONCLUSION

For the foregoing reasons, this Court should dismiss Violet as a party; reverse the court’s findings of income, remand, and order the family court use cash flow analysis to determine Peter’s income; and remand also for a recalculation of child support and college contribution.

Respectfully submitted,

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By his Attorneys,

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Peter N. Floros requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issue of adult children intervening in their parents divorce, although it has been addressed by the Court in the past, is still in flux, and because the measurement of passive landlord income is novel in this jurisdiction.

I hereby certify that the decision being appealed is addended to this brief. I further certify that on June 25, 2014, copies of the foregoing will be forwarded to Susan V. Denenberg, Esq.; and to Susan Floros, *pro se*, 12 Ruth St., Portsmouth, NH 03801.

Dated: June 25, 2014

Joshua L. Gordon, Esq.