

State of New Hampshire
Supreme Court

NO. 2012-0025

2012 TERM

NOVEMBER SESSION

In the Matter of Susan Houle and Reginald Houle

RULE 7 APPEAL OF FINAL DECISION OF
SALEM FAMILY DIVISION

BRIEF OF PETITIONER/APPELLEE SUSAN HOULE

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

The Houle family lived a successful lifestyle, but when they finally split up, their financial secret was revealed.

I. Earner/Homemaker Arrangement

Susan and Reginald¹ began dating in high school, bought a house together in 1987, and got married in 1994. They are now in their 40s and have three teenage children. *Trn* at 8, 235.

Reginald financially contributed to the family as a small-businessman who, as detailed in his brief, took over and successfully ran his father's auto repair business, which is organized as a closely-held S-Corporation. *Trn.* at 160, 235-37; PETITIONER'S REQUESTS FOR FINDINGS OF FACT ¶74, *Reginald Add.*² at 32. Although Susan has a degree in accounting, *Trn.* at 135, when they had children, by agreement Susan stopped working and became a homemaker. She shops, cooks, maintains the house and yard, coordinates the often unpredictable family calendar, and takes the children to their activities and appointments. Upon the children reaching school age, Susan also enrolled and transported them to their after-school sports, music, dance and clubs, *Trn.* at 9, 11-13, 139, 328, and has now been out of the workforce for 16 years. *Trn.* at 141. She testified, "he's the worker ... [a]nd I was the mom." *Trn.* at 187; FINAL ORDER (Oct. 5, 2011), *Reginald Add.* at 20-21.

With Reginald's earning and Susan's contribution to the home, *Trn.* at 224, they were able to live a comfortable lifestyle with little debt. STIPULATION ¶13, *Reginald Add.* at 48. They had a house worth \$277,500, *Trn.* at 23, STIPULATION ¶14, *Reginald Add.* at 49, business real estate valued at \$177,500 (not including the value of the business itself), APPRAISAL REPORT (Aug 16, 2010), Exh. NN (document not in appendix); STIPULATION ¶15A, *Reginald Add.* at 49-50, several cars, a camper, and an antique automobile, *Trn.* at 42, STIPULATION ¶8, *Reginald Add.* at 44; PET.EXH. 10

¹To ease confusion, the parties are referred to herein by their first names. No disrespect is intended.

²Reginald's brief is cited herein as *Reginald Brf.* The addendum bound with his brief is cited as *Reginald Add.* The appendix to his brief is cited as *Reginald Appx.* The few additional documents contained in an addendum to this brief are cited as *Susan Add.*

(document not in appendix), jewelry worth about \$20,000, *Trn.* at 184, a timeshare, *Trn.* at 328; STIPULATION ¶15B, *Reginald Add.* at 50, and about \$150,000 in savings. *Trn.* at 32, 36-37, 285-86, 329; PET.EXH. 5, 6, 7, 8, 9 (documents not in appendix). They enjoyed vacations, and sent all three children to private school through the eighth grade at a cost of over \$4,000 for per child each year. *Trn.* at 206; (REGINALD'S) MOTION TO RECONSIDER AND CLARIFY ¶19 (Oct. 17, 2011), *Reginald Add.* at 9. Over time Reginald acquired ownership from his father both of the business and, separately, of its tools. *Trn.* at 14, 16-22, 200, 288. Reginald moved out in 2009, and at the time of trial was living with his girlfriend. *Trn.* at 235, 302.

II. Business Bookkeeping

Although Reginald had sole control over the business books, Susan was familiar with Reginald's routine business bookkeeping because with her accounting background she set up the system, and helped correct Reginald's occasional mistakes. *Trn.* at 102, 153, 237, 243, 259; FINAL ORDER (Oct. 5, 2011), *Reginald Add.* at 19; PETITIONER'S REQUESTS FOR FINDINGS OF FACT ¶¶23, 75, *Reginald Add.* at 28, 32.

As described by Reginald in his brief, his income comprised three streams – a regular payroll check, a monthly rental from the business to Reginald (as owner of the real estate occupied by the business), and constant but irregular family expenses paid by the business. As Reginald notes, this case concerns the third stream.

Payment of family expenses by the business while neglecting to declare them as taxable income was a longstanding practice in the family. *Trn.* at 113-14. Reginald admitted he had been doing it for years, and the court found that Reginald “pays significant personal expenses to himself and for the benefit of his family from the business checking account.” PETITIONER'S REQUESTS FOR FINDINGS OF FACT ¶79, *Reginald Add.* at 33. Reginald also admitted he had to re-do his business books for purposes of the divorce trial by “reinstating” family expenses back onto the business books as income. *Trn.* at 242, 248, 250, 254. He prepared a document for purposes of the trial, “Adjustments to Net Income to Foreign Auto Works,” showing the family expenses he “reinstated.” *Reginald's Add.* at 67.

III. Household Expenses Paid by Business

Reginald provides a convenient spreadsheet in his brief showing how Susan estimated the monthly family income. *Reginald Brf.* at 13. He does not dispute that the reinstated charges referred to in findings 81 through 88 should be considered income – those comprising home heating oil, truck payment, family cell phones, car and camper insurances, gasoline for him and her, vehicle registrations, charitable donations, and office supplies. *Id.* He contends however, that the charges referred to in findings 89 through 93 should not be reinstated as income – those comprising HSA contributions, life insurances, appraisers, attorneys fees, and apartment repairs. *Id.* He maintains that the second batch should either not be reinstated as income, or that they were not considered income by the court.

Because of his concessions regarding the first batch, there is no need to trace the parties' statements about them in the record. With regard to the second batch, however, the record is nonetheless plain that they were family expenses paid by the business and thus constitute income.

Susan testified based on the business check registers (*see Reginald Appx.* at 7-81) that the Houle family HSA³ contribution was \$500 per month paid by the business. *Trn.* at 82-87, 91, 143-44, 155. Reginald did not dispute the amount, and also conceded he paid for family health insurance through the business. *Trn.* at 269.

Based on the business check registers Susan testified that life insurance for three separate policies was paid by the business, and that the minimum paid was \$20 per month, depending upon the year. *Trn.* at 112, 170-75. Reginald did not dispute the amount, and also conceded he paid for life insurance through the business. *Trn.* at 345.

Reginald had two appraisals done for purposes of the divorce case, one regarding the value of the business real estate, and the other regarding the value of the home. Susan testified that based

³“A health savings account (HSA) is a tax-exempt trust or custodial account that you set up with a qualified HSA trustee to pay or reimburse certain medical expenses you incur.” IRS Publication 969, *Health Savings Accounts and Other Tax-Favored Health Plans* (2011).

on the business check registers the appraisals were paid for by the business. *Trn.* at 103, 112. Reginald confirmed this, and also estimated their cost was slightly greater than the \$152 per month suggested by Susan and reported in his brief. He conceded he paid for these non-business appraisals from the business account. *Trn.* at 254, 350; (REGINALD'S) MOTION TO RECONSIDER AND CLARIFY ¶25 (Oct. 17, 2011), *Reginald Add.* at 10.

Based on the business check registers Susan testified that the business paid for Reginald's divorce lawyers, in the amount of \$833 per month. *Trn.* at 103-04, 112, 145-46, 156. Reginald disputed the amount to some degree, but conceded they were paid by the business. *Trn.* at 250-52, 349, 354.

Susan testified based on the business check registers that the business paid for Reginald's apartment, although the amount is unknown. PETITIONER'S REQUESTS FOR FINDINGS OF FACT ¶94, *Reginald Add.* at 34; (REGINALD'S) MOTION TO RECONSIDER AND CLARIFY ¶¶69-71 (Oct. 17, 2011), *Reginald Add.* at 13; ORDER ON (REGINALD'S) MOTION TO RECONSIDER AND CLARIFY (Oct. 17, 2011), *Susan Add.* at 28 (handwritten on last page of order). Although Reginald disputes it, *Trn.* at 300-01, 340, Susan further testified that Reginald made renovations to the apartment, in lieu of rent, and that the supplies for the improvements were paid for by the business. *Trn.* at 113, 116-18, 157-58, 166.

Based on the business check registers Susan identified numerous other family expenditures paid by the business. Although they were not included in Susan's tabulation, EXH. 48, *Reginald Add.* at 48; *Trn.* at 106, 153, on which Reginald bases his argument in his brief, they were nonetheless heard by the court. As noted, all three of the children attend(ed) private school through the eighth grade, and tuition was paid from the business checking account. The amount of tuition is unclear in the record, but appears to be in the vicinity of \$8,000 to \$10,000 per year, or \$666 to \$833 per month. *Trn.* at 59-71. The family owned a timeshare, which Reginald admitted was paid for at least in part by the business. *Trn.* at 328-29. Susan testified based on the business check registers that the

business paid for utilities for the family's home. *Trn.* at 74-77. Reginald admitted that the business paid for utilities for his apartment. *Trn.* at 254. Susan testified based on the business check registers that the business paid for homeowner insurance on the family's home in the amount of \$661 annually or \$55 per month. *Trn.* at 77-80. Reginald admitted the business paid for an unspecified amount of miscellaneous items including housewares, groceries, restaurant meals, and flowers. *Trn.* at 249, 339.

Keeping score of the personal expenses paid by the business and Reginald's set of "reinstated" business books to determine his income was confusing and appears to have exasperated the court during Reginald's direct examination. Thus the court's comment cited in Reginald's brief:

Well, we'll take our break here, and we'll come back – resume on Mr. Houle's financial affidavit. I will tell you that I'm trying to follow questions regarding where the income is being added in, and I'm looking at two different – three different figures, and perhaps we can clarify that when we ... come back in, because when you say added back in – for example, I'm looking at what is added – what is included ... on his financial affidavit, the pro-rata share of the business profits of 1,128 on a monthly basis, but then I'm looking at these other figures here that are separate from that, I assume – some of which may be subsumed in it, so maybe we can start our afternoon ... session with an understanding so that we're all on the same wavelength.

Trn. at 252-53; *Reginald's Brf.* at 5-6.

IV. Cash in the Cash Jar

Susan testified there was a jar on a dresser in their bedroom containing lots of cash, that it was always present since the inception of the business, and that a common comment when she went out with the children would be “Oh, take, you know, 50, 60 bucks, take 100 bucks out of the cash jar.” *Trn.* at 189, 221-22. Susan said the cash was routinely used for groceries, entertainment, regular living expenses, and vacations. *Trn.* at 117. She also testified they paid their debt to Reginald’s father for purchasing the tools and equipment that went with the business, in cash. *Trn.* at 201-02.

Susan was aware there were some customers, including family and friends, who paid the business in cash, and that at least some of sales of cars and car parts were conducted in cash. *Trn.* at 113-14, 163-67, 221-23. Reginald denied anything more than *de minimus* amounts of cash, and claimed he declined to work for family and friends in order to maintain relationships. *Trn.* at 257-63, 306-07, 326.

The court found Reginald “had cash income ... over the years, which is significant, but in an undermined amount,” that “[t]his unreported income should be considered in establishing child support and spousal support obligation,” and rejected Reginald’s explanation for the amount of cash in the jar. PETITIONER’S REQUESTS FOR FINDINGS OF FACT ¶95, *Reginald Add.* at 34-35; (REGINALD’S) MOTION TO RECONSIDER AND CLARIFY ¶¶74-78 (Oct. 17, 2011), *Reginald Add.* at 13 (this portion of reconsideration denied) (*see* handwritten order, Dec. 9, 2011) *Reginald Add.* at 3.

Susan testified that the lifestyle they afforded was impossible on only the non-cash income shown on the business books:

There was always cash as part of our income. It – we maintain[ed], improved a home, sent three children to Catholic schools, went on vacations, bought new vehicles. All of that was not possible on just strictly what [Reginald] showed as rental and ... payroll income.

Trn. at 221; PETITIONER’S REQUESTS FOR FINDINGS OF FACT ¶76, *Reginald Add.* at 32. Reginald was largely unable to explain the inconsistency. *Trn.* at 331. Thus, although there were three streams of income as described in Reginald’s brief, for practical purposes there were just two – declared and undeclared.

V. Decision on Alimony and Child Support

In his pre-trial proposal regarding alimony, Reginald suggested \$750 per month for three years which would include health insurance, and an even split of other assets. RESPONDENT'S PROPOSED DECREE OF DIVORCE ¶5 (Feb. 4, 2011) (document not in appendix). In her proposal, Susan requested \$3,000 per month for five years plus health insurance, an obligation to maintain her car, and an even split of other assets. PETITIONER'S PROPOSED FINAL DECREE OF DIVORCE ¶¶5-6 (probably Feb. 4, 2011) (document not in appendix). Both requested guidelines-based child support, but differed on their calculation of income. *Compare* CHILD SUPPORT GUIDELINES WORKSHEETS (Feb. 2, 2011), *Reginald Add.* at 63 and 69. The parties agreed Susan will have primary residential responsibility for the children, and stipulated on parenting and some property issues including the values of the home and business real estate. The court was left mostly to determine alimony and child support. PARTIAL PERMANENT STIPULATIONS (Feb. 2, 2011, Oct. 5, 2011), *Reginald Add.* at 44.

In its order the court enforced the stipulation, which resulted in a generally even property split. Reginald got the business and all its associated real estate, inventory, assets and liabilities; while Susan got the marital house. Stocks, bonds, bank accounts, retirement savings, life insurance, vehicles, furniture, and personal property were split roughly evenly. FINAL ORDER (Oct. 5, 2011), *Reginald Add.* at 20-21. The tax exemptions for the children were likewise split, although not evenly – over the years and as the children emancipate it is calculated that Reginald will enjoy a total of twelve exemptions while Susan will get just seven. *Id.* ¶3.

The court found that an approximately equal division of the marital estate was equitable, and that “to achieve an equitable distribution” the court would make an “allocation slightly in favor” of Susan. FINAL ORDER ¶11 (Oct. 5, 2011), *Reginald Add.* at 23. This is because it was a long-term marriage, Susan's earnings and asset-acquisition potential is less than Reginald's, and Susan raised the children in lieu of developing her career. PETITIONER'S REQUESTS FOR FINDINGS OF FACT ¶16, *Reginald Add.* at 27.

The court ordered Reginald pay \$472 per week child support in accord with the guidelines, using the lower income figure suggested by Reginald. UNIFORM SUPPORT ORDER (Oct. 5, 2011), *Reginald Add.* at 38. The court found Susan was in need of a period of rehabilitative alimony, and Reginald had the ability to pay although in an amount less than Susan's request. PETITIONER'S REQUESTS FOR FINDINGS OF FACT ¶¶14, 98, *Reginald Add.* at 27, 35. About half-way between the parties' proposals, it thus awarded Susan \$2,000 per month alimony for four years, plus health insurance for the sooner of two years or until she can acquire it herself. FINAL ORDER ¶4 (Oct. 5, 2011), *Reginald Add.* at 20-21. Alimony will end at about the same time that all but the youngest will have emancipated. *Id.*

Reginald appealed.

SUMMARY OF ARGUMENT

Susan first presents the Houle family financial arrangements, the business bookkeeping, the household expenses paid by the business, and the cash jar.

In her argument Susan notes Reginald's allegation regarding calculation of income was not preserved. She then cites settled law showing that regardless of preservation, the court has discretion to make differing findings of income for differing purposes. She also shows, however, that despite Reginald's allegations, the court did not make differing findings, and that Reginald's argument thus falls apart. Susan then points out that the court's award of alimony and calculation of child support were supported by the record and thus within its discretion. She concludes by suggesting that Reginald was treated kindly by the family court.

ARGUMENT

I. Allegation of Differing Findings of Income not Preserved Here nor Below

Reginald alleges that the court made two “internally contradictory findings of fact relative to calculation of [his] income for purposes of ordering child support and determining his ability to pay alimony.” QUESTION 1, *Reginald Brf.* at iii. He bases the argument on his reading of two separate findings of fact, suggests they mean that the court made two inconsistent findings of income, and then argues that the court is not allowed to do that. *Reginald Brf.* at 11-20.

First, the issue is not preserved. Although he claims the issue was litigated in his motion to reconsider, *see* QUESTION 1, *Reginald Brf.* at iii, it does not appear there. His argument in his reconsideration motion is: 1) that the facts do not support the level of income at which he claims the court arrived, (REGINALD’S) MOTION TO RECONSIDER AND CLARIFY ¶¶23-24 (Oct. 17, 2011), *Reginald Add.* at 9; 2) that the court’s finding of income might be based on a prior, rather than the current year, *id.* at ¶25; and 3) that the evidence at most supports an income of \$8,282 per month. *Id.* at ¶82, *Reginald Add.* at 13. His post-decree pleading concludes by summarizing: “The [c]ourt’s findings concerning Reginald’s gross income are not supported by the evidence and must be reconsidered.” *Id.* at ¶95, *Reginald Add.* at 14.

Nowhere in his motion to reconsider (nor anywhere else in the record) did Reginald suggest error was a supposed discrepancy in findings of income. And the family court’s order on the reconsideration motion ruled on two unrelated issues – the extent to which Reginald is responsible for maintaining Susan’s car, and a finding regarding business expenditures on Reginald’s apartment. ORDER ON (REGINALD’S) MOTION TO RECONSIDER AND CLARIFY (Oct. 17, 2011), *Susan Add.* at 28 (handwritten on last page of order). This suggests the court was not apprised of any alleged error regarding inconsistent findings of income. *LaMontagne Builders, Inc. v. Bowman Brook Purchase Group*, 150 N.H. 270, 274 (2003) (alleged error which first appears in order on the merits must be presented in motion to reconsider so that trial court has opportunity to address it), citing *N.H. Dep’t*

of Corrections v. Butland, 147 N.H. 676, 679 (2002).

Moreover, to the extent the issue was raised below, the question as posed in Reginald's notice of appeal directly contradicts the claim as briefed. In his notice of appeal he asks:

Although the trial court *did not enter a specific finding regarding Mr. Houle's present income*, the size of the ordered monthly obligations suggests the court believed he had a higher level of income than he swore to on his financial affidavit. Was this implicit finding by the trial court supported by the evidence presented?

(REGINALD'S) NOTICE OF MANDATORY APPEAL, *Question 1* at 3 (emphasis added).

By conceding the court "did not enter a specific finding regarding Mr. Houle's present income," any question of two contradictory findings is not preserved. Moreover, by saying that the court "did not enter a specific finding," any argument in his brief alleging *two* (contradictory) findings is waived. Accordingly, that portion of his brief alleging such should be struck and the issue dismissed. *Mahmoud v. Irving Oil Corp.*, 155 N.H. 406-07 (2007) ("The statement of questions presented, along with specific references to the record, provide evidence of preservation of the issues for appeal and apprise the respondent and the court of the issues presented on appeal. ... [Where appellant] failed to comply with [New Hampshire Supreme Court] Rule 16(3)(b), he failed to demonstrate that the issues were preserved for appeal and he created unnecessary burdens for the defendant and the court. Accordingly, we strike his brief and dismiss the appeal.").

II. Court has Discretion to Calculate Income Differently for Child Support and Alimony

It is settled that courts have discretion to make differing findings of income for the differing purposes of child support and alimony, and further, that courts do not even need to make a finding of income to make an award of alimony.

The child support statute *requires* a calculation of income, and it defines “income.” RSA 458-C:3, II(a) (“The total support obligation *shall* be determined by multiplying the parents’ total net income ... by the appropriate percentage derived from this section.”) (emphasis added); RSA 458-C:3, II(b) (“The total child support obligation *shall* be divided between the parents in proportion to their respective incomes.”) (emphasis added); RSA 458-C:2, IV (defining income); *In re State ex rel. Taylor*, 153 N.H. 700, 702-03 (2006) (“While trial courts have discretion to adjust a child support award based upon special circumstances, ... the legislative scheme *requires* that all items includable as ‘gross income’ be considered to determine the parties’ total support obligation.”) (emphasis added); *In re Woolsey*, Slip Op. 2011-0483 __ N.H. __ (Oct. 30, 2012) (“gross income” for child support is net of business expenses).

The alimony statute, on the other hand, while of course allowing consideration of the parties’ respective incomes, does not provide a definition nor require any precise calculation of it. *In re Crowe*, 148 N.H. 218, 225-26 (2002) (awarding alimony when “respondent lacks sufficient property and income to provide for her reasonable needs” and “petitioner has sufficient assets and income to be able to support himself while providing support for the respondent”). Rather alimony is based on equity, RSA 458:19, II (“Upon motion of either party, the court may make orders for the payment of an alimony allowance when such orders would be just and equitable.”); *Holliday v. Holliday*, 139 N.H. 213, 218 (1994), upon a finding of need and ability to pay. RSA 458:19, I.

This court pointed out the difference in *Rattee v. Rattee*, 146 N.H. 44 (2001). There the husband/father was half-owner of a profitable closely-held business corporation. In valuing the business, the court assigned an income of \$100,000, and considered the rest of the money the earner

brought home from the business to the family as “excess income.” The court awarded alimony based only on the assigned \$100,000 salary, but calculated guidelines child support based on the larger amount of money actually earned. Noting the discrepancy, this Court ruled that the family court has discretion to use differing calculations of close-held-business income for alimony and child-support purposes. It wrote:

[W]e conclude that the trial court acted within its discretion when it considered the [husband/father’s] entire income when calculating child support, but only \$100,000 when calculating alimony.

Rattee v. Rattee, 146 N.H. 44, 49 (2001).

Although *Rattee* arose in a context not present here regarding the different ways alimony obligees and child support obligees receive property distributions, it made clear that the family court has discretion to make differing calculations of income for the differing purposes of alimony and child support. Echoing but not citing *Rattee*, Reginald has accordingly conceded that “[t]here is support ... in the case law” that “the trial court has discretion to ... calculate his income differently for alimony purposes under RSA 458:19 than it does for child support purposes under RSA 458-C:2.” *Reginald Brf.* at 17-18.

Thus this issue is not only mistaken on the merits, but also conceded.

III. Even Given its Discretion, Family Court Did Not Make Differing Findings of Income

Even though it would be allowed had it done so, contrary to Reginald's contentions, the family court here did not make two findings of income – contradictory or otherwise. Reginald's allegation that it did is based on parsing several of the court's findings of fact, which when examined do not reveal multiple incomes nor any inconsistency.

A. Allegation of Inconsistency of Findings Requires Misinterpretation of Findings

In her request for findings of fact, Susan proposed 16 specific findings regarding income, a general one, and another concerned only with the cash income. Each are worded identically and propose a finding that, out of his business accounts:

Reginald paid for [a named item and monthly amount] ... which sums should be included in his income for child support and alimony purposes.

PETITIONER'S REQUESTS FOR FINDINGS OF FACT ¶¶81-94, *Reginald Add.* at 33-34. Each of the proposed findings names a particular item and Susan's proposed average monthly cost for it. The court granted eight of the findings with regard to home heating, truck payments, cell phone, car insurance, gasoline, car registration, charitable contributions, and office supplies. *Id.* at ¶¶81-88. The court denied six of them with regard to HSA contributions, life insurance, appraisers, two divorce attorneys, and apartment repairs. *Id.* at ¶¶89-94. The court granted an additional finding that says:

When including payroll checks, gross rental proceeds, and personal expenses paid for by Foreign Auto Works, Reginald's average monthly income approaches \$9700.00, without consideration for cash income and without in depth analysis of each and every other line item expense of Foreign Auto Works."

PETITIONER'S REQUESTS FOR FINDINGS OF FACT ¶97, *Reginald Add.* at 35.

With these various findings in mind, Reginald applies a three-step methodology to allege inconsistent findings of income:

- ① He first notes that the court based his child support on a finding that his monthly income is \$6,886. He accepts this figure or something close to it because it comports with his testimony and with the court's ultimate calculation of his child support obligation. *Reginald Brf.* at 6-7.

② He then adds up the amounts in the eight granted findings, and notes they total a monthly income of \$7,977. To some extent he accepts this figure because he considers it justified by the court’s granted findings, but nonetheless declares it is a “mistaken overestimation of his income.” *Reginald Brf.* at 15.

③ Finally, he adds up the amounts in the eight granted findings plus the six denied findings, and notes they total a monthly income of \$9,707. He discovers this is the same figure as granted in finding ¶97. He does not accept that calculation because he maintains the court denied the specific findings that comprise it, because it is contrary to his testimony yet consistent with Susan’s, because it is more than he claims he earns, because the court did not use that figure to calculate child support, and because it contradicts the court’s other findings of income. *Reginald Brf.* at 16-17.

In order to arrive at the alleged contradiction in the third step of Reginald’s methodology, however, one must apply a particular reading to the findings that comprise it. Note again the language in those findings:

Reginald paid for [a named item and monthly amount] ... which sums *should* be included in his income for *child support* and *alimony* purposes.

PETITIONER’S REQUESTS FOR FINDINGS OF FACT ¶¶81-94, *Reginald Add.* at 33-35 (emphasis added). As drafted the findings are aspirational. Susan hoped they “should” be included. And she further hoped they should be included for two different purposes – child support and alimony. Granting them only means that they *should* be, but not necessary *are*, included in the calculation of income. *Hannon v. Myrick*, 111 A.2d 729, 731 (Vt. 1955) (“should” in contributory negligence jury instruction has meaning similar to “could,” “can,” “might,” “may,” “to be able,” and “ought”); *In re MBL Associates*, 693 A.2d 698, 701 (Vt. 1997) (“should” in land use planning regulation means “identifying that a requirement is encouraged but not mandated”). Moreover, reflecting the law in *Rattee*, the findings are drafted to distinguish between child support purposes and alimony purposes.

Unfortunate for Reginald’s conclusion, the findings are not so definite as he suggests. Had

the proposed findings used the word “shall” rather than “should,” perhaps Reginald’s claim would be supported. *In re Juvenile 2003-248*, 150 N.H. 751, 753 (2004) (“The term ‘shall’ is generally regarded as a command.”). Likewise had the findings been separated into categories distinguishing between child support and alimony, he might be able to claim an inconsistency – *e.g.*, “Reginald paid for [a named item and monthly amount] which sums *shall* be included in his income for *alimony* purposes”; followed by “Reginald paid for [a named item and monthly amount] which sums *shall* be included in his income for *child support* purposes.”

But to sustain Reginald’s argument would require a misinterpretation of the court’s findings.

First, the indefiniteness of the findings do not support the definiteness which Reginald’s contradiction argument requires.

Second, the court did not say *why* it denied the six findings regarding HSA contributions, life insurance, appraisers, divorce attorneys, and apartment repairs. PETITIONER’S REQUESTS FOR FINDINGS OF FACT ¶¶89-94, *Reginald Add.* at 34. Any inaccurate detail in the proposed findings could account for denial, such as the incorrect year or a disputed dollar amount. But Reginald interprets the denials categorically – that the court intended to deny based on the nature of the expense – rather than for some other reason. Nothing in the particular findings, nor in the court’s order, nor in the record generally, supports his interpretation. For this reason also his claim of inconsistency is unsuccessful.

Because the record does not support Reginald’s interpretation that the findings are contradictory, his overall claim must fail.

B. “Approaches \$9,700” Does Not Mean “Equals \$9,700”

Note again the language of finding ¶97 which was granted:

When including payroll checks, gross rental proceeds, and personal expenses paid for by Foreign Auto Works, Reginald’s average monthly income *approaches* \$9700.00, *without consideration for cash* income and without in depth analysis of each *and every other line item expense* of Foreign Auto Works.”

PETITIONER’S REQUESTS FOR FINDINGS OF FACT ¶97, *Reginald Add.* at 35 (emphasis added).

The finding uses the word “approaches.” It does not say “Reginald’s income equals \$9,700.” By using “approaches” the finding says Reginald’s income was something less than \$9,700 – but not “exactly \$9,700” as Reginald’s argument assumes. *Cf. Seal Tanning Co. v. City of Manchester*, 118 N.H. 693, 697 (1978) (“The parties stipulated at the trial that during the first year of operation of the sewer rental charge, Seal Tanning’s charges would amount to approximately \$75,000, and the charges for Waumbec Mills would approach \$100,000.”).

Because the court did not specify any *particular* finding of income, no other figure can logically contradict it.

C. Personal Expenses and Cash Jar Raise Income Further

Finally, the court made two additional related findings – on which Reginald’s brief does not focus. First, it found:

The *personal expenses paid from the business checking account* should be included in the calculation of Reginald’s income for the purposes of child support and spousal support.

PETITIONER’S REQUESTS FOR FINDINGS OF FACT ¶80, *Reginald Add.* at 33 (emphasis added). As above the finding uses the indefinite word “should,” and is a general finding that all “personal expenses” generally should be included in the income calculation. By granting it, the court indicated there were personal expenses in addition to those mentioned in the other findings, and the record confirms there were. For instance, no finding lists the large private school tuitions which were indisputably paid by the business, yet they were income; likewise the timeshare, homeowners insurance, and miscellaneous items such as housewares and groceries. PETITIONER’S REQUESTS FOR FINDINGS OF FACT ¶97, *Reginald Add.* at 35.

The personal expenses that went unmentioned in the other findings could easily push Reginald’s income calculation to \$9,700, or beyond, thus belying his claim that the court determined his income was something less.

The second item Reginald’s brief neglects concerns his cash income. Recall the court granted

Susan’s proposed finding that:

When including payroll checks, gross rental proceeds, and personal expenses paid for by Foreign Auto Works, Reginald’s average monthly income approaches \$9700.00, *without consideration for cash income....*”

PETITIONER’S REQUESTS FOR FINDINGS OF FACT ¶97, *Reginald Add.* at 35 (emphasis added).

While Reginald focuses on that portion of the finding regarding how much his monthly income might approach, he neglects that portion indicating that cash generated by the business raised it even further.

The amount of cash the business gave the household as “income” is unresolved, but the record suggests it may be considerable, and therefore Reginald’s income could easily be considered approaching \$9,700. Whatever the court’s view of the volume of cash, it did not – nor did it have to – arrive at a precise calculation. Therefore nothing can be inconsistent with it.

Accordingly, there are no contradictory findings of income, and this Court should reject Reginald’s contention.

IV. Awards of Child Support and Alimony Were Within the Discretion of the Family Court

Reginald correctly notes that the standard of review is the discretion of the fact finder. *Reginald Brf.* at 11, citing *In re Crowe*, 148 N.H. 218 (2002).

The family court was within its discretion in calculating child support based on the amount of income Reginald did not dispute – his paycheck, plus monthly rental, plus “reinstated” personal expenses.

The trial court was likewise within its discretion in determining alimony based on Susan’s testimony, which originated in and was corroborated by Reginald’s bank records, that there were more personal expenses paid by the business than Reginald admitted. *Thayer v. Thayer*, 119 N.H. 871, 873(1979) (“fringe benefits were properly attributed to [husband’s] net income”). The court was further within its discretion in believing Susan’s testimony, given her accounting background and personal experience with the cash jar, that Reginald conducts at least some portion of his business in cash. The court found that although it was “in an undetermined amount,” the “unreported” “cash income” was “significant.” PETITIONER’S REQUESTS FOR FINDINGS OF FACT ¶95, *Reginald Add.* at 34.

The court said that because of the length of the marriage, and because Susan had forgone a career to raise the children, it intended to make an “allocation slightly in favor” of her. *In re Nassar*, 156 N.H. 769, 777 (2008). Accordingly within the court’s discretion, the award of alimony is slightly more than halfway between the parties’ proposals, and is explicitly rehabilitative.

Reginald’s bookkeeping methods were essentially a common form of tax fraud. Tracy L. Coenen, *ESSENTIALS OF CORPORATE FRAUD* (2008); Richard Lavoie, *Flying Above the Law and Below the Radar: Instilling A Taxpaying Ethos in Those Playing by Their Own Rules*, 29 *PACE L. REV.* 637, 673 (2009) (discussing differing tax compliance rates among business sectors; suggesting low compliance among small businesses explained by propensity for risk, tax-evasion subculture, and competitive pressures) (“[Small] businesses can operate in the underground economy by accepting

cash payments for their services and neglecting to report them on their tax returns. Further, small-business owners can also evade taxes by commingling their business and personal affairs. For example, the business can provide owners with cost-free services or have non-deductible personal expenses paid by the business and reported as deductible business expenses.”). The court was within its discretion in not ignoring potentially unseemly gains. *See, In re Brownell*, 163 N.H. 593 (2012) (court has discretion to take into account illegally dissipated assets in marital property distribution).

Accordingly, the court’s order regarding both child support and alimony were supported by the record and within the court’s discretion. This Court should thus affirm.

V. Child Support Properly Calculated

In his brief Reginald makes a sideways allegation – by the use of a question mark in his spreadsheet – that the court erred by ordering \$2,045 in child support without a finding of income to support it. *Reginald Brf.* at 16. He suggests that an admitted income of \$6,886 produces a guideline child support of \$1,998, but that the court awarded \$47 per month more than that without specifying the income used to calculate the guidelines support.

It is speculated, however, that the difference is merely due to which year's guideline form was used. The New Hampshire Department of Health and Human Services, Division of Child Support Services, updates its guidelines in April of each year. *See* RSA 458-C:3, I(b) & RSA 458-C:6 (requiring periodic updating of guidelines).

Reginald's child support guidelines worksheet, which he appropriately filed just before trial, is dated February 2, 2011, CHILD SUPPORT GUIDELINES WORKSHEET (Feb. 2, 2011), *Reginald Add.* at 69, and therefore probably used the 2010 guidelines and forms. The trial in this matter occurred over two days in February 2011. The court issued its order in October 2011. The guidelines were thus updated after trial but before the order, and in its diligence the court probably used the newer guidelines. This is apparent because if one were to calculate child support using the parameters and conditions set forth in Reginald's guidelines worksheet, but using the current DHHS on-line guidelines calculator, it produces a guidelines child support of \$2,048, nearly identical to the court's order.⁴

It is thus apparent that the court probably used the updated calculator, and any alleged error is either Reginald's own or was the serendipity of time. Because Reginald does not squarely allege error however, and there is none, this court should affirm.

⁴Although not part of the record, a print-out of this demonstration is included in the addendum to this brief. *Susan Add.* at 29.

VI. Court Treated Reginald Kindly

Despite his contentions, the court treated Reginald equitably. Based on the evidence it heard, the court could have properly issued far more severe orders on child support and alimony.

First, regarding the property division, although Susan got the house, Reginald got the money-making enterprise, of which he has total control. Susan is a single mother years out of the workforce looking for relatively low-paying work, while Reginald will continue his demonstrably profitable business using whatever practices he chooses.

Second, the court treated Reginald well regarding its calculation of income. The only specific finding of Reginald's income is \$6,886 per month, which is what he admits. As noted, the record supports additional household expenses that were not "reinstated" by Reginald into his income. *In re Clark*, 154 N.H. 420, 425(2006); *In re Fulton*, 154 N.H. 264, 269 (2006). The record also supports "cash income ... which is significant, but in an undetermined amount." PETITIONER'S REQUESTS FOR FINDINGS OF FACT ¶95, *Reginald Add.* at 34. Reginald alleges the court made two inconsistent findings of income, and complains that "[b]oth ... cannot be correct." *Reginald Brf.* at 12. In suggesting the court should be forced to harden a finding of income for alimony Reginald risks a higher calculation for *both* child support *and* alimony. Rather, by exercising its discretion and not imputing a *greater* income to Reginald in its child support calculation, the court treated him kindly.

Third, the alimony award is neither excessive nor too long lasting. Reginald has the ability to pay, and Susan is in need of rehabilitative alimony so she can continue guidance of the two children still in highschool, and simultaneously reestablish her career. The five-year period roughly coincides with all but the youngest child's emancipation, when hopefully Susan will be self-supporting.

Fourth, the oldest child turns 18 in July 2013, which will reduce Reginald's child support obligation.

Fifth, although Reginald will pay Susan's health insurance for a short period, through

Susan's efforts he is relieved from paying health insurance for the children. Susan was successful in qualifying and enrolling all three children in New Hampshire's "Healthy Kids" program, *Trn.* at 82; PETITIONER'S REQUESTS FOR FINDINGS OF FACT ¶63, *Reginald Add.* at 31, which is a low-cost program for uninsured children, and which substantially reduces Reginald's costs. *See e.g.*, <http://patients.dartmouth-hitchcock.org/billing_questions/nh_healthy_kids.html>.

Sixth, the way the court structured child support and alimony gives Reginald a tax advantage. "Because alimony is tax deductible and child support is not, separating parties have every incentive to label the bulk of any settlement alimony, not child support. The IRS designed rules to curb this practice, but it probably still continues." Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, U. ILL. L. REV. 319, 371 (2012). The establishment of child support guidelines also undermines the practice, Laura W. Morgan, *Child Support Guidelines Interpretation & Application* § 2.03 (2010), and this Court frowns on it. *In re Watterworth*, 149 N.H. 442, 446 (2003). Nonetheless, had the court used a higher calculation of income for child support and simultaneously awarded less alimony, both of which Reginald appears to advocate, even if his monthly obligation were the same, Reginald's tax situation would be less advantageous.

Seventh, also tax related, over time Reginald gets almost twice as many child tax exemptions than Susan.

Finally, Reginald essentially admitted tax evasion in that he failed to report as income many years of family expenses paid by the business.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

Susan Houle
By her Attorney,

Law Office of Joshua L. Gordon

Dated: November 29, 2012

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Susan Houle suggests that oral argument is not necessary because there are no novel issues of law raised in this case and the decree was within the court's discretion. She nonetheless requests that if oral argument is scheduled, her Attorney Joshua L. Gordon, be allowed 15 minutes.

I hereby certify that on November 29, 2012, copies of the foregoing will be forwarded to Jared O'Connor, Esq.

Dated: November 29, 2012

Joshua L. Gordon, Esq.

ADDENDUM

1. ORDER ON (REGINALD’S) MOTION TO RECONSIDER AND CLARIFY
(Oct. 17, 2011) (last page only, with court’s handwritten order)
(Dec. 11, 2011) 28

2. Demonstration of child support DHHS calculator (DHHS website
accessed Nov. 16, 2012) 29