

# State of New Hampshire Supreme Court

IN THE MATTER OF  
WAYNE SARETTE  
and  
LINDA SARETTE  
appellee,  
appellant.

N.H. Sup.Ct. No. 2014-0574

## MEMORANDUM OF LAW

NOW COMES Wayne Sarette, by and through his Attorney, Joshua L. Gordon, and submits this memorandum of law in lieu of a brief in accord with Supreme Court Rule 16(4)(b). Because all the issues raised in appellant's brief are within the discretion of the trial court, Wayne Sarette requests this Court affirm the decree below.

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## I. Statement of the Facts and Statement of the Case

Wayne Sarette and Linda Sarette<sup>1</sup> were married in 1994. They have two children, ages 15 and 17. *Trial Trn.* at 7-8. DECREE OF DIVORCE (June 12, 2014) at 1, *Addn.* at 18 (hereinafter DECREE); PETITIONER'S REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW ¶1 (May 28, 2014), *Addn.* at 35 (hereinafter WAYNE'S FOF&ROL).

Wayne, age 43, has an 11th grade education, is a licensed plumber and for 16 years has operated "WWW Sarette & Brothers," a plumbing business in Goffstown, New Hampshire, of which he is the sole owner. The business has several employees and vehicles, keeps inventory and equipment, and operates out of a garage facility attached to the marital home. RESPONDENT'S FINDINGS OF FACT AND RULINGS OF LAW ¶ 121 (May 28, 2014), *Addn.* at 40 (hereinafter LINDA'S FOF&ROL); *Trial Trn.* at 41, 42, 60, 105, 170, 275, 293, 303.

Linda, age 54, has a bachelor's degree in accounting, and worked as an accountant until shortly after the children were born. At that time, she became a homemaker, was the bookkeeper and accountant for the plumbing business, and serviced a dozen private clients on the side. *Trial Trn.* at 41, 268-70.

Linda and Wayne separated in 2013 after a 19-year marriage, which because of the close connection between home and work also caused Linda to lose her job. *Trial Trn.* at 204. Linda moved to another house in Goffstown enabling the children to remain in their school district, and at the time of trial was working part-time. DECREE at 1; LINDA'S FOF&ROL ¶41; *Trial Trn.* at 39, 267, 317, 451.

After a 2-day trial in May 2014, during which only the parties testified, the court issued a decree on all issues – parenting, property, and alimony. Linda appealed.

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<sup>1</sup>Because of their shared cognomen, Linda Sarette and Wayne Sarette are referred to herein by their forenames. No disrespect is intended.

## II. Grounds for Divorce as Irreconcilable Differences is Within the Discretion of the Trial Court

During the marriage Linda blamed Wayne for there never being enough money. *Trial Trn.* at 46, 51. Wayne knew what he was earning, so he began questioning spending, *Trial Trn.* at 47, 54, 178-179, 223, which within both the family and the business had been Linda's area of responsibility. *Trial Trn.* at 168, 178. Linda had bought and maintained nine horses, their boarding and related equipment – some of these expenditures made surreptitiously – and had run up credit card bills totaling nearly \$100,000. *Trial Trn.* at 10-11, 50-54, 96-97, 159, 228, 280, 311-313, 321-332, 433, 437, 438-451. When Wayne confronted Linda about these matters, he found an inability to communicate. *Trial Trn.* 98. Consequently, Wayne took Linda's credit cards, which unintentionally resulted in her being unable to buy gasoline when she had driven from Goffstown to Greenland. *Trial Trn.* at 177, 313-315.

In the family court and in her appellate brief Linda argues that this incident constituted cause for divorce as “extreme cruelty” or treatment that “seriously ... injure[d] health or endanger[ed] reason” pursuant to RSA 458:7, III and V.<sup>2</sup>

The court, however, determined that the breakdown of the marriage was primarily caused by “the stress of financial worries, wife's emotional and physical health, the lack of common interests, and the parties' gradual and growing unhappiness.” DECREE at 2; LINDA'S FOF&ROL ¶ 1 (denying fault grounds).

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<sup>2</sup>Linda initially argued cause based also on adultery, RSA 458:7, II, but the allegation was abandoned, was dismissed early in the litigation, and was not appealed. ANSWER AND CROSS PETITION FOR DIVORCE ¶ 13 (Apr. 5, 2013), *Addn.* at 54; PETITIONER'S MOTION TO DISMISS (Apr. 15, 2013) (not included in addendum) (court's margin order: “No objection having been filed. Motion granted.”); *Trial Trn.* at 160.

The court wrote:<sup>3</sup>

Husband asserts that irreconcilable differences caused the breakdown of the marriage: “we couldn’t work together.<sup>4</sup> Her horses were a huge financial burden and were one-sided and separated us as a family ... It seemed like I could never make her happy.<sup>5</sup> I never made enough money and I never felt respected as a man.”<sup>6</sup> He reports that he was also unhappy in the marriage because of wife’s general unhappiness<sup>7</sup> and emotional volatility.<sup>8</sup> She said that she wanted to commit suicide more than once, and sometimes in the presence of the children.<sup>9</sup> In 2012, she opened a window in the parties’ upstairs bedroom and was preparing to jump from it when [daughter] saw her and “screamed at the top of her lungs that mom was jumping out the window.”<sup>10</sup> And during an argument with husband, wife held a knife to her throat and said “I should just kill myself.”<sup>11</sup> When [daughter] was learning how to drive, she and wife got in an argument in the car and wife opened the passenger door while the car was still moving. She then got out of the car at an intersection and [daughter] drove to a nearby store and called husband.<sup>12</sup>

Wife argues that husband’s adultery and his treatment of her “in a cruel, demeaning, controlling and manipulative manner” caused her to suffer emotional distress and to endanger her health and reason. She asserts that husband’s cruel treatment of her began in late 2012: “he screamed at me to get out of his house, he said I’d have nothing and I’d get no wages and I was worthless.” In February 2013, he admitted to wife that he had a girlfriend. Wife believes that the children knew about the girlfriend before she did and she “heard people in the office talking about his affair. The last year and learning about the affair has been very difficult.”

The incident that wife asserts started his cruel treatment of her was when he secretly took her credit cards from her purse before she drove to a client’s business one day. She

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<sup>3</sup>Because it would be superfluous to attempt a better explanation of the family court’s reasoning than its own narrative, lengthy quotations to the family court’s ruling is provided throughout this Memorandum. For this Court’s convenience, footnotes have been supplied which contain citations to the record supporting the family court’s specific findings. The citations contained in the footnotes are not part of the decree.

<sup>4</sup>*Trial Trn.* at 10.

<sup>5</sup>*Trial Trn.* at 21, 46, 228.

<sup>6</sup>*Trial Trn.* at 46.

<sup>7</sup>*Trial Trn.* at 47, 49.

<sup>8</sup>*Trial Trn.* at 21, 153.

<sup>9</sup>*Trial Trn.* at 21, 25, 409-410.

<sup>10</sup>*Trial Trn.* at 20, 395.

<sup>11</sup>*Trial Trn.* at 21, 392, 295.

<sup>12</sup>*Trial Trn.* at 16-18, 410.

was “left stranded in Greenland” when she went to get gas for the drive home and learned that she couldn’t pay for it.<sup>13</sup>

The court finds that irreconcilable differences caused the breakdown of the marriage. Financial strain was the most significant factor. Husband worked long hours and earned a considerable income from his business. The parties nevertheless amassed a great deal of debt – nearly \$75,000 in personal debt and more than \$355,000 in business debt. Wife concedes that their debt caused “extreme financial stress” for them.

Compounding the financial difficulties were wife’s horses. Between September 2006 and November 2011, she spent a total of \$79,500 to buy nine horses. She also spent between \$800 and \$1,500 a month to feed and board the horses. Husband did not always know when she bought the horses or how much she was paying for their room and board. He also did not always know the source of the funds and now suspects that she used money from his business. At the beginning of 2013, she was paying \$2,100 per month to board three horses. She then signed the horses over to a third party because she could no longer afford the payments. Husband argues that wife not only gave away marital assets, but that this also illustrates the enormous cost of her horses – if she wants to get the horses back, she will have to pay \$29,300 as reimbursement for their room and board for the last 14 months.<sup>14</sup>

Wife’s horses were a particular source of conflict not only because of their cost, but also because of the time she and [daughter] spent riding them. Husband reports that “she and [daughter] rode two to three weekends a month and [son] said he felt alone. He stayed in his room and read a lot.”<sup>15</sup> Wife describes the horses as a “bad word” during the marriage. She concedes that husband asked her to “please stop doing her personal things, like riding, to cut down on expenses.” She also concedes that husband told her prior to their separation that “the horses needed to go” and “he made it clear that he thought the horses destroyed our marriage.”

Another contributing factor to the breakdown of the marriage was that the parties lost interest in or were prevented from doing other activities together. For example, husband enjoyed snowmobiling and other physical activities. Wife went snowmobiling with him for a time, but stopped after she was in a car accident. She suffers from some physical health issues, including fibromyalgia, muscle spasms, and a bad back that limit her ability to be active; consequently, she has had to stop snowmobiling and doing most

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<sup>13</sup>ANSWER AND CROSS PETITION FOR DIVORCE ¶ 14 (Apr. 5, 2013), *Addn.* at 54; RESPONDENT’S PROPOSED FINAL DECREE OF DIVORCE ¶ 1 (May 14, 2014), *Addn.* at 74; *Trial Trn.* at 391-398.

<sup>14</sup>WAYNE’S FOF&ROL ¶16; LINDA’S FOF&ROL ¶¶ 77-79, 80-89; *Trial Trn.* at 10-11, 52, 159, 228, 280, 311-313, 321-332, 433, 437-451.

<sup>15</sup>*Trial Trn.* at 10-11.

outdoor activities.<sup>16</sup>

The court further finds that the parties' marital difficulties existed for a considerable period of time before wife claims that husband began to mistreat her. The breakdown of the marriage was gradual and not as sudden as she alleges. Husband was unhappy with the marriage five or six years ago and went to individual counseling<sup>17</sup> because he "just wanted to be loved. I wanted to know what needed to change in the marriage."<sup>18</sup> Wife felt suicidal as far back as 2012,<sup>19</sup> *before* she learned of husband's affair and *before* the incident when he took her credit cards. She, too, went to individual counseling.<sup>20</sup> Yet her counseling records contain no reference to husband's adultery or mistreatment. And the parties went to four or five sessions of marriage counseling in 2012 in an effort to work out their difficulties.

In short, the stress of financial worries, wife's emotional and physical health, the lack of common interests, and the parties' gradual and growing unhappiness caused its breakdown.

DECREE at 1-2 (emphasis in original).

This Court will not overturn the trial court's determination regarding cause unless it "engaged in an unsustainable exercise of discretion" and will uphold if "there is evidence in the record to support its finding that irreconcilable differences, and not misconduct on the part of the respondent, caused the irremediable breakdown of the marriage." *In re Martel*, 157 N.H. 53, 62 (2008).

The record supports all the family court's findings. Accordingly, this Court should affirm the judgment of the family court that the breakdown of the marriage was caused by irreconcilable differences.

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<sup>16</sup>*Trial Trn.* at 193, 226, 465-66.

<sup>17</sup>*Trial Trn.* at 49, 76, 224-25.

<sup>18</sup>*Trial Trn.* at 225.

<sup>19</sup>*Trial Trn.* at 470-71.

<sup>20</sup>*Trial Trn.* at 313, 400-408.

### III. Alimony is Within the Discretion of the Trial Court

The family court weighed Linda's and Wayne's financial situation, and constructed an equitable order providing Linda alimony of \$1,500 per month until child support ends, when it increases to \$2,700 per month, for a total of six years – “less than what she needs, but as much as [Wayne] can pay.”

DECREE at 7-8. The court wrote:

Wife asks for alimony of \$4,500 per month for nine years, based on:

- “(husband) is awarded the family business for which both parties were previously employed,”
- “(her) income has been cut drastically due to her job loss at the company,”
- “(husband) always made significantly more income than (she),”
- “(she) sacrificed her employment opportunities to serve as primary caretaker for the parties' children, which allowed the parties to further build their business,” and
- “(she) is capable of working part time, but that due to the automobile accident, (she) suffers from various health issues which leave her in chronic pain, for which she receives numerous treatments, and which make her unable to work full time or be self-supporting.”

Husband proposes that in lieu of alimony, he will pay wife's health insurance coverage for three years, at a cost of \$643 per month, her car loan payment – \$465 per month, and her car insurance and registration – \$81 per month.

Wife has a Bachelor's Degree in accounting. She has an accounting and bookkeeping business and worked full time at it until shortly after [daughter] was born, in 1998. She then cut the number of her clients in half so that sometime after 2001, she could also work for *WWW Sarette & Brothers* doing bookkeeping and accounting.<sup>21</sup> She had a number of responsibilities there: writing checks, making deposits, calling vendors, keeping records for workers compensation and accounts receivable, and preparing financial statements and payroll and tax returns.<sup>22</sup> The most income she earned in any year since the marriage was \$15,606.

Wife asserts that she cannot work full time because of her health limitations. Ever since the car accident (in 2007) she has suffered from chronic pain. She goes to physical therapy twice a week, gets spine adjustments, and uses a “whole-body vibrating machine

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<sup>21</sup>*Trial Trn.* at 41, 268-70.

<sup>22</sup>*Trial Trn.* at 272-73.

to loosen up.” She cannot sit for long periods of time.<sup>23</sup>

Husband believes that wife is exaggerating her physical limitations. He “doesn’t understand her claim ... she moved a chicken coop, rides horses, and she can still do bookkeeping. The car accident was (years ago) and the driver’s side rear was hit by the rear quarter and tire. She continued to snowmobile and ride ATVs that winter, after the accident.”<sup>24</sup> He also disagrees about the extent of the sacrifices she made when she stopped working full time at her own business and went to work for *WWW Sarette & Brothers*. He describes her as “not a valuable employee. She did what she wanted to do. I couldn’t reason with her ... I tried to hire a secretary but she didn’t want me to. As a result, she gave up half her clients and didn’t have to.”<sup>25</sup>

The court finds that wife is, at least for the time being, partially disabled. She is clearly suffering from some emotional and physical conditions that make working full time nearly impossible. But the court is convinced that she can work more than she currently is – as husband notes, she can do accounting and bookkeeping without needing to exert herself physically.

Wife needs alimony. Her monthly expenses, as listed on her financial affidavit, total \$8,722. They exceed her monthly income by \$6,852. Some of her discretionary expenses are high, however – Section 6 of her financial affidavit, *General and Personal*, totals \$1,981 and Section 7, *Children’s Expenses and Activities*, totals \$860. In contrast, Section 6 of husband’s financial affidavit totals \$1,559 and Section 7 totals \$200. Wife’s discretionary expenses are higher than husband’s by \$1,082 per month. The court deducts \$1,082 from wife’s monthly expenses in order to equalize the parties’ discretionary expenses, resulting in adjusted monthly expenses of \$7,640. Her adjusted monthly expenses exceed her monthly income by \$5,770.<sup>26</sup>

Husband can afford to pay alimony. His monthly expenses, as listed on his financial affidavit, total \$12,895, but they include temporary child support of \$1,784 and temporary alimony of \$3,948. The court deducts these because they are temporary obligations and will end with the issuance of this Final Decree. Husband’s adjusted monthly expenses are \$7,163. He has a monthly surplus of \$2,381. His new child support obligation is \$1,113, leaving him with a monthly surplus of \$1,268. After [son] is no longer entitled to child support, husband’s child support obligation will increase to \$1,329 per month, leaving him with a monthly surplus of \$1,052 until [daughter] is no longer entitled to child support.<sup>27</sup>

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<sup>23</sup>*Trial Trn.* at 271, 282.

<sup>24</sup>*Trial Trn.* at 130, 226.

<sup>25</sup>*Trial Trn.* at 204, 209.

<sup>26</sup>LINDA’S FINANCIAL AFFIDAVIT (May 13, 2014), *Addn.* at 207.

<sup>27</sup>WAYNE’S FINANCIAL AFFIDAVIT (May 14, 2014), *Addn.* at 196.

The business pays many of husband's personal expenses and is paying wife's car loan, car insurance and registration, and her health insurance. Husband or the business shall continue to pay these expenses. Husband shall also pay wife \$1,500 per month in alimony until his child support obligation for [son] and/or [daughter] terminates altogether. Beginning the first month after husband is no longer obligated to pay child support, his alimony obligation shall increase to \$2,700 per month.

The total amount of monthly support that wife will receive for the next six years, including the car and insurance payments, is approximately \$4,000 per month, less than what she needs, but as much as husband can pay. She should be able to supplement her income by increasing her bookkeeping and accounting business.

The duration of alimony is six years, a reasonable period of time in light of the length of the marriage, wife's role as primary caregiver to the children, her sacrifice of her own business to work for *WWW Sarette & Brothers*, husband's history of far greater earnings, and his greater ability to acquire future income and capital assets.

Six years is enough time for wife to improve her health. She has already made some improvement – she can raise her arms and use them to pull. There is good reason to think that her health will keep improving, especially if she keeps keeping as hard in physical therapy.

Six years is also enough time for wife to increase her income from her business or to find a full time job to earn enough to become self-supporting. Before the marriage, wife worked for an accounting firm and earned \$40,000 a year.<sup>28</sup> She has continued to do bookkeeping and accounting since, albeit on a much smaller scale, so she still has current and valuable skills.<sup>29</sup> She should be able to earn at least that much again by 2020.

DECREE at 6-8 (*italics in original*).

“The trial court has broad discretion in determining matters of ... alimony when fashioning a final divorce decree. Absent an unsustainable exercise of discretion, we will not overturn its ruling or set aside its factual findings. *In re Gronvaldt*, 150 N.H. 551, 554 (2004) (quotations and citation omitted).

The record supports all the family court's findings. Accordingly, this Court should affirm the judgment of the family court regarding alimony.

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<sup>28</sup>*Trial Trn.* at 272-73.

<sup>29</sup>*Trial Trn.* at 270.

#### IV. Valuation of Marital Home is Within the Discretion of the Trial Court

Linda offered a valuation of the marital home that was prepared in January 2013 for the purposes of a refinancing, which estimated a value of \$340,000. APPRAISAL OF 294 GOFFSTOWN BACK ROAD (Resp. Exh. L) (Jan. 8, 2013), *Addn.* at 89. Wayne offered an appraisal done in August 2013 for the purposes of the divorce litigation, which estimated \$310,000. APPRAISAL OF 294 GOFFSTOWN BACK ROAD (Pet. Exhibit 8) (Aug. 20, 2013), *Addn.* at 119. They differed by \$30,000.

The court explained its reasoning for choosing the latter:

Husband had an appraisal done of the marital home in August 2013. The appraiser opined that the fair market value is \$310,000. Wife believes that the value is \$340,000 based on an appraisal that was done in January 2013 for the purpose of refinancing the mortgage. Neither appraiser testified, but based on a review of the appraisals, the court finds that the fair market value is \$310,000, consistent with the August 2013 appraisal, for the following reasons:

- the August appraisal was closer in time to the final hearing,
- the August appraisal used seven comparable sales while the January one used six; the former one therefore had more data with which to compare other sales in the local real estate market,
- the August appraisal made fewer adjustments to the comparable sales. The greater the adjustments to the comparable sales, the less reliable those sales become, and
- the average distance of the comparable sales (from the marital home) in the August appraisal was 1.79 miles and the farthest single comparable sale was 3.13 miles; in the January appraisal, the average distance was 2.715 miles and the farthest single comparable sale was 5.89 miles. A comparable sale that is nearer the marital home is generally a better reflection of the local real estate market.

DECREE at 8-9.

The family court has discretion to value equity and debt in the marital home. *In re Costa*, 156 N.H. 323 (2007). “[T]rial courts are free to exercise their sound discretion in establishing an appropriate valuation date for the equitable distribution of marital assets.” *In re Nyhan*, 147 N.H. 768, 771 (2002). The court has discretion to choose among valuation methodologies. *In re Gordon*, 147 N.H. 693, 696

(2002). Linda cites *In re Gina D.*, 138 N.H. 697 (1994), which addresses the reliability of an expert's report to prove or disprove child sexual assault; the case has no bearing on the much more routine exercise of valuing suburban homes.

The record, including the appraisals themselves, supports the court's findings. Accordingly, this Court should affirm the family court's choice of appraisal of the marital home.

## **V. Valuation of the Business is Within the Discretion of the Trial Court**

In her brief Linda alleges "fail[ure] to disclose accounts receivable and related documents such as year-end sales journal [which] precluded sufficient finding of business value." LINDA'S BRF. at 22. It is not clear whether Linda is unsatisfied with discovery, with the court's choice to use assets and liabilities rather than accounts receivable to determine the value of the business, or with the valuation of the business itself.

### **A. Discovery**

Linda's attorney acknowledged that "in preparing for trial ... at the last minute" she discovered she did not have accounts receivable listed in the format she expected. *Trial Trn.* at 252. During the final moments of the first day of trial, Linda's attorney raised the issue with the court, complaining that she wanted the accounting software and data rather than the monthly print-outs she had received, that the print-outs should be dated at the beginning rather than the end of each month, and that there was no report of annual totals. *Trial Trn.* at 252-59. Wayne, apparently still on the stand, indicated he would ask his accountant about the matter. *Trial Trn.* at 259. There was no explanation why the issue was not raised at a time when it could have been investigated during the discovery phase of the litigation, nor an allegation that Wayne failed to comply with discovery rules. Moreover, there is no further mention of the matter, either during the second day of trial a week later, or in any pleading or order.

To the extent Linda is now appealing the court not having ruled on this discovery matter, that was never raised with the family court, nor pursued in any way. *New Hampshire Dep't of Corr. v. Butland*, 147 N.H. 676 (2002). It is thus waived or unpreserved.

To the extent Linda is now appealing a discovery order, the matter was not preserved because it was not raised at a time that would have given the court or the parties opportunity to do something about it.

In this State the lodestar has always been whether pretrial discovery will contribute to the orderly dispatch of judicial business. Discovery has been regarded as a proper procedural aid for the parties to *prepare their case in advance of trial* and a logical method of *preventing surprise* and permitting both court and counsel to have an intelligent grasp of the *issues to be litigated* and knowledge of the facts underlying them.

*Riddle Spring Realty Co. v. State*, 107 N.H. 271, 277-78 (1966) (emphasis added). *See Murray v. Developmental Servs. of Sullivan Cnty., Inc.*, 149 N.H. 264, 267 (2003) (allowing testimony of witnesses even though discovery had been conducted late because testimony was uncomplicated and untimeliness was fault of other party, and holding: “If a party is surprised by the introduction of evidence or the presentation of a witness previously unknown to it, the trier of fact is likely to be deprived of having both sides of an issue fully presented, and the system becomes less effective as a means of discovering the truth.”).

To the extent Linda is now appealing not having received the software and data from the plumbing business, the court has discretion to rule on disclosure and discovery of electronic information. *New Hampshire Ball Bearings, Inc. v. Jackson*, 158 N.H. 421, 430 (2009).

Accordingly, to the extent there even was an appealable discovery ruling, the family court should be affirmed.

## **B. Valuation Methodology**

The family court made clear that given its nature, the value of the plumbing business was confined to the value of its equipment and inventory:

In terms of fair market value ... the business has no real value. Its income depends on husband’s ability to work and to capitalize on his good reputation. Without him, clients would have no obligation to remain with the business. The income would surely suffer if husband were not there and customers left. The court finds that the only real

value of the business is in its equipment and inventory. The machinery and equipment was appraised in December 2013 with a net value of \$200,500. And the parties did an inventory and determined that it was worth \$50,789.84. The total value of the assets is \$251,290. The total of the business debt is \$355,016, resulting in negative equity of slightly less than \$104,000.

The court awards the business to husband, free and clear of any interest of wife. He is awarded all of its income and assets and is solely responsible for all its-debt. Wife is not awarded any value for her interest in the business because the business has no value.

DECREE at 5 (emphasis in original). The court also pointed out that “the accounts receivable have not been considered in the calculation of the value of the business.” *Id.* at 10

There is no dispute regarding the numbers used by the court in its calculation, and they are supported by the record. SUMMARY OF APPRAISAL REPORT OF MACHINERY AND EQUIPMENT AT WWW SARETTE BROTHERS, INC. (Pet. Exh. 9) (Dec. 12, 2013), *Addn.* at 149.

“[T]rial courts are free to exercise their sound discretion in establishing an appropriate valuation date for the equitable distribution of marital assets.” *In re Nyhan*, 147 N.H. at 771. The court has discretion to choose among valuation methodologies. *In re Gordon*, 147 N.H. at 696. Valuation of business assets, liabilities, and inventory are within the discretion of the family court. *McAlpin v. McAlpin*, 129 N.H. 737, 742 (1987). The family court is free to disregard alleged assets of a business, such as reputation or professional goodwill, given the circumstances. *In re Cottrell*, 163 N.H. 747, 750 (2012).

The court’s valuation did not refer to other methods of valuing a business, and the valuation methodology it chose did not depend upon accounts receivable, which is the information Linda alleged was missing. Thus, to the extent Linda made an objection to methodology, this Court should affirm.

### **C. Valuation of the Business**

This Court “review[s] a trial court’s decision on the management of discovery and the admissibility of evidence under an unsustainable exercise of discretion standard. To meet this standard, the [appellant] must demonstrate that the trial court’s ruling was clearly untenable or unreasonable to

the *prejudice* of [her] case. *In re Hampers*, 154 N.H. 275, 280 (2006) (citation omitted) (emphasis added).

As noted, the court's valuation methodology did not depend upon accounts receivable, which is the information Linda alleged was missing. Thus, even if the court did not properly exercise its discretion regarding discovery, accounts receivable was not necessary information. Consequently Linda has not and cannot assert any prejudice, and this Court should affirm.

#### **VI. Award of and Value of Children's Toys is Within the Discretion of the Trial Court**

Linda argues in her brief that a snowmobile and its trailer, a rowboat and its motor, and several ATVs should have been considered marital property and equitably distributed, and also argues that the court undervalued them. Wayne acknowledged that although the recreational vehicles were titled in his name they belonged to and were used by the children, expressed his unconcern about their ultimate disposition, and allowed that the children could continue using them or could sell them as they wish. *Trial Trn.* at 81, 173; WAYNE'S FOF&ROL ¶ 15; LINDA'S FOF&ROL ¶¶ 70-76.

First, in her pre-trial documents, Linda preferred that Wayne be awarded them, and has therefore waived any claim. RESPONDENT'S PROPOSED FINAL DECREE OF DIVORCE ¶ 8B (May 14, 2014), *Addn.* at 74; RESPONDENT'S PROPOSED FINAL DECREE ¶ 8B (Nov. 4, 2013), *Addn.* at 59.

Second, because "[t]rial court determinations under RSA 458:16-a, I, are reviewed *de novo*, while equitable divisions of property pursuant to RSA 458:16-a, II are reviewed for an unsustainable exercise of discretion," *In re Goodlander*, 161 N.H. 490, 495 (2011), this might arguably involve an issue of law – the only one in this case – but that issue was nowhere preserved. Thus this Court's inquiry is only whether the award was equitably made within the family court's discretion.

Moreover, this Court has made clear that the family court has jurisdiction to rule on, and cannot ignore the validity of, third-party property interests. *In re Muller*, 164 N.H. 512, 518 (2013) ("Because the mortgage interest at issue here belongs to a third party, the family division lacked the jurisdiction to invalidate it. Our holding today does not imply that the family division lacks jurisdiction to divide

an encumbered asset; the division of the net equity in a marital home subject to a mortgage, for example, is within the statutory purview of the family division, as is the division of marital debt. However, when dividing such property pursuant to RSA 458:16-a, the family division does not have the jurisdiction to disregard or invalidate a third party's claim of interest in marital property.”) (citation omitted). Valuing and awarding vehicles is in the discretion of the trial court. *McAlpin v. McAlpin*, 129 N.H. at 737.

Third, although the children are teenagers, Linda is essentially arguing about their toys. Just because legal title and state registration remain in Wayne’s name does not mean the items do not belong to the children. Moreover, even if the recreational vehicles were considered marital property, presumably they would have been equitably distributed between Linda and Wayne, and thus there is no prejudice.

Accordingly, this Court should, as the family court did, disregard the recreational vehicles from the allocation of marital property.

Finally, Linda disputes the valuation of these items, claiming they are worth more than Wayne suggested. The family court considered evidence regarding value, WAYNE’S FINANCIAL AFFIDAVIT (May 14, 2014) at 7, *Addn.* at 196; *Trial Trn.* at 80-81, 172, and rejected Linda’s claim of additional worth. LINDA’S FOF&ROL ¶ 71 (denying request for finding that “[t]hese items are likely worth more than \$35,000”). Valuation of personal property is in the discretion of the trial court, *see In re Sarvela*, 154 N.H. 426, 434, (2006), and this Court should affirm.

## VII. Minor Math Mistake

Linda and Wayne have a number of accounts deposited with the Edward Jones investment firm; two of them are “Custodian Accounts,” one for each child; the other two are “Coverdell” accounts, one for each child, which are tax advantaged education savings accounts; the rest are indisputably part of the marital estate. BANK STATEMENTS (Resp. Exh. AA) (Mar. 28, 2014), *Linda’s Appx.* at 141-43.

In her brief Linda alleges an arithmetic error. She is correct that there is an error, but wrong in her calculation of it.

Linda’s single account does include the children’s Coverdell accounts, and some of her money is in the account, specifically  $\$160.76 + 142.86 = \$303.62$ . The correct amount that should be attributed to the wife is  $\$8,541.00 - \$3,525.05 + 160.76 + 142.86 = \$5,319.57$ . In its order the court credited her equitable claim by \$8,541. The court thus overvalued Linda’s share of the Jones account by \$3,221.43, not \$3,525.05 as suggested in Linda’s brief. To that extent, Wayne concedes the math mistake.

**W**HEREFORE, for the reasons explained, Wayne Sarette respectfully requests this Honorable Court affirm the decree of the family court.

Respectfully submitted  
for Wayne Sarette  
by his attorney,

Dated: May 28, 2015

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I hereby certify on this 28<sup>th</sup> day of May 2015, a copy of the foregoing is being forwarded to Lucinda Hopkins, Esq.

Dated: May 28, 2015

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Joshua L. Gordon, Esq.

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