State of New Hampshire
Supreme Court

NO. 2015-0588

2016 TERM

JUNE SESSION

In the Matter of Caren Logan and James Logan

RULE 7 APPEAL OF FINAL DECISION OF THE
ROCHESTER FAMILY DIVISION COURT

BRIEF OF CAREN LOGAN

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STATEMENT OF FACTS

I. Caren and Jim Met and Married

Caren Logan, 57 years old at the time of trial, grew up in California, where she earned a college certificate in health and fitness management. *Trial* at 32-34, 943.[1] She began working in the cosmetic industry, eventually creating a consulting business with clients including Estee Lauder, establishing cosmetic counters at hotel spas all over the world. *Trial* at 34, 641, 913-920, 1225-27, 1260; NARRATIVE DECREE (Aug. 25, 2015) at 21, *Addendum* at 40.[2]

Jim Logan, 62 at the time of trial, has a masters from Dartmouth business school. In the 1980s he licensed patents for touch screen technology, took his company public in the 1990s, and made his first fortune. *Trial* at 134, 1029-33. He cheated on his first wife, was unsuccessful co-parenting with her, and remains estranged from her and his now-adult children. *Trial* at 522-29, 747, 876, 1038-1039.

Caren and Jim met on-line in 1999. They began living together in 2001 at an old large farm-field-forest-barn-house property in Deerfield, New Hampshire. They got married on May 21, 2004 when Caren was 45 and Jim was 51. *Trial* at 34-35, 726, 909-10. Although Caren was making good money, their wealth was highly disparate, and Jim demanded a prenuptial agreement. The prenup makes each parties' property their separate property, and provides:

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[1]Trial in this matter comprised nine days. The trial transcripts are sequentially numbered and are cited herein as *Trial* at ##. The transcripts from other hearings are cited by their name and date. To reduce confusion with shared last names, the parties are referred to herein by their first names used routinely in the record; no disrespect is intended.

[2]There are two similarly-named documents that comprise the court's decree, both issued on August 25, 2015. The "Final Decree of Divorce," which is Jim's proposed decree as amended and approved by court, is cited herein as FINAL DECREE. The court's more lengthy narrative, entitled "Final Divorce Decree" is cited herein as NARRATIVE DECREE. Both are included in the addendum hereto. Citations to both documents herein refers to their native pagination.

> In the event of a judgment of a legal separation or divorce … Caren shall be entitled to a property distribution … of 1% of Jim's separate property … for every full year Jim is married to Caren, up to a maximum of thirteen years (or a total of 13% of Jim's separate property).

PRENUPTIAL AGREEMENT ¶ 4C (May 6, 2004), *Jim's Appx*. at 6, 7 (capitalization altered, redundant numeration omitted); STIPULATION REGARDING PRENUP (Dec. 18, 2014) (approved by court in margin order), *Jim's Appx*. at 2. The agreement also reduces the stated percentage to account for inheritances received by Caren, but assures Caren one-half equity in the marital home, and allows her a $50,000 advance "in the event proceedings are instituted … for a legal separation or divorce." *Id*. ¶¶ 4C & 4D.

II. Children by Surrogacy

Although Caren "didn't think I would have children at my age," *Trial* at 727, Jim felt "I had kind of lost my previous set of children," *Trial* at 1040, and brought up the idea. *Trial* at 1039. They tried to get pregnant, but were not successful. *Trial* at 727. They hired a consultant, took fertility tests, and tried "alternative methods." They attempted *in vitro* fertilization, starting with Caren's eggs and Jim's sperm, injected into Caren with medication, and did that three or four times before doctors determined it would not work. *Trial* at 728-29, 1040.

They then discussed adoption, and later, surrogacy. Caren said that "Jim really wanted to go forward with a surrogate, and I really didn't want to in the beginning, didn't know how I felt about it. It was kind of a new concept for me." *Trial* at 729-30. Ultimately they enlisted an agency, chose an anonymous egg donor, engaged a woman in Florida to be the carrier, retained a lawyer, and signed the contracts. *Trial* at 728-34.

Twin girls were born to the carrier in April 2005, and Caren and Jim took the babies home to New Hampshire a few days later. *Trial* at 734.

At the time, Jim and Caren agreed to not tell the twins the circumstances of their birth;

although both have privately reconsidered the issue, they have not effectively communicated on when or how to reveal the information. *Trial* at 792-94, 1188; GAL REPORT (Aug. 21, 2014) *passim*, *Sealed Appx*. at 94. The court indicated portions of the record concerning the issue may be sealed. *Trial* at 805-813.

The GAL testified Caren does not give the biological difference much significance. But Caren believes Jim is hyper-aware of his biological connection and her lack, and because Jim has threatened to unilaterally tell the children about the circumstances of their birth, she does not trust his motives. *Trial* at 556, 628, 792-99.

III. Caren Stopped Work to Become a Mother

As a new mother of twins with a job requiring foreign travel, and a husband in need of domestic support to maintain his prosperous far-flung businesses, Caren quickly realized she would have to let lapse her career. *Trial* at 34-38, 642. This coincided with a shift in the spa industry disrupting Caren's niche. *Trial* at 137, 913-915. The parties agreed Caren would stop working to become a stay-at-home mom, *Trial* at 629, 737; GAL REPORT at 2, and by the time the children were about two, had wound down her business. *Trial* at 734-36, 641, 1225-27. Thus while Caren once had significant income, after the girls were born she earned much less, and then almost none thereafter. *Trial* at 918-920, 1225-27, 1260. PETITIONER'S FOF&ROL ¶ 217 (Aug. 7, 2015), *Jim's Appx*. at 208, 227; NARRATIVE DECREE at 21-22.

Caren was the primary parent, the full-time caretaker, farmer, property manager, and homemaker, until the children entered school. *Trial* at 34-37, 554, 620, 735-738, 1311, 1474; GAL REPORT at 8, 10. During those years Caren shopped for and prepared the children's food, played with them, took them on outings and to doctor's appointments. *Trial* at 34-35, 738.

IV. Children Did Not Change Jim's Work Schedule

Because of this, Jim's career suffered little interruption; he expanded it, and made a second fortune.

With his background in patents, he and partners created a patent business, wherein they acquire interests in patents, identify entities that infringe, and then collect. Jim testified:

> [W]e were only the third company to ever get Apple in front of the jury and we won that jury trial.… But then we went on to license a bunch of other companies in the business and generate some pretty good money.

Trial at 137-38, 1033-35, 1256, 1288. Jim said one of his patent lawsuits in this period "hit a home run." *Trial* at 90. At the time of the divorce hearing, he had "about 20 patents that are in the hopper in some form or fashion," had recently won or settled suits against CBS, Fox, and others, and had additional patent trials coming up all over the country. *Trial* at 1228-41, 1353. Jim testified he has been or is involved with many other businesses based in many places, as director, investor, and other roles. *Trial* at 133-38, 467, 1034-36. Jim said that although he believes as "a retired technology CEO" he is not employable, he is not retired. *Trial* at 133-137, 735, 1037, 1260, 1269, 1329; PETITIONER'S FOF&ROL ¶¶ 230, 231, 236.

Jim has not had standard W-2 income since before the children were born, but he works, and his endeavors during the marriage have made him lots of money including dividends, interest, and capital gains. *Trial* at 35, 1228-31, 1259-1260, 1350. In addition to his patent work, Jim has branched into land development, actively managing his assets. *Trial* at 1029-35. For purposes of the prenup, the court found Jim's separate property assets are worth about $5.5 million, and that he made $2.7 million in 2011 and $3.5 million in 2012. NARRATIVE DECREE at 11, 22. Consequently, he and Caren and the kids were able to buy anything they wanted. *Trial* at 848-49, 1271, 1269.

Although some of Jim's work takes him around the globe, he sometimes works from home or at his office; while his itinerary is flexible, he works full-time, and during the marriage maintained a regular 10AM to 6PM work schedule. *Trial* at 35, 133-137, 736-40, 1040-1046, 1228-31, 1351, 1246. Jim expressed his belief that "I don't think you purposely don't work just so you can be with your children," and that doing so sets a bad example. *Trial* at 1431, 1352-54. Nonetheless, Jim conceded that Caren is a good mother:

> You know, she provides good meals and, you know, I think she's warm and she's loving towards them. You know, I think she looks out for their best interests.

Trial at 1311. Caren's testified that "my life changed quite a bit when I had twins," but that Jim's didn't. *Trial* at 737-38.

V. Jim is Impatient With Domesticity, But Has Strong Opinions on Childrearing

While Jim has been an involved father who takes his daughters to varied experiences, *Trial* at 637, 739-40, 827, 1040-1046, 1092-1108, numerous examples show he is not patient with domesticity.

For instance, Jim often hires babysitters when work creates inconveniences, including up to shortly before trial. *Trial* at 736, 1109, 1142, 1351, 1465; NARRATIVE DECREE at 22. When the kids were two years old, Caren had health issues requiring weeks of bed rest. Jim announced three days after her surgery he had business that would take him away for much of it, and left her at home with two young children. *Trial* at 738.

Jim nonetheless has strong opinions on health care and child rearing, which appears to have created the most intractable issues.

Caren tends to follow the advice of her daughters' pediatrician, *Trial* at 563, 752; NARRATIVE DECREE at 16, whereas Jim believes in naturopathic medicine, is reluctant to call doctors, rants that indigenous populations get better treatment than the United States medical

system, and says he knows better than trained doctors. *Trial* at 1183-85, 1266, 1371-79; GAL REPORT at 14-15; NARRATIVE DECREE at 16.

The parties differ on vaccinations. Caren wants to vaccinate as recommended by the pediatrician and the school, *Trial* at 577, 1398; LETTER FROM DOCTOR (Jan. 14, 2014), Exh. 13 at Tab 1 (omitted from appendix), whereas Jim believes vaccinations are a government/industry conspiracy, *Trial* at 1494-96, a "total hoax, perpetrated … to sell $600 a shot vaccinations." *Trial* at 1410. For a time Caren went along with Jim's views in order to keep marital peace, but stopped acquiescing because the children travel and are in school, and there is no longer marital peace to keep. *Trial* at 754-759, 987-89, 1381. As a compromise the pediatrician prioritized a list of vaccinations, to which Caren consented, *Trial* at 755-759, and which the court ordered. NARRATIVE DECREE at 25.

Jim opposes antibiotics for ear infections, *Trial* at 1157, 1375, 1407, painkillers at the dentist, *Trial* at 1407-08, and sunscreen and bug repellent. *Trial* at 574, 626, 762-66, 948-952, 1082, 1170-72, 1364-70. Because Jim's family has a history of celiac disease, he thinks the children should not be fed gluten, even though they show no symptoms of intolerance. *Trial* at 515, 568, 576, 770-78, 1007-08, 1159-66, 1443-49.

At least twice, minor accidents – a bicycle fall and a dog bite – have occurred on Jim's watch, which Caren does not fault, but which were complicated by Jim's disavowal of their significance. Jim did not seek medical attention, and then would not communicate about it. Caren had to bring the children to the doctor lacking adult information about the injuries. *Trial* at 579, 759-761, 767-768, 1298-1303, 1151-1156.

More generally, Caren thinks Jim is insensitive to the girls' emotional needs. *Trial* at 791-92. Thus, for example, one of the daughters thought she was spending special time with her

father, but Jim brought along his girlfriend and the girlfriend's children. *Trial* at 795. When the girls were at Disney World with Caren, Jim phoned and told them their pet looked dead, spoiling the vacation. *Trial* at 1491-93. Jim does not enforce homework, allowing the children to go to school unprepared. And although Caren is tolerant of Jim's parenting, he brings them to school not having showered, wearing scraggy clothing, their hair knotted, without breakfast, and "you know, not put together." *Trial* at 519, 559, 606-07, 995-96, 1179, 1409. UPDATED GAL REPORT (May 22, 2015) at 3, *Sealed Appx*. at 112. This causes Caren to worry about the girls' self-confidence. *Trial* at 783-85, 803, 893, 1175-78, 1409, 1417.

Jim has introduced the children to his girlfriends, allowing them to witness adult intimacy probably beyond their age, which Jim defends on the grounds that he is now in another committed relationship, and the children get along with his new girlfriend and her kids. *Trial* at 597, 795-97, 834-837, 864-898, 1085.

Jim and Caren clash on numerous matters. Jim refused to read a parenting skills book Caren thought would be instructive. *Trial* at 516. Jim refused to use an industry-standard co-parenting smart-phone app recommended by the GAL and co-parenting counselor, *see* <https://www.ourfamilywizard.com/>, because its costs money, Jim thinks he can duplicate its functions using Google calendars and spreadsheets, and it represents a conspiracy by the information industry. *Trial* at 516, 944, 997-98, 1067-68, 1433-36.

Jim wants the children to go to private school, and took the girls for a visit, whereas Caren thinks they should remain in the public school for the time being, and thinks she should have been informed before he created expectations. *Trial* at 786-88, 938-42, 1093, 1218-21; SUPP. FOF&ROL ¶¶ 85-89 (Aug. 7, 2015), *Jim's Appx*. at 251, 259; NARRATIVE DECREE at 24 (court will appoint commissioner to decide schooling if parties cannot). Caren consistently has had difficulty

communicating with the children when they are on Jim's parenting time, *Trial* at 796-97, 831-32, 1114-1120, and thinks Jim is cavalier about age-appropriate safety issues. *Trial* at 574, 587, 747, 843, 1138-39.

Because these disputes appear intractable, yet resolution is necessary, Caren advocated for "sole decision making over major decisions, including, but not limited to, decisions about the children's education, [and] non-emergency health and dental care." CAREN'S PROPOSED PARENTING PLAN (June 2015), *Appx*. at 43. This request became critical later.

The parties' fractiousness exhausted two co-parenting counselors, but the court found it lacked authority to mandate a co-parenting coordinator. *Summer Hrg*. (June 2, 2015) at 13-15. It thus ordered Jim and Caren try co-parent counseling one more time. *Trial* at 506, 517, 631; UPDATED GAL REPORT at 1-2; NARRATIVE DECREE at 16, 25.

Although Jim recognizes a pattern regarding his estrangement from his prior family, and his situation with Caren and their kids, he disclaims responsibility, complaining that "both [the ex-wife] and Caren were thinking that the children were hers and I was just an accessory.… [T]hey were acting as if the children were theirs and not mine as well." *Trial* at 1402-03. He variously blamed the GAL, the lawyers, his ex-wife, and Caren. *Trial* at 595, 627, 1425-26.

VI. Adultery, Dangerous Prostitute, Divorce

In March 2013, Caren got a call from a woman she did not know. The woman told Caren she was a prostitute who had been having a sexual relationship with Jim for eight years. *Trial* at 40-42; AMENDED PETITION FOR DIVORCE (May 24, 2013), *Appx*. at 10. Jim admitted the adultery had been regular since 2007. *Trial* at 1322. Jim's explanation was that his sex life with Caren was not sufficient, he believed he had her tacit acquiescence, the affair was Caren's fault, it was "only sex," and there was no deceit because Caren never asked. *Trial* at 47, 1324-1325,

1331-1333, 1420-1421.

Jim admitted to Caren the woman had threatened and stalked him, as well as Caren and the children, she was dangerous and had already extorted $10,000. The children were removed and the police were involved. All four obtained restraining orders. At the time of trial the woman was incarcerated for an unrelated attempted murder. *Trial* at 38, 43-46, 540-42, 780-82, 1047-1049, 1322; RESTRAINING ORDERS (March, May, and June 2013), Exh. X, Tabs A, B, & C (omitted from appendix); HAVERHILL GAZETTE (Dec. 4, 2014), Exh. X Tab M (omitted from appendix).

Three days after the call, Caren petitioned for divorce, including grounds of adultery. PETITION FOR DIVORCE (Mar. 29, 2013), *Appx*. at 1; AMENDED PETITION FOR DIVORCE. She testified that her life changed in a moment: she became physically ill, lost sleep, and feared for her children. She sought mental-health counseling. Caren realized she did not know her husband, and began questioning his actions and motives. *Trial* at 46-48, 636. Jim conceded their marriage fundamentally changed and Caren became distrustful of him. *Trial* at 1049-50. Jim left the home, although later the parties bought a house for Caren in Chester, New Hampshire so that Jim could take over the Deerfield farm. *Trial* at 392, 1223; STIPULATION REGARDING PRENUP.

The court found adultery was the primary cause of the breakdown of the marriage, and granted a fault divorce. NARRATIVE DECREE at 14; FINAL DECREE ¶ 1. Because of the terms of the prenuptial agreement, however, there is no financial result of fault. *Trial* at 700.

VII. Caren Tries to Reestablish a Career

When the marriage dissolved, at 57 Caren was faced with making a living. The spa industry had changed leaving her no opportunities, so she took advantage of family connections to establish a real estate brokerage firm. It has not, however, been highly successful. *Trial* at 37, 920-935, 1227-28; NARRATIVE DECREE at 22. Jim thinks Caren is underemployed. *Trial* at 1260.

Caren's assets are the home in Chester, which was treated as an advance on her prenup distribution. With an inheritance, in 2011 she bought an off-beach house in Hampton, New Hampshire, which she rented out (and has since sold). Pursuant to the prenup she owns half the equity in the marital home. *Trial* at 56-58, 63, 922; STIPULATION FOR ADVANCE OF PROPERTY SETTLEMENT (July 18, 2013), Pet. Exh. 7 (omitted from appendix).

VIII. Caren Pays Children's Health Insurance

No party has health insurance though an employer. *Trial* at 936-938, 1273-1275; UNIFORM SUPPORT ORDER ¶11 (Aug. 25, 2015), *Jim's Appx*. at 201. Under the temporary decree, Jim paid $5,800 per month in child support, allowing Caren to afford the children's health insurance, TEMP. UNIFORM SUPPORT ORDER ¶¶ 4.1, 13A, 16A (Feb. 3, 2014) ("Obligee is already paying $500/mo to cover the children and will continue to do so.") (omitted from appendix), which costs Caren $1,000 per month. PETITIONER'S MOTION FOR MODIFICATION OF TEMPORARY ORDER ¶ 2 (Oct. 30, 2014), *Appx*. at 17.

While during the marriage the couple maintained health insurance for the family, more recently Jim decided to "self-insure" because he believes he can afford his own health care. *Trial* at 936-938, 1273-79, 1293-94. Both parties understand that Caren needs health coverage and she should pay for her own insurance. *Trial* at 1273-1275, 1293-94; PETITIONER'S PROPOSED FINAL DECREE ¶6 (May 22, 2015), *Appx*. at 28. Because it is the only policy, however, for an extra premium Caren's health insurance also covers the kids. *Trial* at 1274

Caren requested that Jim be ordered to pay for the children's health and dental insurance. *Trial* at 862. Jim opposes that because it would resemble alimony, having Caren add it to her own policy is the globally cheapest way, and he believes he should not have to subsidize what he considers Caren's poor financial choice. *Trial* at 1319, 1273-1275; PETITIONER'S MOTION FOR

MODIFICATION OF TEMPORARY ORDER (Oct 30, 2014) (requesting Jim pay for children's health insurance during temporary period); RESPONDENT'S OBJECTION TO PETITIONER'S MOTION FOR MODIFICATION OF TEMPORARY ORDER ¶ 14 (Nov. 5, 2014) (noting monthly amount of temporary child support), *Appx*. at 19; PETITIONER'S SUPPLEMENTAL MOTION FOR MODIFICATION OF TEMPORARY ORDER (Jan. 13, 2015) (restating request for Jim to pay children's health insurance), *Appx*. at 23; RESPONDENT'S OBJECTION TO PETITIONER'S SUPPLEMENTAL MOTION FOR MODIFICATION OF TEMP. ORDER (Jan. 19, 2015), *Appx*. at 25.

In its decree, although the court cut child support by forty percent, it retained the requirement that Caren pay for the children's health insurance. FINAL DECREE ¶2 (Aug. 25, 2015), *Addendum* at 34. Though Caren cannot get the child tax exemptions, *Trial* at 1275; FINAL DECREE ¶3, she planned to apply for government-sponsored health insurance for the kids. PETITIONER'S MOTION FOR RECONSIDERATION (Sept. 4, 2015), *Appx*. at 67.

In addition, because of Jim's inattention, and despite his claim about her choices, *Trial* at 989-90, 1178, 1475; EMAIL FROM JIM TO GAL (Nov. 17, 2014) Resp's Exh. X, Tab E, (omitted from appendix), Caren generally buys such things as the girls' clothing and school lunches, *Trial* at 531-32, 859, 1479, but cannot match the lifestyle they enjoy at Jim's house. *Trial* at 848-49.

IX. Caren's Therapists and Therapy Records

The GAL and the co-parenting counselor suggested both parties get the benefit of consultation with a mental health therapist. *Trial* at 649, 817, 1441-42. On these suggestions and also on her own volition, starting within two weeks of the prostitute's revelations, Caren began counseling, which she was continuing two years later at the time of trial. Jim did not partake because "I'm comfortable with the situation I'm in, I am in a very happy period of my life, and I don't feel like I needed to go to counseling." *Trial* at 1441-42.

With two therapists Caren discussed numerous personal matters, and collectively their notes and records comprise 131 pages.[3] NOTES, DOCTORS ELLEN RONKA & ROGER LAMORA (Apr. 11, 2013 through June 11, 2015), Pet. Exh. 16, *Sealed Appx*. at 12.

Before trial no mental health records or professionals were discovered or contemplated as witnesses, *Trial* at 76, and the GAL was not directed to investigate psychological evaluations of any party. ORDER ON APPOINTMENT OF GUARDIAN AD LITEM (May 14, 2013), *Appx*. at 6. During the fourth day of trial, however, Jim disclosed that he had served subpoenas on Caren's two therapists, seeking both their notes and to cross-examine them; Caren filed a motion to quash. *Trial* at 649-52 PETITIONER'S MOTION TO QUASH RESPONDENT'S SUBPOENAS (June 23, 2015), *Appx*. at 36. During a portion of the fifth trial day the court held a hearing on the matter. *Trial* at 699-722. Caren argued the psychotherapist-patient privilege applied, while Jim argued the privilege had been waived or should be pierced.

Over protest Caren disclosed the records; the court reviewed them *in camera*, determined the privilege was waived and the records were admissible, noted copies were being distributed to Jim's lawyer, and allowed that the therapists could be (although they ultimately were not) cross-examined. *Trial* at 649-50, 711-13, 817-819; ORDER REGARDING DISCOVERABILITY OF THERAPEUTIC RECORDS (June 25, 2015), *Appx*. at 41.

[3]Regarding privacy of the records, the court ordered: "Mr. Logan shall not have his own copy of these records. No use of these records shall be made for any purpose not directly related to the presentation and prosecution of this case. These records shall not be otherwise utilized, shared, or disseminated without a specific court order." ORDER REGARDING DISCOVERABILITY OF THERAPEUTIC RECORDS (June 25, 2015), *Appx*. at 41.

STATEMENT OF THE CASE

Caren filed for divorce in March 2013 a few days after the prostitute called her, and amended her petition to include fault grounds of adultery in May 2013. PETITION FOR DIVORCE (Mar. 29, 2013), *Appx*. at 1; AMENDED PETITION FOR DIVORCE (May 24, 2013), *Appx*. at 10. The court held a temporary hearing in January 2014, and in December 2014 the court approved a stipulation enforcing the parties' prenuptial agreement. STIPULATION REGARDING PRENUP (Dec. 18, 2014) (approved by court in margin order), *Jim's Appx*. at 1. The case was removed from the Derry Family Division to the complex case docket at Rochester. ORDER OF REASSIGNMENT (Dec. 31, 2013) (omitted from appendix).

Trial was held over nine days in May, June, July, and August, 2015. On August 25, the Rochester Family Court (*Robert J. Foley*, J.) issued a lengthy decree and marked up Jim's proposed decree, and also issued a parenting plan and uniform support order. NARRATIVE DECREE (Aug. 25, 2015), *Addendum* at 40; FINAL DECREE (Aug. 25, 2015), *Addendum* at 34; PARENTING PLAN (Aug. 25, 2015), *Appx*. at 59; UNIFORM SUPPORT ORDER (Aug. 25, 2015), *Jim's Appx*. at 201. Motions for reconsideration were filed by both parties, which were both denied in margin orders. PETITIONER'S MOTION FOR RECONSIDERATION (Sept. 4, 2015), *Appx*. at 67; RESPONDENT'S MOTION TO RECONSIDER (Sept. 4, 2015), *Appx*. at 78. Jim appealed and Caren cross-appealed.

SUMMARY OF ARGUMENT

When deciding matters involving children, there is great temptation to use all available information, including a parent's mental health records. Caren Logan first argues the court invaded her psychotherapist privacy by admitting into evidence two years of her therapist's records, thus undermining statutory policy protecting the privilege.

Finality of judgments arises in many contexts. Caren notes this case has not yet reached "judgment," and thus the time for calculating her percentage under the prenuptial agreement is still running. She argues the court's finding of 11%, based on the amount of time that had passed at the time of trial, was legal error, and that it should be at least one percentage point higher.

Turning to the facts, Caren argues that the court was correct in its understanding of financial information and assessment of witnesses, and that this court should not revisit those perceptions.

First, there is no reason to look behind the numbers printed on promissory notes to determine the value of the asset they represent, and therefore the court was correct in awarding her a percentage of the amount printed. Second, noting the parties entered a stipulation regarding the value of Jim's patents that are not easily susceptible of valuation, Caren argues the stipulation is clear on its face that the court had discretion to award Caren any percentage in its discretion, and the half it awarded her was reasonable. Third and fourth, Caren argues that the court was free to disbelieve Jim's explanation regarding his alleged bank balance, and that the court had authority to apply state law in the allocation of a tax refund.

Finally, Caren points out that she ended up paying for the children's health insurance only because, unlike Jim, she is not wealthy enough to self-insure; and that while Jim can easily afford the insurance, she cannot.

ARGUMENT

I. Court Erred in Finding Therapist-Patient Privilege Impliedly Waived

New Hampshire's psychotherapist-patient privilege provides:

> The confidential relations and communications between any [licensed psychotherapist] and such licensee's client are placed on the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communications to be disclosed, unless such disclosure is required by a court order. Confidential relations and communications between a client and any person working under the supervision of a person licensed under this chapter which are necessary and customary for diagnosis and treatment are privileged to the same extent as though those relations or communications were with the supervising person licensed under this chapter, unless such disclosure is required by a court order.

RSA 330-A:32.

This court noted in *In re Berg*, 152 N.H. 658 (2005), that "the public policy behind the therapist-client privilege may be even more compelling than that behind the usual physician-patient privilege," because it "foster[s] productive relationships between therapists and their clients, … [and] advances the public good accomplished when individuals are able to seek effective mental health counseling and treatment." *Berg*, 152 N.H. at 664, 665 (brackets omitted).

Waiver of the privilege was addressed at length in *Desclos v. Southern New Hampshire Medical Center,* 153 N.H. 607 (2006). There a quadriplegic patient sued her doctor for malpractice. Although the plaintiff's pre-injury mental health records were "clearly relevant to the issue of damages in regard to pain and suffering and loss of enjoyment of life," *Desclos*, 153 N.H. at 609, the court noted:

> [A] party waives the psychotherapist-patient privilege by putting the confidential communications at issue by injecting the privileged material into the case. If the privilege-holder has injected the privileged material into the case such that the information is actually required for resolution of the issue, then the privilege-holder must either waive the privilege as to that information or be prevented from using the privileged information to establish the elements of the case.

Desclos, 153 N.H. at 612. Because the psychotherapist-patient privilege is statutorily on par with the attorney-client privilege, this court cited criminal cases regarding injection of privileged material. When a criminal defendant alleges ineffective assistance of counsel, thereby putting into issue "the core of attorney-client communications," the privilege is waived. *Desclos*, 153 N.H. at 612 (quoting *Petition of Dean*, 142 N.H. 889, 891 (1998). But when a criminal defendant merely pleads not guilty, the privilege is not waived. *Desclos*, 153 N.H. at 613 (citing *State v. Elwell*, 132 N.H. 599, 607 (1989)). Waiver occurs only when the privilege-holder "has injected privileged material into the case, such that the information is actually required for resolution of the issue." *Desclos*, 153 N.H. 607, 614 (2006) (citing *Aranson v. Schroeder*, 140 N.H. 359, 370 (1995), and *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 568 (Mo. 2006)). Thus, this court held:

> If [plaintiff] claims that her pain and suffering, loss of enjoyment of life, or loss of earning capacity include a clinically diagnosed disorder … or if the claims involve expert testimony or other expert evidence regarding her mental suffering, that will waive her psychotherapist-patient privilege. If, however, the mental suffering that [plaintiff] claims involves only *generic mental suffering*, then such claims would not waive her psychotherapist-patient privilege.

Desclos, 153 N.H. at 615 (emphasis added)."Generic mental suffering" is defined as "the kind of distress or humiliation that an ordinary person would feel in such circumstances, [which] are generally in the common experience of jurors and do not depend on any expert evidence." *Desclos*, 153 N.H. at 613-14 (citing *Cunningham*, 182 S.W.3d at 568).

In Caren and Jim's case, at the end of the family court's hearing on Caren's motion to quash, it issued a bench order admitting the records:

> [B]ecause I'm being asked to ultimately make incredibly important decisions about children, and I'm asked this question and given this responsibility day after day, I have decided in the cases that have reached me that asserting a responsibility and a right to be primarily responsible for a child injects all aspects of your mental and emotional well-being into the case, and impliedly waives the privilege … and that it is incumbent upon me to review the records carefully, in camera, to determine

> if the contents of those records are within the scope of the privileged impliedly waived. And so, I'm going to deny the motion to quash.

Trial at 708-09 (paragraphing altered). After its *in camera* review, in its written order the court held:

> [Caren] impliedly waived her privilege to these therapeutic records by making fault allegations and asserting that the best interests of the parties' two children will be served by being placed in her primary residential responsibility. These positions may not have constituted an "injection" of issues, as contemplated by the Supreme Court in the malpractice case of *Desclos*. However, a family parenting case is a much more mutual process than a malpractice case, wherein the status of plaintiff and respondent is virtually irrelevant, and the affirmative assertion of a parenting issue is almost systemic.

ORDER REGARDING DISCOVERABILITY OF THERAPEUTIC RECORDS (June 25, 2015) (citation omitted), *Appx*. at 41 ; *Trial* at 648, 708-09.

The family court acknowledged there had been no "injection" as required by *Desclos,* and there has been, for instance, no allegation that Caren is an unfit mother. Rather, the feelings generated by a husband cheating on his wife are "the kind of distress or humiliation that an ordinary person would feel in such circumstances."

Nonetheless, the court found the therapeutic privilege was waived merely by "the affirmative assertion of a parenting issue." The court also acknowledged that assertion of parenting issues is "systemic," presumably meaning that by merely being involved in the family court regarding parenting, one automatically waives one's therapist-patient privilege.

In its decree, the court acknowledged that the therapist notes informed about Caren's feelings after the adultery revelation, and her coming to terms with it over the following two years. NARRATIVE DECREE at 14-15. The court also noted the "records cut both ways." ORDER REGARDING DISCOVERABILITY at 1.

Caren was still in counseling at the time of trial. The last record in the series are doctor's

notes from a therapy appointment which took place after day 2 but before day 3 of trial, thus giving Jim's attorney a real-time picture of Caren's motivations. After his review, apparently Jim's lawyer nonetheless found them useless, as he switched positions and argued against their admission. *Trial* at 817-819. By that time, however, Caren's privacy had been invaded.

Mental health counselors are endemic in the family court, especially in high-conflict cases such as Caren and Jim's. Routinely allowing discovery of therapists' records undermines the public policy of encouraging mental health treatment. Parties will, from fear of revelation, refrain from getting the help they need. Or, knowing their therapist might someday testify, parties will use the therapy session as just another front in the family court war.

This court should make clear privileges are not automatically waived for merely expressing concerns for one's children, confirm the importance of the therapist-patient privilege, reverse the family court's ruling admitting the records, and order the records remain sealed.

II. Prenuptial Percentage Should be 12% not 11%

The parties prenuptial agreement says:

> In the event of a *judgment of a legal separation or divorce* … Caren shall be entitled to a property distribution … of 1% of Jim's separate property … for every full year Jim is married to Caren, up to a maximum of thirteen years (or a total of 13% of Jim's separate property).

PRENUPTIAL AGREEMENT ¶ 4C (emphasis added, capitalization altered, redundant numeration omitted). The parties stipulated and the court found the agreement enforceable. STIPULATION REGARDING PRENUP; PET'S MEMO (PRENUPTIAL AGREEMENT) (Aug. 7, 2015), *Appx*. at 51.

The prenup distinguishes between a "judgment of … divorce" in the quoted clause, and another clause which becomes operative "in the event proceedings are instituted … for a legal separation or divorce." *Id*. ¶¶ 4C & 4D. Thus there can be no mistake that the parties intended the percentage to be calculated at the time of "judgment." This can be contrasted with *MacFarlane v. Rich*, 132 N.H. 608 (1989), where the prenuptial that specified its administration turned on the date "a petition for legal separation or libel for divorce is *filed* by either party." *MacFarlane*, 132 N.H. at 611 (brackets omitted, emphasis added).

Current court rules provide that "[i]n contested cases … the decree will not become final until the thirty-first … day from the date of the clerk's notice of decision. If a timely appeal is filed, the decree will not become final until the expiration of the appeal period pursuant to Supreme Court Rule 7." FAM.CT.R. 2.29.B; *Gray v. Kelly*, 161 N.H. 160 (2010). Moreover, the appeal period does not expire until this court issues its mandate. SUP.CT.R. 24; *Carleton, LLC v. Balagur*, 162 N.H. 501, 506 (2011); *State v. Gubitosi*, 153 N.H. 79, 82 (2005) ("the effective date of our decision was the date the mandate was issued").

An asset that comes into a marriage prior to the finality of the marriage is regarded as property of the marriage. *Holliday v. Holliday*, 139 N.H. 213, 215 (1994) (lottery ticket won after

separation but before decree held marital property).

In Jim and Caren's case, the prenuptial percent clock is still ticking because Jim appealed. Accordingly, a "judgment of … divorce" will not exist until the post-appeal mandate.[4]

The parties were married on May 21, 2004. As of the date of this brief, the twelfth "full year" recently passed, and would have passed even if no party had requested appellate briefing extensions. While even a lengthy appellate period is unlikely to reach the thirteenth full year, it is apparent Caren is due 12% of Jim's separate property under the prenup.

Because only eleven full years had elapsed at the time of trial and when the court issued its decree in August 2015, the court appears to have assumed Caren gets just 11%, which is what it awarded. NARRATIVE DECREE at 12. That percentage, while perhaps accurate at the time, became error upon Jim prosecuting this appeal. Thus, at the conclusion of the appellate proceeding, this court should remand for recalculation of Caren's percentage in accord with the date of the eventual mandate.[5]

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[4]Rules currently being considered by this court are explicit that finality occurs upon "the supreme court mandate." PROPOSED FAM.CT.R. 2.29.B.4. *See* <www.courts.state.nh.us/committees/adviscommrules/Public-Hearing-Notice-1215.pdf>.

[5]Throughout the proceeding, Caren's lawyer repeatedly requested 11%, but also repeatedly expressed her understanding that the percentage would be eventually recalculated in accord with the prenup. *See, e.g.,* PETITIONER'S MEMORANDUM OF LAW (PRENUPTIAL AGREEMENT) (Aug. 7, 2015) at 2-3 ("Pursuant to the terms of the Prenuptial Agreement, Petitioner is entitled to a property distribution of 11% of Respondent's separate property … *subject to further adjustments in accordance with the Prenuptial Agreement*.") (emphasis added), *Appx*. at 51; PETITIONER'S REQUEST FOR FINDINGS OF FACT ¶ 18 (Aug. 7, 2015) (Pursuant to the prenuptial agreement, Caren is entitled to a property distribution of 11% of James' separate property … *that should be further adjusted in accordance with the Prenuptial Agreement*.") (emphasis added), *Jim's Appx*. at 209-10.

It appears Jim has waived any claim that the percentage is stuck at the 11% it was at the time of trial. Caren's expert, on cross-examination by Jim's lawyer, testified: "Q: Now, the longer this case goes and the longer Caren Logan is married to James Logan for a full year, her percentage goes up, does it not? A: …[I]f the divorce was not final by next June it would be another year, that's correct.… Q: And so if there's a ruling in this case and there's an appeal and it's not resolved until June of '16, you'd be back here saying she's entitled to 12 percent, not 11, wouldn't you? A: …[I]f the marriage had not ceased, then next June it would be 12 percent." *Trial* at 387-89.

III. Promissory Notes Should be Valued at the Amount Printed on Their Face

In 2012 two entities, LBN and LBS, gave promissory notes to Jim, in the amount of $1,220,876 and $227,200, for a total indebtedness of $1,448,076, in exchange for land that Jim sold to the entities. NARRATIVE DECREE at 10, 27; PROMISSORY NOTE FROM LBN TO JIM (Dec. 28, 2012), *Jim's Appx*. at 83; PROMISSORY NOTE FROM LBS TO JIM (Dec. 28, 2012), *Jim's Appx*. at 86. He now argues that the court should ignore those notes in determining his separate property, a percentage to which Caren is entitled under the prenup.

The family court has broad discretion in choosing a date for valuation of assets. *In re Costa*, 156 N.H. 323, 330 (2007); *In re Watterworth*, 149 N.H. 442, 451 (2003); *In re Gordon*, 147 N.H. 693, 696 (2002) ("We have adopted the view that the trial court has wide discretion in determining the date on which a value should be placed on marital assets.") (quotation omitted); *In re Nyhan*, 147 N.H. 768, 771 (2002). The court may chose a valuation date most suited for the type of asset being considered. *Hillebrand v. Hillebrand*, 130 N.H. 520, 523 (1988).

The court also has discretion to pick among valuation methodologies. *In re Cottrell*, 163 N.H. 747 (2012) (court chose one spouse's valuation method over other's); *Gordon*, 147 N.H. at 693 (same); *In re Valence*, 147 N.H. 663, 675 (2002) ("court's use of [specified] valuation method was consistent with its broad discretion to divide property between divorcing spouses").

Promissory notes are routinely considered assets in divorce cases. *In re Spenard*, 167 N.H. 1, 7 (2014); *see also In re Preston*, 147 N.H. 48 (2001) (annuity is a marital asset); *Bergeron Estate*, 117 N.H. 963, 967 (1977) (balance due on note is estate asset). And it is no defense to an action on a promissory note that the article for which it was given proved to be of no value. *Reed v. Prentiss,* 1 N.H. 174, 175 (1818).

Jim's position is that the court should have looked behind the promissory notes to the value of the real estate they purchased. JIM'S BRF. at 20-29. He says that because the value of the

promising entities declined after the notes were drawn, the face value of the notes should be disregarded. Jim suggests the court should have valued the underlying property assets after they had declined in value, rather than using the numbers printed on the notes. He goes so far as to call the numbers written on their face "the alleged future face value." JIM'S BRF. at 27.

Jim then offers two different methodologies to net out the value of the notes in an attempt to claim they are worth something less than their face value. But the court was within its discretion to chose Caren's expert's valuation method, rather than use a fictitious netting or discounting methodology.

This court should defer, and thus affirm.

IV. Patent Stipulation Gave Court Discretion to Award Caren "A Certain Percentage, As Determined By The Court"

A. Parties' Patent Stipulation, Court's Construction

At the beginning of the first day of trial, the parties discussed an agreement they were still negotiating, regarding the valuation of Jim's patent interests. *Trial* at 12. A stipulation was reached, submitted to the court for approval, and approved by the court later that day. *Trial* at 29; PATENT STIP. (May 26, 2015), *Jim's Appx*. at 14.

The patent stipulation provides:

- "Certain of the assets that might be valued under the parties' Prenuptial Agreement formula present significant valuation difficulties."
- "In order to avoid valuation problems, Caren is awarded a certain percentage, *as determined by the Court*, of James' percentage ownership of the following LLCs: Personal Audio, Bringrr, and True Mail."
- "Caren's interest shall be as a member of each of these LLCs equal to her resulting percentage of James' membership interest. *By way of example only*, if James has a 10% membership interest and Caren is awarded a 10% interest in James' membership, Caren would have a 1% membership interest in that LLC."
- "This Agreement shall be governed by the laws of the State of New Hampshire."

PATENT STIP. ¶¶ 1, 3A, 3B, 5B (May 26, 2015) (emphasis added).

Underscoring the valuation difficulties, Jim testified the ultimate value of the patents was doubtful or speculative due to the inherent risks of the patent enforcement industry, and also apprehended that the mere exercise of preforming a valuation might weaken their value. *Trial* at 1256-59; RESPONDENT'S MOTION TO RECONSIDER ¶ 8 (Sept. 4, 2015), *Appx*. at 78. Underscoring the determined-by-the-court provision, Jim's attorney assured the judge the agreement "provides for Mrs. Logan to have whatever percentage you determine." *Trial* at 178.

Thus the stipulation had two purposes: to avoid valuation of difficult-to-value assets that might be degraded by the valuation process, and to give the court discretion to "award[] a certain

percentage" to Caren.

Implementing the two stipulated purposes, in its decree the court ordered:

> [The] Stipulation dated 5/26/15 and approved that same day took several applications for, or already issued, patents completely out of the process defined by the Prenuptial Agreement. As these assets were significantly difficult to value, the Stipulation also avoided the valuation of these assets. It also allowed the Court to determine what percentage Mrs. Logan shall be awarded of James' percentage interest in the LLCs, which own the patents or the patent applications.
>
> I find that the appropriate percentage to be used to define Mrs. Logan's interest in these patents and pending applications is 50% of Mr. Logan's interest. The parties took this piece out from under the Prenuptial Agreement, largely because of valuation issues. However, outside the Prenuptial Agreement, this effectively becomes marital property guided by RSA 458:16-a, II.

NARRATIVE DECREE at 6. After trial, and in accord with the equitable property division of RSA 458:16-a, the court awarded Caren half of Jim's patent interests. NARRATIVE DECREE ¶ 9 at 25.

B. Purpose of Patent Stipulation

In his brief Jim suggests the purpose of the stipulation was "avoidance of trial testimony addressing the numerical dollar value of Mr. Logan's patent interests," and the "only interpretation … was the parties' desire to avoid trial testimony." JIM'S BRF. at 13, 15.

Difficulty in valuation, however, was not merely a question of time, cost, or availability of witnesses.

Jim summarized his businesses, which make investments in patents that, through litigation or negotiation, he hopes might someday be valuable. *Trial* at 134-39, 1256-59. No matter the quantity or quality of evidence, Jim testified that patent values are speculative, and betting on them is the nature of his business. Jim noted the "20 patents that are in the hopper in some form or fashion" are his primary business assets, but acknowledged that merely going through the valuation exercise could degrade them.

In his brief Jim says "there was no reason or purpose for [him] to remove any assets from the enforceable Prenuptial Agreement's distribution formula without some concession in exchange." JIM'S BRF. at 15. But this ignores Caren's leverage in negotiating the patent stip – the potential devaluation of his primary business assets, which Jim avoided by entering it.

Moreover, the law is not kind to speculative valuations in marital cases. *In re Donovan*, 152 N.H. 55, 59 (2005) (court cannot rely on financial affidavit on which income for child is only speculation); *In re Telgener*, 148 N.H. 190, 192 (2002) ("Consideration of a tax consequence is precluded, however, when the trial court must speculate as to a party's future dealing with the property."); *Ruben v. Ruben*, 123 N.H. 358, 361 (1983) (court should not speculate as to future earnings). In addition, given the speculativeness and potential devaluation, the prospect of the family court declaring an unfavorable value had to have confronted Jim with great uncertainty.

Thus, Jim had enormous incentive to ensure Caren was provided sufficient terms to enter the patent stipulation. The resulting language of the stip – "Caren is awarded a certain percentage, as determined by the court" – is the bargain Caren drove in these circumstances.

C. Language of Patent Stipulation

Contrary to Jim's assertions, the language of the stipulation makes clear the patents were intended to be treated separately from the prenup percentage.

- The stipulation specifies that without it, "certain of the assets" "might be valued under" the prenup. PATENT STIP. ¶ 1. With the stip, they are no longer under the prenup, and won't be valued under it. Thus, as the court held, the language of the patent stip takes those assets out of the prenup.
- The stipulation also specifies that "Caren is awarded a certain percentage, as determined by the Court." PATENT STIP. ¶ 3A. Under the prenup, the percentage would be determined by the prenup. But under the stip, the percentage is determined by the court. Those determinations are irreconcilable, and shows that the stip displaced the prenup as to Caren's percentage of the patent assets.
- The exact percentage is left unspecified because the parties could not agree. Thus they

left it to the court. The for-instance in the stipulation is careful to specify it is "[b]y way of example only." PATENT STIP. ¶ 3B. Despite Jim's allegation that the for-instance is illuminating beyond an example of how the parties expected the court to employ arithmetic, JIM'S BRF. at 11, 13, the for-instance uses "10%" because it is a familiar number, easy to calculate, and thus a convenient example.

- Jim's brief assigns error for not attempting to construe the prenup together with the stip. JIM'S BRF. at 19. But the rule of construction is that the more recent and more specific authority controls over the older and more general. *See Petition of PSNH*, 130 N.H. 265, 283 (1988). Thus the mere existence of the patent stip, which is both newer and speaks directly to patent assets rather than general marital property, shows that as to the patents it displaces the prenup.
- Jim's brief notes that the stipulation contains no specific reference to RSA 458:16-a, and therefore the statute cannot be implicated. JIM'S BRF. at 12, 14. The stipulation is specific, however, that it "shall be governed by the laws of the State of New Hampshire," PATENT STIP. ¶ 5B, among which is the equitable distribution statute.
- Jim argues that the name of the document – "stipulation regarding interests in certain property pursuant to the prenuptial agreement" – means that the stip is subsumed by the prenup. JIM'S BRF. at 11-12. Captions, however, are an aid to construction only when the language they headline is ambiguous. *See In re Weaver*, 150 N.H. 254 (2003); *In re CNA Ins. Companies*, 143 N.H. 270, 274 (1998) ("[W]here the statutory language is clear and unambiguous this court will not consider the title in determining the meaning of the statute."). Here there has been no allegation of an ambiguity, because there is none. Moreover, the caption does not create an ambiguity, because had there been no stipulation, the assets would be controlled by the prenup, thus making the supplanting stipulation – accurate to its caption – "pursuant to" the prenup.

D. Whether Parties Acted in Accord with Patent Stipulation

Throughout his brief Jim repeatedly says that had the parties intended the court's outcome, they would have acted differently.

- In his brief Jim suggests that proof of his interpretation of the stip is that the parties did not offer evidence regarding equitable division or development of the patents. JIM'S BRF. at 15. First, such evidence was submitted. The nine-day trial comprised multiple days of testimony by the parties, and by their respective experts. The evidence is aplenty regarding, for instance, inequality in earning power and asset generation, respective employment prospects, Caren as homemaker contributing to Jim's ability to earn, child-care responsibilities, and adulterous fault. *See* RSA 458:16-a, II (enumerating list of considerations for equitable division). Second, Jim nowhere proposes what other evidence he might have offered, suggesting both a lack of prejudice, and also that there isn't much more he could have added; the only reasonably

imaginable additional evidence would have been valuation of the patent assets, which Jim suffered to avoid.

- Jim chides Caren for "identif[ying] no pleading that identified property to be divided outside of the parties' prenuptial agreement," citing statements of Caren's lawyer in the first few minutes of trial. JIM'S BRF. at 18 (citing *Trial* at 18). To the extent the criticism is relevant, it is not clear why there would be such a document. Moreover, the patent stipulation is the one document which would match Jim's criteria, but it did not come into existence until after the transcript passage Jim cites. *Trial* at 29.
- In his brief Jim claims that the court made findings which would undermine equitable distribution of the patent interests. JIM'S BRF. at 16 (citing CAREN'S FOF&ROL ¶¶ 18, 30, and 48). The cited findings, however, undermine nothing. Finding #18 suggests Caren should get an 11% share of Jim's separate property, which "should be further adjusted in accordance with the Prenuptial Agreement"; finding #30 merely quotes the prenup; and finding #48 lists the entities which own Jim's patent interests.
- Jim's brief repeatedly cites Caren's expert's report, and how it charts the patent assets, claiming that the expert's report proves "patent interests [are] part of Mr. Logan's "Separate Property" subject to the Prenuptial distribution formula." JIM'S BRF. at 16. The cited fragments of the expert's report, however, merely note the expert reviewed the patent stipulation, and that in accord with it he assigned the patents zero value. MALONEY REPORT (June 15, 2015), *Jim's Appx*. at 24, 26, 29, 30.
- Jim's brief also claims that because during trial Caren did not reference a claim to equitable distribution of the patent interests, she did not intend that outcome, and therefore they should not be awarded to her. JIM'S BRF. at 17. Jim cites to *Birch Broadcasting v. Capitol Broadcasting*, 161 N.H. 192 (2010), for the proposition that actions after execution can aid construction of contracts. After the patent stipulation, however, there was no need for Caren to revisit the issue – it was resolved during the first day of trial when the court approved the stip.

E. Court Gave Patent Stipulation the Effect the Parties Intended

The patent stipulation was entered a year-and-a-half after the prenup was declared enforceable, and is specific about how the patent interests should be handled. Unlike the prenup, the patent stipulation unambiguously gave the court unfettered discretion to chose a percentage of Jim's patent interests to award Caren – the crucial provision largely unaddressed in Jim's brief.

In its decree, the court awarded Caren half the patent interests, which was both within the provisions of the patent stipulation, and within the equitable division statute. The family court made no error, and this court should affirm.

V. Court Allowed to Discredit Jim's Uncorroborated Testimony Regarding Bank Balance

As noted in Jim's brief, Jim included in his list of separate property a negative $55,950 entry, with an annotation that it represented "[a]mount of uncleared checks from checking account." PERSONAL STATEMENT OF NET ASSETS, Exh M, *Jim's Appx.* at 21. The court found that "[t]he evidence did not support using Mr. Logan's negative entry of $55,950 for uncleared checks." NARRATIVE DECREE at 9.

While Caren did not address the issue in her testimony, Jim expounded:

> So the first entry is a new number, which is a negative $56,000 for the J.P. Morgan checking account. That had been zero before and now it's a negative number. And what we had done previously is we had taken that negative amount and added it to the loan amount with J.P. Morgan. So it gets a little bit complicated here, but – because I think the question came up yesterday, how could your loan amount with J.P. Morgan be greater than the line of credit amount that we had. So what's going on is I had to sell some stock recently. Knowing that I was out of my line of credit, I sold some stock to have some cash, and then the cash goes into the checking account as needed. So to make it clear, we just put down minus 56,000 as a negative in the checking account, and then we reduced the loan amount that we had with J.P. Morgan. So that's really what the loan amount is. And it's underneath the cap now by about 35,000. And when those checks clear, you know, the minus 56,000, that money will come out of the equity account, which now has some cash in it.

Trial at 174.

Jim did not offer anything corroborating his description, such as copies of the allegedly uncleared checks, bank statements, or loan documents. Documents generated by J.P. Morgan that are in the record do not display anything appearing to authenticate his story, and Jim has pointed to none. Morever, Jim's quoted explanation is largely unintelligible, and draws on unsupported ultimatums such as "I had to sell some stock recently."

A factfinder is not bound to believe evidence just because it is uncontradicted. *In re Pasquale*, 146 N.H. 652, 656 (2001) (court did not credit otherwise uncontradicted evidence

offered by GAL regarding custody of child); *Azzi v. Azzi*, 118 N.H. 653, 657 (1978) ("As we have often noted, the master is free to reject even uncontradicted evidence.").

Here the court did not credit Jim's uncorroborated testimony, and committed no error.

VI. 2010 Tax Refund is Joint Property Because Taxes Were Filed Jointly

The couple's 2010 federal taxes, which Jim took care of exclusively, were filed jointly, and paid entirely by Jim because Caren did not have any income. *Trial* at 79. Jim over-paid taxes that year, but did not apply it to the next year's taxes, and let it languish at the IRS. Despite considerable testimony, Jim's reasons are not easily discernible, but appear to be to be designed to minimize tax liability in other years. *Trial* at 84-88, 1283-84; NARRATIVE DECREE at 6. In any event, there was an available IRS refund of $84,131.

Jim's expert testified that under federal law the IRS would return the money in any fashion the parties chose. *Trial* at 439, 446. Caren's expert testified that the refund is controlled by state equitable division law because the 2010 return was filed jointly. *Trial* at 378-79. The court, citing *In re Plaisted*, 149 N.H. 522, 527 (2003), noted that "what constitutes a joint marital asset is controlled by the Prenuptial Agreement," and also noted that the prenup is specific that it "shall be governed, controlled and interpreted under the laws of the State of New Hampshire." PRENUPTIAL AGREEMENT ¶ 16. Thus, the court found "there is no convincing reason to apply federal law to the determination of the issue." NARRATIVE DECREE at 7; FINAL DECREE ¶ 20.B.

Because the refund was a joint asset, the court awarded half to each party. On such matters this court defers to the discretion of the trial court, *In re Wolters*, 168 N.H. 150, 155 (2015), and should therefore affirm.

VII. Jim Should be Paying for Health Insurance

During the temporary period, when Caren was receiving $5,800 in child support, it may have made sense that Caren paid for the children's health insurance, which costs $1,000 per month. Jim conceded this: during the temporary period he argued that he need not cover health insurance for the children because the amount of temporary child support was sufficient for Caren to afford the premium. But after trial Jim's child support was cut to $3,493 per month, no longer sufficient to cover child expenses in addition to their health care costs.

Jim suggests that paying for the children's health insurance is akin to alimony, which is barred by the prenup. But because health insurance is for the children, not Caren, it does not resemble alimony.

As Jim notes, because Caren has her own health insurance, adding the children to Caren's policy may be the globally least expensive solution. But merely because Caren cannot duplicate Jim's ability to self-insure, does not imply that Caren should be the one who pays for the children's health care. Moreover, the least expensive solution could have been accomplished by requiring Jim to pay the difference between a policy for Caren alone versus a family policy covering Caren and the children.

Although Jim suggested he should not have to pay for what he considers Caren's poor financial choice in purchasing health insurance, in actuality Caren is paying for Jim's risky attitude toward health care calamities.

The court did not explain its decision that Caren pay for the children's health care, and thus its reasoning is unknown. This court should remand for consideration of the matter, including the nature of the children's health care as a result of the decree.

CONCLUSION

This case raises two important legal issues – whether therapist-patient privileges are waived whenever a court considers the interests of children, and whether agreements depending upon a court "judgment" should be calculated according to general rules of finality. This court should reaffirm its protection of private records, and its well-defined rule of finality.

While Jim is much wealthier than Caren, she does not begrudge her prenuptial agreement. The stipulations the parties entered during the course of the proceeding, and the facts adduced at trial, point to conclusions regarding the allocation of assets for which the court appropriately exercised its discretion.

As to the children's health care, they are fortunate enough to have a wealthy father such that they should not risk requiring state-assisted medical insurance.

REQUEST FOR ORAL ARGUMENT

Caren Logan requests that her attorney, Joshua L. Gordon, be allowed oral argument because this case entails two important legal issues, and a number of complex factual matters.

Respectfully submitted,

Caren Logan
By her Attorney,
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Dated: June 19, 2016

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief.

I further certify that on June 19, 2016, copies of the foregoing will be forwarded to Doreen F. Connor, Esq.

Dated: June 19, 2016

Joshua L. Gordon, Esq.

ADDENDUM