State of New Hampshire
Supreme Court

NO. 2015-0586

2016 TERM

MAY SESSION

In the Matter of

Diane Malinick and John Malinick

RULE 7 APPEAL OF FINAL DECISION OF THE
OSSIPEE FAMILY COURT

BRIEF OF PETITIONER/APPELLEE DIANE SEBASTIAN

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I. Diane and John's Assets Before Marriage

Diane Sebastian[1] is 57 years old, and has two adult daughters from a previous marriage. PETITION FOR DIVORCE (Dec. 19, 2012), *John's Appx*.[2] at 1; FINAL ORDER (Aug. 3, 2015), *Addendum* at 27. Diane enjoyed a lengthy career as a mental health worker in the Connecticut state hospital, but due to the rigors of the job, suffered a variety of injuries requiring surgery and resulting in a "service-connected disability." *Trial* at 11, 14;[3] LETTER FROM STATE OF CONNECTICUT, RETIREMENT SERVICES DIVISION (Jan. 18, 2013), Exh. 4 at 195 (omitted from appendix). Accordingly, Diane gets social security and disability benefits totaling about $3,500 per month. *Trial* at 14, 76; FINAL ORDER at 2.

Diane had received two windfalls – a $100,000 inheritance from her mother in 1997, and a $100,000 inheritance from her brother in 2000, her having years before donated him a kidney. *Trial* at 11, 70. She used these to acquire real estate in Connecticut. Thus, before the marriage Diane owned four rental units and the home in which she raised her daughters. *Trial* at 9-10, 68-75. The rental units required rehabilitation, giving her experience with construction and maintenance of real property. *Trial* at 11, 158. Totaling her benefits and rentals, Diane's pre-marriage income was about $5,000 net per month. *Trial* at 10, 15; OSC RETIREMENT PAYROLL (Oct. 31, 2014), Exh. 4 at 200 (omitted from appendix); SOCIAL SECURITY ADMINISTRATION,

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[1]Diane Sebastian has ceased using her married name, *Trial* at 310, but to ease confusion both parties are referred to herein by their first names. No disrespect is intended.

[2]The appendix filed with this brief is cited as *Appx.* at #, indicating the page number referenced. The appendix filed with John's brief is cited as *John's Appx.* at #.

[3]Trial took place over three widely-spread days in 2014 and 2015. The three-volume transcript is sequentially paginated. Accordingly, the transcript is cited herein as *Trial* at #, indicating the page number referenced.

Your New Benefit Amount (2014), Exh. 4 at 201 (omitted from appendix). In addition, she had about $198,000 in liquid savings, and a timeshare in Aruba. BANK ACCOUNTS AS OF DIANE MALINICK MARRIAGE (undated), Exh. 4 at 199 (omitted from appendix). FINAL ORDER at 2.

John Malinick is two years older than Diane, and also has adult children. He operates a sole-proprietorship tool delivery business, which buys "automotive tools and equipment, auto body tools and equipment, and machinist tools and equipment" from wholesalers, financed on John's credit card, and then distributes them to mechanics and machine shops from a box truck. *Trial* at 62-64, 488-89, 255. John characterized the operation of his business, and its non-computer paper-based bookkeeping system, as "very simple." *Trial* at 255, 324, 368, 595.

Before the marriage, John owned his home in Baltic, Connecticut, had $3,700 in the bank, an IRA worth about $36,000, and business inventory and operating cash worth about $68,000. *Trial* at 493; FINAL ORDER at 3. John had restored two antique British sports cars, together worth about $53,000. CREDIT APPLICATION (Sept. 17, 2014), Exh. 14 at 5. He has some age-related medical issues. *Trial* at 325-26.

II. Mutual Dream of a Log Home in New Hampshire

In 2003 Diane and John met on a dating site, sharing a dream of building a log home in New Hampshire. *Trial* at 25, 151, 157-58, 214, 313. Diane moved into John's house in Baltic in 2005. *Trial* at 219, 234, 371-73. During that time, John helped Diane maintain her rental units, and Diane helped John balance the books for his tool business. *Trial* at 62, 220-21.

Their arrangement was that each kept separate finances, with the intent that assets of each would eventually pass to their respective children. *Trial* at 9; FINAL ORDER at 1, 2. Diane and John had no joint accounts. *Trial* at 9, 577. They split household bills equally, and held mutual monthly reconciliations with one reimbursing the other. *Trial* at 9, 89, 206, 233-34, 361, 461, 559, 666-67; FINAL ORDER at 1.

Diane joined John in his search for the perfect piece of land in New Hampshire. In 2003, accompanied by Diane's daughter, they found it in Tuftonboro. *Trial* at 8, 25, 214-16, 313-314. In 2004 John bought the land in his name alone, as Diane was not yet committed to the relationship. DEED FROM WORKMAN TO MALINICK (Jan. 15, 2004), Exh. 2, *John's Appx*. at 126. A year later she was, and when Diane paid John half the purchase price, *Trial* at 24, 219, 285, 412-15, they put the deed into both names. *Trial* at 26, 30, 349; DEED FROM MALINICK TO MALINICK AND BIMLER (July 26, 2005), Exh. 2, *John's Appx*. at 129. In 2007, the land was placed in a trust with the intent that each's interest would pass to their respective children. *Trial* at 9, 31, 227, 350. DEED FROM MALINICK TO TRUSTEES (Sept. 18, 2007), Exh. 2, *John's Appx*. at 131.

To realize their New Hampshire dream, in 2004, 2005, and 2006, Diane sold all her Connecticut real estate, fetching collectively about $490,000. *Trial* at 10; HUD SETTLEMENT STATEMENT (Feb. 4, 2005), Exh. 4 at 188-89 (omitted from appendix).

John had established a revolving home equity line of credit (HELOC), secured by his Baltic

house. *Trial* at 12, 432-435, 457. In 2007 he unsuccessfully tried to sell his tool business, then discontinued it in 2008. *Trial* at 36-38, 122, 237, 320. In 2009 John began to ready Baltic for sale, which before it could be put on the market needed a new septic system, garage doors, a well pump, and other work. *Trial* at 375-78, 524; CHECKS FROM DIANE TO VENDORS (various dates), Exh. 5 (omitted from appendix). Diane testified she paid $3,517 for these improvements on the understanding she would be repaid upon sale of the Baltic house, which John disputes, *Trial* at 19, 40-41, 78-79, 582; FINAL ORDER at 3, and which forms questions III and IV of John's brief. The Baltic house went on the market until 2009 – after the housing market burst – and sold for just $116,000.[4] FINAL ORDER at 3.

[4]The record is ambiguous regarding the Baltic sale price; the figure cited is the finding of the court.

III. Construction in Tuftonboro

Construction began on the log home in New Hampshire in 2006, with the couple traveling weekends between Connecticut and Tuftonboro, purchasing materials and working on the house. *Trial* at 161, 219, 230.

John claims he "built [the house] with my own two hands. … I built it. I know every nail, every screw, every board in that house because I built it." *Trial* at 314. Certainly John worked on the house, taking pride, for instance, in installing dimming rope lights in the jacuzzi. *Trial* 230-31. But the record contains contracts and payments to tradesmen and laborers, suggesting much of the work was hired. For example, over $48,000 was paid in 2006 to "Cross Country Construction," for framing the exterior and interior walls, setting the logs and joists, making the deck and loft, constructing the roof and dormers, installing and trimming windows and doors, and siding and trimming the exterior. PAYMENT SCHEDULE, SCOPE OF WORK, & COPIES OF CHECKS (Apr. 1, 2006), Exh. Z, *Appx*. at 3. In addition, the town-approved building permit names "Cross Country Construction" as the builder. TOWN OF TUFTONBORO, BUILDING PERMIT APPLICATION (Feb. 16, 2006), Exh. B, *Appx*. at 1. John also claimed he did the plumbing, *Trial* at 231, but over $5,500 was paid to a plumber. CHECKS TO FRANK ROBERTSON (May 13, 2006), Exh. X.

Twice John admitted he was not the builder, but rather acted as general contractor supervising others, *Trial* at 236, 306, including hiring and firing tradesmen. *Trial* at 234. John made no effort to quantify the value of his efforts. FINAL ORDER at 5.

Although John tried to minimize the extent of Diane's involvement in the project, Diane testified that she researched and determined elements of the house because she wanted to ensure it could accommodate her disabilities and her extended family; she helped choose items including the log kit, flooring, and appliances; and she contributed labor by staining the siding and

participating in interior finishing. *Trial* at 157, 209-10, 220, 229-30, 364, 471.

The parties got married in September 2006. At the time of their wedding, John said "the house was not done by a mile," *Trial* at 482, 350-51, but Diane considered it "90 percent built." *Trial* at 13, 33-36, 211-12. Upon the town granting an occupancy permit in June or July 2007, Diane moved in. *Trial* at 13, 226.

John joined Diane in Tuftonboro in March 2008. *Trial* at 36-38, 56-57, 234, 482-84. He had already closed his Connecticut tool business, and although he made some effort to re-establish it in New Hampshire, *Trial* at 237, 320-21, he "was hoping that I could work part-time." *Trial* at 237. Thus he worked just three days a week in 2009, and even less in 2008. *Trial* at 237, 386, 494-95.

John claimed he spent his time building the house, *Trial* at 233, 320, which he insisted was not yet complete, *Trial* at 238, but Diane considered the project largely done. Rather, she observed John bought a new Ford pickup truck and traveled to faraway places with family, but made little money. *Trial* at 36, 39-40, 465; IRS FORM 1040 SCHEDULE C, Exh. 11 (omitted from appendix) (showing $32,253 gross receipts for tool business in 2008); JOHN'S FINANCIAL AFFIDAVIT (Mar. 31, 2015) (sealed, omitted from appendix) (showing self-employment income of $31,728). John admitted it was his intent to partially retire. "When I started up the business again, … I was hoping that I could work part-time, you know, three days a week and be able to – you know, and take care of everything." *Trial* at 237-38.

IV. Paying for Materials and Construction

Diane anticipated they were going to borrow to pay for the New Hampshire house, *Trial* at 11, but then learned John could not qualify for a loan because his only asset, the house in Baltic, was encumbered by the outstanding balance on his HELOC. *Trial* at 12, 65, 240; DIME BANK STATEMENT, FOR THE PERIOD 01/01/06 TO 12/31/06, Exh. 17, *John's Appx*. at 8-9. So that John could qualify to borrow, in August 2006 by check written to the HELOC, Diane reduced his balance by advancing John $50,000. *Trial* at 12, 80-81, 198-99; CHECK FOR $50,000 FROM DIANE TO DIME SAVINGS BANK (Aug. 9, 2006) Exh. 6, *John's Appx*. at 6. This $50,000 contribution to John's HELOC is at issue in question II of John's brief.

John believed they didn't need loans to build because they would spend savings. *Trial* at 307. In what appears to be a compromise, they agreed Diane would initially finance construction, and John would repay her when he sold his house in Connecticut. *Trial* at 12-13, 44 (Diane); *Trial* at 311-12 (John). It worked for a while, and they halved expenses. *Trial* at 58 (Diane); *Trial* at 403 (John).

Although John paid for much of the construction by writing checks to vendors from his HELOC account, *Trial* at 171-190, 242, 265-75, 465, Diane often directly paid for construction materials because, according to John, it earned her airline miles on her credit card. *Trial* at 317. John also acknowledged that Diane wrote many checks for large sums to his HELOC, *Trial* at 206, 431, 441-453, 454-455, 457, 503-04, and checks to him directly with a payee of "cash." *Trial* at 49, 191, 352-53. NINE CHECKS FROM DIANE TO CASH OR TO JOHN (Dec. 22, 2004 to Sept. 16, 2009), portion of Exh. 3, *Appx*. at 16.

Diane kept close track of her expenditures, transactions, payments to John by deposit to his HELOC, and payments to John in cash, because it was her understanding that John had agreed

to repay her his half. Over the course of construction, between 2006 and late 2007 when Diane considered the house completed, she calculated she had spent over $446,000 on the house. *Trial* at 43-44; LIST OF EXPENDITURES IN DIANE'S HANDWRITING (undated), portion of Exh. 3 at 43-47, *Appx*. at 11. John did not keep records, but varyingly alleged that he spent on the house between $30,000 and $60,000 more than Diane. COURT ORDER at 5.

The parties have different explanations for these transactions.

Diane understood that although John interacted with contractors and thus physically paid their invoices, *Trial* at 307, she was providing construction funding by consistently replenishing John's HELOC, thereby fronting money to John – which he would eventually repay, and from time to time did partially repay. *Trial* at 44, 171-190.

John claimed *he* was fronting the construction money, and testified that Diane made checks out to him:

> Because I was writing the larger checks out of my equity loan, and it was getting unbalanced as to who was paying what, and I said I need some – "you gotta give me some money" – because, I mean, if I have my equity loan and I'm paying interest on it and she's got money sitting in the bank earning interest, it's not really fair.

Trial at 551. Thus John said that when Diane gave him money, it was because she was reimbursing him for his outlays, *Trial* at 431, 457, 551-52, including the $50,000 advance to his HELOC. *Trial* at 242, 311-12, 453, 553-56. At times however, John equivocated, offering less categorical explanations for amounts he received from Diane. *Trial* at 409 ("Possibly."), 410 ("I do not know."), 503-04.

These differing explanations form part of question VI of John's brief.

V. Building the Garage

In 2008, about the time John moved in, the couple finished the final piece of their construction project, the detached garage, which cost about $62,000. *Trial* at 27, 59-61, 234, 278, 363, 581. Like everything else, they agreed to split the cost, and they did so equally. *Trial* at 27, 263, 285.

As part of the divorce, an appraisal was done, which John conceded measured the value of the entire property, including the garage. *Trial* at 388-89. The parties stipulated to the value of the marital residence, $349,365.50, which was the mid-point of the range the appraisal had estimated. STIPULATION (June 18, 2013), *John's Appx*. at 20; LETTER TO DIANE & JOHN FROM RANDY PARKER, APPRAISER (2011) (omitted from John's appendix), *Appx*. at 25. The appraisal warned that market value of a property is not the same as "[w]hat you paid for it," or "[t]he cost to rebuild it today." APPRAISAL (2011) at 83, *Things that Don't Affect the Value of Your Property* (omitted from John's appendix), *Appx*. at 26.

Nonetheless, in the divorce proceedings John requested the court award him dollar-for-dollar his share of the cost of the garage. Echoing the appraisal, Diane argued that value and cost are not the same, and that the stipulated value of the entire property is what should be addressed by the court. *Trial* at 391, 393-98. This issue forms question I of John's brief.

VI. Cash in the Rafters

In his interrogatory answers, John noted his "2006 net worth" included the New Hampshire land and house, two bank accounts, his business, and personal property. INTERROGATORY QUESTION AND ANSWER #14 (Mar. 31, 2015), Exh. 22, *Appx*. at 27. Although the evidence suggests John is a frugal man, *Trial* at 367, he had discontinued his Connecticut tool business, and there is nothing in the record showing an ability beyond his day-to-day living expenses to generate sums of cash for a construction project. *Trial* at 320, 366-67. Thus, during trial John was confronted regarding the source of the money he claimed to have paid Diane.

On the first day of trial, in November 2014, John testified he knew Diane had more money than he. *Trial* at 379. John admitted that even before he moved to New Hampshire, "as my cash was running lower and lower, I had to cash in $10,000 out of an IRA so I could continue to pay my share of the bills." *Trial* at 237, 320. (When asked why he had not disclosed an IRA, John testified, "I never considered it assets because – no, I'm serious. I never considered it assets because it was there for some day when I retired." *Trial* at 589.)

On the second day of trial, in March 2015, John claimed that much of the money he purported to give Diane was in cash, *Trial* at 348, 505, although he was candid that "I cannot prove" it. *Trial* at 468. He first claimed that his source of cash was his business, and admitted intermixing personal money with business assets. *Trial* at 308, 462-64, 522. Upon being pressed on the fact that his financial affidavit showed his expenses exceeded his income, he then claimed he borrowed cash from friends, "[b]ecause it's what I have to do to survive," but he did not specify from whom, when, or how much. *Trial* at 522.

On the third day of trial, in May 2015, John claimed that as much as half the money he purported to have given Diane was in cash. *Trial* at 599. When questioned about why such sums

were not disclosed in his interrogatory answers, tax forms, or any other documentation, he asserted: "cash reserves that I had that [Diane] knew nothing about." *Trial* at 593-95. After Diane's attorney was unable to ascertain any details about the cash, the court inquired: "I've been withholding this desire for some time now. Where'd you keep the cash at?" John answered: "In the rafters." *Trial* at 604.

VII. John Partially Reimbursed Diane for Construction

It is undisputed that in 2009, just over a year after John moved to Tuftonboro, he wrote several large checks to Diane, including three totaling $114,200. CHECK FOR $25,000 FROM JOHN TO DIANE (June 5, 2009) Exh. 1, *John's Appx*. at 14; CHECK FOR $44,200 FROM JOHN TO DIANE (June 5, 2009) Exh. 1, *John's Appx*. at 18; CHECK FOR $45,000 FROM JOHN TO DIANE (May 29, 2009) Exh. 1, *John's Appx*. at 16.

Diane testified that these were partial payments of the money John owed her for the construction she financed, *Trial* at 19-21, 43, and that she deposited the checks into a 12-month CD at Laconia Savings Bank. *Trial* at 19-02, 346-47. John said the checks were not repayments, but were the proceeds of his Baltic house, *Trial* at 331-32, 605, which he intended to save for a new personal truck, a new tool truck, and other items. *Trial* at 331-32, 502, 518-19. The court did not credit John's testimony as to the source or intended use of the money, nor believe that the Baltic proceeds would cover the checks. COURT ORDER at 3. John said he asked Diane to deposit the three checks into her Connecticut credit union account, which he claimed earned a higher interest rate than his. *Trial* at 332, 347, 500, 575.

Diane denies that John requested she invest the money for him. *Trial* at 20. She noted that such commingling would not be in keeping with their arrangement to maintain separate finances for the benefit of their respective children. *Trial* at 454. She also pointed out that there is no basis for believing she had a higher interest rate, because John had opened the same type of account in Connecticut, *Trial* at 147-50, 501, which had the same interest rate. LETTER FROM CSE CREDIT UNION TO DIANE (Apr. 1, 2015), Exh. 28A, *Appx*. at 28 ("there is only one interest rate"); *Trial* at 613-14, 616-17; 634-36.

John nonetheless accused Diane of not doing with the money what he told her, and in the divorce requested its return. *Trial* at 333, 335. This issue forms question V of John's brief.

VIII. It's My House

John wants the house because he always yearned for a log home in New Hampshire, he looked for land for a long time, he claims he built it, and he says he needs it to operate his business. *Trial* at 313-14, 498-99. Diane wants the house because it is replacement for her Connecticut real estate investments, she mostly paid for it, and she wants a place that can accommodate her daughters and grandchildren when they visit during holidays. *Trial* at 13-18, 75 157-58, 193, 637.

To ensure that she could afford a family court property decree, were she were awarded the house and ordered to buy out John, Diane was pre-qualified for a buyout up to $200,000. *Trial* at 15, 17, 29; MORTGAGE PRE-QUALIFICATION (Dec. 4, 2012) (attached to Diane's Feb. 21, 2013 Financial Affidavit), *Appx*. at 10.

John claimed he could afford a buyout, *Trial* at 390, but there is no letter of credit in the record, and he has no other adequate known asset. *Trial* at 596-98.

Who should get the house built in this short marriage, and why, forms the remaining portion of question VI of John's brief.

STATEMENT OF THE CASE

I. Separation and Divorce

The parties had been in counseling, and agreed it was not working. *Trial* at 124, 239. Diane noted what she considered unstable behaviors, and in April 2012 moved out of the marital bedroom. During Thanksgiving 2012 John's drinking caused her some embarrassment, thus deciding Diane on a divorce. *Trial* at 125-26, 386. There was a restraining order, cross allegations that one forced the other out of the house, accusations that personal property was removed or destroyed, and suggestions that door locks were surreptitiously re-keyed. *Trial* at 124-133, 201, 378-79, 315, 335-37.

Diane filed for divorce in December 2012. PETITION FOR DIVORCE (Dec. 21, 2012), *John's Appx*. at 1. The parties stipulated on many issues, including the value of the Tuftonboro real estate. PARTIALLY AGREED-TO TEMPORARY DECREE (Feb. 21, 2013) (omitted from appendix); STIPULATION (June 18, 2013), *John's Appx*. at 20. They did not agree on who gets possession of the house, but John has occupied it since the separation. PETITIONER'S PROPOSED TEMPORARY DECREE (Apr. 9, 2013) (margin order) (omitted from appendix). When Diane was ousted, John felt so pleased "I was like dancing in the street" because "[s]he wasn't fighting with me anymore." *Trial* at 519, 526.

II. Trial and Property Division

The court held a three-day bench trial, with the first day in November 2014, the second four months later in March 2015, and the third six weeks after that in May 2015. Both parties were represented. Diane testified for two-thirds of Day 1; John testified for the balance of Day 1, all of Day 2, and most of Day 3; there were no other witnesses. Both parties submitted voluminous exhibits.

In its order, the court found that Diane brought to the marriage about $688,000 in assets,

plus social security and disability benefits totaling about $3,500 per month. FINAL ORDER (Aug. 3, 2015) at 2, *Addendum* at 27. It found John's pre-marital assets were about half that. FINAL ORDER at 3. The court held that the marriage was short-term. FINAL ORDER at 1. It found that except for the Tuftonboro house, the parties kept their assets separate, that they reconciled each month, and that they intended their individual property interests to pass to their respective children. FINAL ORDER at 1-2. The court found the value of the house with garage was as the parties stipulated. FINAL ORDER at 2.

As to the contribution each made to the New Hampshire house, and given their sharing arrangements, the court found that John agreed to reimburse Diane for her contributions upon selling Baltic. FINAL ORDER at 1. It found they jointly contributed to Tuftonboro's construction, both in money and sweat. FINAL ORDER at 1-2. Although the court noted it could determine with some exactitude Diane's contributions to the house, it could not exactly quantify John's because:

> There was so many conflicts in [John's] testimony about cash resources, where money came from to pay toward the home construction costs and what money was used for what purposes, that [it] assigned only limited credibility to [his] testimony, and [that] the exhibits he presented do not generally and necessarily corroborate his testimony.

FINAL ORDER at 5. Given this, the court held:

> [T]he preponderance of the evidence presented leads to the conclusion that [Diane] provided the vast majority of the financial contribution required for the construction of the marital home, and [John] provided the vast majority of the valuable physical work in constructing the home.

FINAL ORDER at 5.

On balance, the court therefore found "the parties are in an equal position relative to the value of the marital real estate created by them," and awarded each exactly one-half the stipulated equity in the real estate. FINAL ORDER at 5. The court awarded the house to Diane. FINAL DECREE ¶ 15 (Aug. 3, 2015), *Addendum* at 34.

The court found that the $50,000 check Diane gave to John was a "contribut[ion] to pay down [John's] home equity line of credit on his Connecticut home," and likewise the $3,517 Diane paid for improvements to Baltic were "contribut[ions] to the costs of getting that home ready for sale." FINAL ORDER at 6. Therefore those amounts "are deemed an offset against [John's] equity value in the marital home." FINAL ORDER at 6.

Regarding the three checks totaling $114,200 which John had given to Diane, the court found:

> [T]he preponderance of the evidence presented leads to the conclusion that [Diane's] version of what these payments were intended to be is true, and there was no agreement to use the funds for a variety of purposes, including the investments, home construction costs and the acquisition of vehicles for [John].

FINAL ORDER at 4.

Each party was awarded their bank and investment accounts, daily-use vehicles, and personal property; Diane retained her timeshare, and her disability and social security income; John kept his business assets, trailer, tools, guns, and valuable antique cars. FINAL ORDER at 6-7. The court denied John's request for alimony and health insurance, and also denied Diane's request for rental expenses and litigation costs. *Trial* at 82; FINAL ORDER at 7.

Overall, after awarding Diane the house and each party half its value, and then subtracting the $53,517 Diane already gave John by contributing to his HELOC and paying for improvements to Baltic, the court determined that Diane owes John $117,700.[5] FINAL ORDER at 6. Consequently, the court found that the total value awarded to Diane was $349,275, and the value awarded to John was $339,845; and that the split, "albeit not equal" is "fair and equitable." FINAL ORDER at 7. Finally, the court put its final order into effect pending this appeal. FINAL ORDER at 1.

[5]Diane concedes the court miscalculated, and this figure should be $121,164.51

III. Reconsideration and Appeal

John's request for reconsideration, to which Diane objected, was denied. MOTION FOR RECONSIDERATION & CORRECTION (Aug. 6, 2015) (margin order), *John's Appx.* at 106 & 112; OBJECTION TO MOTION FOR RECONSIDERATION (Aug. 13, 2015) (omitted from appendix); ANSWER TO OBJECTION TO MOTION FOR RECONSIDERATION (Aug. 21, 2015), *John's Appx.* at 115; REPLICATION TO ANSWER TO OBJECTION TO MOTION FOR RECONSIDERATION (Sept. 3, 2015) (omitted from appendix). John appealed several issues, all grounded on the discretion of the family court, as detailed in his brief.

SUMMARY OF ARGUMENT

All the issues John raises are committed to the discretion of the trial court. Diane first defines that discretion, and then lists each issue with an explanation of why the court credited Diane's position and did not believe John's testimony. Sprinkled in John's brief was an allegation that the trial court did not adequately explain its factfinding in its seven-page single-spaced narrative, but that was not preserved nor developed. Accordingly, this court should affirm.

ARGUMENT

I. Standard of Review for All Issues: Discretion of the Trial Court

"As [this court] afford[s] trial courts broad discretion in determining matters of property distribution in fashioning a final divorce decree, [it] will not overturn the trial court's decision absent an unsustainable exercise of discretion." *In re Henry*, 163 N.H. 175, 183 (2012). When the court is "presented with conflicting evidence … [i]t is the fact-finder's function to weigh conflicting evidence and to assess its credibility." *State v. McGann*, 122 N.H. 542 (1982).

"[M]arital property is not to be divided by some mechanical formula but in a manner deemed just based upon the evidence presented and the equities of the case." *Matter of Kempton*, 167 N.H. 785, 799 (2015) (quotation omitted). Property settlements should disentangle the parties if possible. *See Bonneville v. Bonneville*, 142 N.H. 435, 438 (1997) (interpretation of settlement).

An equal division is equitable, *In re Watterworth*, 149 N.H. 442 (2003), as is an unequal division, according to the circumstances, *Hanson v. Hanson*, 121 N.H. 719 (1981), if equity requires. *In re Valence*, 147 N.H. 663 (2002); *Fabich v. Fabich*, 144 N.H. 577 (1999) (overruled on other grounds, *In re Preston*, 147 N.H. 48, 50 (2001)). A party cannot complain that the property division is unequal if he did not present evidence of value. *In re Jones*, 146 N.H. 119 (2001) (party did not present evidence on value of business); *In re Ramadan*, 153 N.H. 226 (2006).

The assets a party brought to the marriage is a valid reason for an unequal distribution, *In re Sarvela*, 154 N.H. 426 (2006) (wife invested own funds in marital home); *Hoffman v. Hoffman*, 143 N.H. 514, 520 (1999), as are the comparable contributions made by each. *Flaherty v. Flaherty*, 138 N.H. 337 (1994). In determining distribution, the court may consider the marriage's duration. *Id.* The court may award an entire asset, including the marital home, to one party. *In re Costa*, 156 N.H. 323 (2007); *In re Peirano*, 155 N.H. 738 (2007).

When a court determines that an unequal distribution of property is warranted, it should state its reasons, *In re Peirano*, 155 N.H. 738 (2007), which may be in narrative form, *In re Letendre*, 149 N.H. 31, 35 (2002), or in list form if a party requests specific findings and rulings. *Magrauth v. Magrauth*, 136 N.H. 757, 763 (1993).

This court will decline to address issues unpreserved for review, *In re Henry*, 163 N.H. 175 (2012), or undeveloped on appeal. *In re Mallett*, 163 N.H. 202, 215 (2012).

II. Who Gets the House?

John argues that he should have been awarded the house, with an order that he should pay Diane her share. *John's Brf.* § VI.

It is apparent both parties have an emotional attachment to the Tuftonboro home, although perhaps for different reasons. Together they chose the land, together they determined the design, and together they built the house; nothing in the record suggests one had a greater bond to the home than the other. Thus any argument regarding the beauty or uniqueness of the property, or a party's connection to the land or the house, applies equally to both John and Diane, and therefore is not determinative.

Moreover, the court was generous to John, and he should have little reason to complain.

John came to the marriage with little liquidity, had quit his job in Connecticut, and only tepidly tried to reestablish it in New Hampshire. He admitted that his intent after the move was to partially retire, apparently hoping to live off Diane's largess, enjoying trips to her timeshare in Aruba. Diane was understandably annoyed that John did not show much motivation to perform his duty to their sharing bargain.

It is not disputed that John acted as general contractor for the building project, and certainly he did some of the building work himself. Despite his memory of driving every nail, John made no effort to quantify his industry. Diane thought he did less than he claimed, and the court charitably overlooked any exaggeration. By giving him half the house's value, he probably received more than his due.

By securing a letter of credit, Diane demonstrated she had the ability to compensate John for his share of the value of the house, if that became necessary. John gave the court no such assurances, and the record shows he does not have the means to buy out Diane's half. Awarding

the house to John would lead to lingering entanglements which the court was wise to avoid.

Although the Tuftonboro house provides John's part-time tool business a convenient setup, nothing in his lengthy testimony suggests he needs anything more than a place to park his truck and a desk to do his books.

As the court had discretion to award the house to Diane, and John has alleged no unlawful exercise of that discretion, this court should affirm.

III. The Cost of the Garage is Subsumed in the Value of the Real Estate

The garage cost about $62,000 to build, and each party already contributed their half. John argues that in the property settlement Diane should give him a dollar-for-dollar reimbursement for his share of its separate construction cost. *John's Brf.* § I.

The cost of the garage is already subsumed in the value of the property in its entirety, and John's argument ignores the difference between value and cost. *See, e.g., Eno Brick Corp. v. Barber-Greene Co*., 109 N.H. 156, 160 (1968) (distinguishing between "the price paid and the fair market value" in context of contract damages); Annotation, *Modern Status of Rule as to Whether Cost of Correction or Difference in Value of Structures is Proper Measure of Damages for Breach of Construction Contract,* 41 A.L.R.4th 131 (Whether "measure of the owner's damages is the cost of correcting or completing the construction, on the one hand, or the difference in value between the structure as built and the structure as contracted for, on the other.").

Separating the garage from the rest of the property is arbitrary, and would result in double-counting. John could, for instance, claim that the cost of the kitchen sink, which the parties presumably split, should be calculated separately; that Diane should first pay him half the sink's separate cost, and then again pay him half its value as a component of the property.

The appraisal, to which both parties stipulated, explained its valuation was of the entire real estate, including the land, the house, and the garage, and warned that the value of a property is not the same as "[w]hat you paid for it," or "[t]he cost to rebuild it today." The court found that the parties equally contributed to the property's value, which includes the garage. After awarding the property to Diane, the court appropriately exercised its discretion in ensuring each received half its total agreed value, and this court should affirm.

IV. $50,000 Check from Diane to John's Equity Loan was a Contribution to Construction Costs

Over the course of construction, Diane gave John money, with which John paid vendors and contractors. One of the transfers from Diane to John was a $50,000 check from Diane to John's HELOC. Whatever the parties called the transaction, the court did not believe John's claim that Diane owed him money and the $50,000 was her payment. *See John's Brf.* § II. The court's skepticism was well-founded, as it is apparent Diane had more resources and liquidity, that John could not pay down his HELOC until Baltic sold which was affecting his credit, and that the parties intended the money be repaid to Diane. The court accurately understood the check was Diane paying down John's HELOC. This court should affirm.

V. $3,000 + $517 Was Money Diane Gave John to Ready Baltic For Sale

John's house in Baltic needed work before it could be marketed, and Diane paid for improvements to its septic, garage doors, and well. The court did not believe these items were ordinary household bills, *see John's Brf.* § III & IV, but investments in John's real estate separate from the parties' regular reconciliations. This court should affirm.

VI. Three Checks Totaling $114,200 Were John's Repayments to Diane for Construction Costs

John wrote Diane three checks, all within a week of each other in 2009, totaling $114,200. *See John's Brf.* § V.

The court did not credit John's story that the money was the proceeds of the Baltic sale, because it didn't believe him generally, and because the numbers didn't add up. The court also did not believe John asked Diane to invest the money for him so that he could buy new trucks. John had a similar bank account with the same interest rate, and given the good reasons for separate finances, there would be no sense in Diane maintaining John's investments.

Rather, John owed Diane money for construction, and that's what the checks were. This court should affirm.

VII. Trial Court Adequately Detailed Its Factfinding

Sprinkled throughout John's brief is an allegation that the court's findings were insufficiently expressed, *John's Brf.* at 11-12, 15, 18, 20, despite the court's seven-page single-spaced narrative, and its completed final decree form. The issue is mentioned in passing, with no developed argument. To the extent there is an issue, it was not preserved in the trial court, nor in John's notice of appeal. Accordingly it was waived. *In re Mallett*, 163 N.H. 202, 215 (2012); *In re Henry*, 163 N.H. 175 (2012). Moreover, John did not request specific findings. *In re Peirano*, 155 N.H. 738 (2007); *In re Letendre*, 149 N.H. 31, 35 (2002); *Magrauth v. Magrauth*, 136 N.H. 757, 763 (1993). This court should decline to address the matter, and affirm.

CONCLUSION

In this short-term marriage, the trial court did the reasonable thing. It gave Diane the house, thus avoiding entanglements which would otherwise be necessitated by John's apparent inability to buy out Diane's share. John has given no reason to revisit that. On the other issues, the trial court was forced to discount John's credibility, particularly after his last-minute discovery of cash in the rafters. Accordingly, this court should affirm.

Oral argument is requested to aid the court's understanding of the facts.

Respectfully submitted,

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Dated: May 1, 2016

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CERTIFICATIONS

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

I further certify that on May 1, 2016, copies of the foregoing will be forwarded to Diana G. Bolander, Esq.

Dated: May 1, 2016

Joshua L. Gordon, Esq.

ADDENDUM