THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

Sullivan County

5th Circuit – Family Division – Claremont

In the Matter of:
C C and J D
Docket No. 220-1999-DM-

FINAL ORDER ON AMENDED PETITION FOR CONTEMPT AND ATTORNEY'S FEES; PETITION TO BRING FORWARD AND MODIFY DIVORCE DECREE; PETITION TO BRING FORWARD AND MODIFY CHILD SUPPORT; PETITION FOR ACCOUNTING and PETITIONER'S VERIFIED MOTION FOR AN AWARD OF RETROSPECTIVE AND PROSPECTIVE ATTORNEY'S FEES

A final hearing in this matter was held over 14 days in February and April 2015. C C was represented by Attorney Arend Tensen and Attorney Howard Myers; I also appeared as co-counsel, although she did not attend chambers conferences because of her status as petitioner. J D was represented by Attorney John Loftus; on one occasion his partner, Attorney Barney Brannen appeared to cross-examine a witness. Petitioner called ten witnesses; respondent called six.

The parties were divorced in February 2000, by way of a Permanent Stipulation and uncontested divorce hearing. The current action was brought forward in July 2011. Ms. C filed a (1) Petition for Contempt, (2) a Petition to Change Court Order and (3) a Petition for Contempt and Attorney's Fees; Petition to Bring Forward and Modify Divorce Decree; Petition to Bring Forward and Modify Child Support; Petition for Accounting. Later, on October 25, 2011, she filed a Motion to Amend Petition, which was granted. Her Amended Petition, filed on that date, consolidates all of the prior claims and alleges the following claims for relief: Petition to Reopen and to Modify Property Settlement ("*Shafmaster* claim" – Mr. D failure to disclose assets or the value thereof on his financial affidavit; undue influence; fraudulent conveyance pursuant to the NH Fraudulent Transfer Act; fraud, deceit and misrepresentation); Petition to Enforce and for Contempt and for Attorney's Fees relating to, among other things, reimbursement for miscellaneous and tuition expenses for the children; Petition to Bring Forward and Modify Child Support; and Petition for Accounting of the children's trust funds. On March 4, 2014, Ms. C filed Petitioner's Verified Motion for an Award of Retrospective and Prospective Attorney's Fees, a ruling upon which was reserved for final hearing. Although many other pleadings were filed between June 2011 and the final hearing in February and April 2015, they related largely to discovery (except for a matter involving S school enrollment, decided in August 2014) and have been resolved. Ms. C had filed a Motion for Retroactive and Prospective Alimony on October 1, 2012, but, at the final hearing, she withdrew her alimony request.

History of the Marriage and Pre-Divorce

The parties were married in October 1993 and divorced in February 2000. They have two children, , a college student, and , who is 18 years old and a junior at in Meriden, NH. C C has remarried and resides in the Cornish home that the parties purchased just prior to the 2000 divorce and which was awarded to Ms. C in the divorce settlement. J D resides in Vermont with his second wife. Although the divorce was 15 years ago, the history of the marriage is relevant to Ms. C 's claims for relief.

J D is a member of a very wealthy family, prominent in New York City real estate development. The Organization, which is owned and operated by the third generation of the family, owns and operates many valuable commercial and residential properties in Manhattan. Mr. D worked for the Organization at the time of the parties' marriage in October 1993. Ms. C left a sales position in Washington, DC to live with Mr. D in a home he purchased in Katonah, NY, and enrolled in Benjamin Cardozo Law School in September 1993. She graduated in 1996, passed the New York Bar exam, and went to work for a small New York law firm approximately two days a week. Mr. D was separated from his employment at the Organization in January 1998, but retained his financial interest in family holdings and trusts.

was born on August 14, 1995, and was born December 22, 1996. Mr. D had been diagnosed with in June 1989, and was careful about his diet, followed an exercise routine, and tried to avoid stress. Ms. C was an accomplished athlete and during the marriage trained for and ran in marathon races. Both parties took flying lessons, and Ms. C obtained her pilot's license and qualified for an instrument rating. The parties purchased an airplane for Ms. C 's use. They moved to New Hampshire from New York in June 1999, living in their Wolfeboro lake house while extensive renovations were made to the home in . The divorce petition was filed in July 1999.

The parties' relationship was contentious from almost the beginning of their marriage. The parties had frequent arguments over lifestyle choices and relationship issues. Ms. C testified that Mr. D tried to control her diet and appearance, was not supportive about her attendance at law school or her decision to work part-time after the children were born, had no empathy for her during a miscarriage, allowed her little control over financial decisions, threatened to "make her disappear" (like a relative's spouse) and demeaned her constantly. Mr. D testified about Ms. C 's histrionic behavior during arguments, her inability to negotiate in a healthy manner, and his habit of giving in to her every demand as the only way to avoid conflict. They both testified about the physical nature of many of these arguments, both claiming to be victims of the other's abuse. Ms. C testified about her husband throwing her against a wall, pushing her down stairs, smashing her head against a wall resulting in a concussion, perhaps unintentionally hitting her with a car, along with other general allegations of his becoming "physical." Mr. D claimed that they engaged in mutual altercations and on two occasions she kicked him and broke his ribs and on three occasions scratched and bruised his face. Many times after a fight, Mr. D would leave the family for several days or even, on one occasion, for weeks. Ms. C understood this to be an intentional abandonment in order to punish her for disagreeing with him; Mr. D claims that he did this to provide peace for the children and to avoid the stress that exacerbated his symptoms.

It seems that the marriage reached a crisis point in 1998 and 1999. The arguments escalated and Ms. C 's employer noticed a change in her demeanor. He testified that toward the beginning of 1998, unlike her usual professional manner, she appeared disorganized, disheveled, weepy, unreliable and very fragile. In November 1998, Ms. C was taken into custody and briefly hospitalized after Mr. D called the police following what Ms. C. describes as a "breakdown." The parties disagree over the details of the incident (Ms. C believes Mr. D manipulated the police to take action; Mr. D claims he was fearful for her – and his – safety), but there is no doubt that she resisted police intervention. Ms. C and the children went to New Hampshire for two weeks and, upon their return, she and Mr. D agreed that the family should move to New Hampshire permanently. In January 1999, they signed a purchase and sale agreement on the house in . The possibility of divorce was clearly raised about this time; for example, Mr. D asked Ms. C to execute a post-nuptial agreement covering the disposition of the home in the event of a divorce. They argued about it and no post-nuptial agreement was ever executed. In

January 1999, Ms. C suffered a head injury incurred in the course of a heated argument (the details of the incident differ substantially). At about the same time, Mr. D suffered a cracked rib in the course of another argument (the details of that incident are also in dispute). Both parties received medical attention as a result of these injuries.

The parties closed on the house purchase in May 1999 for a sales price of $775,000. In June 1999, they moved into their Wolfeboro, NH lake house while the home (which had been a bed and breakfast inn) was undergoing extensive renovations, including the building of a sun room, and becoming furnished. The parties moved into the home in July 1999, after spending about $150,000 in renovations, furniture and decorations. Mr. D had been there about two weeks when the parties agreed to divorce, following a heated argument related to Ms. 's attendance at a road race in New York over the weekend. Mr. D moved into one of his rental properties in Wolfeboro, and the children remained with their mother in . I believe they had some preliminary discussions at the time, or shortly after, about a divorce settlement. It is Mr. D s memory that the general outline of the discussions at that time was that Ms. C would receive the home and $1 million, and the Wolfeboro lake house would be held in trust for the children. Ms. C remembers that discussion as an ultimatum, allowing no further negotiations.

Subsequently, both parties retained legal counsel. Ms. C , through counsel, filed for divorce on July 27, 1999. A temporary agreement was reached and a temporary stipulation filed with the court on September 28, 1999. Negotiations continued and, finally, a Permanent Stipulation was filed on February 18, 2000, with an uncontested divorce hearing held on February 23, 2000. The Permanent Stipulation provided for the following: (a) the children would live with their mother, see their father on alternate weekends and Wednesday nights and holidays and vacations; (b) child support would be at the rate of $11,500 per month until entered 9th grade, and then $10,500 per month until reached the age of 18 or graduated high school, whichever occurred first; (c) child support was not modifiable, but if a court decided to decrease child support nonetheless, the parties were required to make an independent adjustment so that Ms. C receives no less and no more than $11,500 or $10,500 per month, until reached age 20 or graduated from high school, whichever occurs first; (d) child support could be paid from a trust fund established for the benefit of the children, but that would not preclude either party from requesting funds from the trust to pay for miscellaneous expenses for the children; (e) Mr. D was responsible for all of the children's health-related expenses, including health insurance; (f) the children's secondary school expenses would be paid from any trust funds in the children's names and, when exhausted, would be Mr. D 's sole responsibility; (g) the children's post-secondary educational expenses would be paid in the same manner; (h) the parties would be equally responsible for the children's miscellaneous expenses (subject to prior mutual agreement), although either or both could seek contribution from the children's trusts toward those expenses; (i) Ms. C received the motorboat and the airplane; (j) Ms. C was awarded the home in along with all furnishings; (k) Ms. C was awarded the summer home in Wolfeboro, along with all furnishings; (l) Mr. D was awarded two rental properties in Wolfeboro, the prior marital home in Somers, NY, and his home in West Lebanon, NH; (m) Mr. D would pay Ms. C the sum of $1 million as a property settlement; (n) the parties waived further discovery, and agreed that they had had the opportunity to obtain valuations of business interests and real estate holdings and, if they did not, it was of their own choosing, and that they each disclosed their income and assets, although they acknowledged that some assets had been valued and some had not; they agreed that, nonetheless, the stipulation was fair, just and reasonable, and represented an equitable division of the property acquired during their marriage.

The parties' final divorce decree became effective February 23, 2000.

Post-Divorce History

Ms. C took the NH Bar Examination, passed and found employment with Attorney law office in Lebanon, NH. Mr. D moved to Vermont. Ms. C married , the parties' contractor, in the summer of 2002, after he and his first wife divorced. According to Ms. C , the parties' relationship between the time of the divorce and mid-2002 was "unbelievably hostile." She testified that Mr. D would yell at her and wouldn't trust her requests for reimbursement for the children's expenses. Mr. D divorce counsel, Attorney Hanson, got involved and was the recipient of some angry emails from Ms. C , threatening, among other things, various legal actions.

In May 2002, Ms. C , acting *pro se*, filed a Petition to Enforce for Contempt and for Attorney's Fees. In it, she claimed that, contrary to the terms of the Permanent Stipulation, Mr. D refused to reimburse her for his share of the children's miscellaneous, even though he had assented to various programs and activities. She requested reimbursement of $1,932 in arrearages for ballet and gymnastics lessons, ski programs and equipment, and summer camp; $929.50 in attorney's fees; interest payments; and, if necessary, incarceration. In a subsequent pleading, she asked for attorney's fees in the amount of $1,500 for her time and alimony in the amount of $1,000 per month in the event that Mr. D prevailed in that case. The Court, in a September 9, 2002 Order on Pending Motions, finding that "the parties evidently have retained some level of hostility toward each other since the divorce," ordered Mr. D to pay $1,882 in reimbursement, did not find him in contempt of court, denied the request for attorney's fees, and clarified the miscellaneous expense reimbursement provision of the Permanent Stipulation. Some important clarifications were that continuing enrollment for an activity to which both parties had previously given consent did not require new or additional consent, although consent could be expressly withdrawn; any kind of consent would be considered full consent and subject to reimbursement; and any request for reimbursement toward miscellaneous expenses from any trust naming the children as beneficiaries would require notice to the other parent.

Subsequently, at least from the testimony at trial, the parties' relationship settled down over the next six or seven years, although it was not without its difficulties. Hostilities arose again sometime in 2009, about the time that filed for a child support modification against , now Ms. C husband. Mr. D and his current wife had developed a friendship with , and Ms. C found the filing of the child support case against Mr. to be suspicious, especially after it was withdrawn.

Ms. C testified that, on March 30, 2009, she met with Mr. D at her office to ask about trust fund issues because she knew that a trust had been or was going to be established from which Mr. D could pay his child support. (According to a letter from Ms. C to Attorney Hanson on June 2002, she was aware that "in another few years... [Mr. D] will be tapping into the trust that comes into effect.") Shortly thereafter there was a flurry of emails indicating that Ms. C was considering seeking access to the trust for the payment of the children's miscellaneous expenses, as permitted in the parties' Permanent Stipulations. In April and May, there were emails about the identification of the trustee who would be making distributions (eventually determined to be Louise at) and about Mr. D s claim that (who had not been a trustee of the preceding trust for two years) was requesting financial information from Ms. C so a determination could be made about her need for trust distributions. In the beginning of May 2009, Ms. C asked that the children's trust pay Cardigan Mountain middle school tuition. The request was denied, apparently upon the suggestion of Mr. D , who was consulted by the trustee in an attempt, apparently, to ascertain the intent of the grantor.

The children's trust fund arose from the terms of a 10-year Grantor's Annuity Trust (GRAT) established by Mr. D in 1999, at the same time other members of his family were doing the same thing. According to Attorney Joseph McDonald, who testified as an expert on trusts, the GRAT became a popular estate planning tool just about the time of the parties' divorce. In its very essence, a GRAT is funded with assets that pay the donor a time-limited fixed annuity (in this case for 10 years); at the end of the term, the remaining value in the trust is passed on to a beneficiary (in this case,). The purpose is to legitimately avoid certain federal income tax payments. The annuity payment is non-discretionary during the life of the GRAT. In this case, at the end of the GRAT term, the beneficiaries received the remainder in the form of a trust, which, while irrevocable, is subject to discretionary distributions by the trustee.

I think it was Ms. C 's testimony that the first time she realized that the children's trust had resulted from a GRAT (which had been disclosed but not valued on Mr. D 's financial affidavit that was filed at the time of the divorce) was in December 2010 from discussions she had with Louise , the trustee, although, according to her testimony, she was not aware of what a GRAT was at that time. Ms. C also testified that it was also about this time that she felt that she had been "duped" by Mr. D during the divorce negotiations. According to the Permanent Stipulations, she is able to request distributions from the children's trust to help pay for their miscellaneous expenses, but she had been unsuccessful thus far in receiving any payments, she believed, because of Mr. D s interference. She felt that Mr. D never intended for her to be able to access the trust fund and induced her to sign the divorce agreement under false pretenses. Further communications with Ms. at , continued to result in unsatisfactory results for Ms. C . On July 15, 2011, she began this action.

Petition to Reopen and to Modify Property Settlement

A. ***Shafmaster* Claim: The Respondent Failed to Disclose the Marital or Personal Assets or the Value Thereof on His Financial Affidavit**

The parties each submitted two financial affidavits during the course of the 1999-2000 divorce case, one at the time of the temporary agreement and another at the time of the Permanent Stipulation. Neither parties' financial affidavits were perfect (Ms. C failed to include rental income; Mr. D failed to include his 401k and IRA, neither of which had substantial value in the context of this case). While Mr. D income disclosure on his financial affidavit was allocated oddly, Ms. C 's expert witness, Seth Weber, testified that the income he disclosed on the 1999 and 2000 financial affidavits was consistent with the income reported on the parties' 1999 tax return; Attorney Hanson, Mr. D s divorce attorney testified that the income section of the financial affidavit was based on Mr. D s 1998 taxable income. Although the reporting of taxable income would not take into account Mr. 's receipt of the GRAT annuity, which is (according to Attorney MacDonald, an expert witness) taxed to the GRAT and not the recipient, the main issue regarding mandatory disclosure arises with the quality of Mr. 's disclosure of valuable trust assets and other holdings.

Mr. testified that, at the time he was completing the financial affidavits, he did not have his financial records in his possession, thinking they were still at the parties' home in Katonah, NY. He also testified that he was somewhat estranged from the family and believed that obtaining detailed information about his assets – all family holdings – would not be an easy task. Once Mr. retained Attorney Hanson as counsel for the divorce, Attorney Hanson took responsibility for assuring that all litigation requirements – including court rules – were met. Attorney Hanson testified that he prepared Mr. 's financial affidavits based on what he had learned from his client and from a lawyer that Mr. 's father had retained in New York. Through this method, Attorney

Hanson was able to identify Mr. 's assets. He included any (approximate) account balances that Mr. provided to him. Because, as he testified, Attorney Hanson's practice has always been to list everything that might be considered a marital asset even if the value has not yet been ascertained, he stated "unknown" as to the value of those assets which did not yet have a determinative value.[1]

Mr. Durst's 1999 financial affidavit states: "The Respondent [ ] has significant investments and business interests. The Respondent is in the process of compiling the requested information. In the meantime, Respondent is able to provide the following..." This financial affidavit, containing this caveat was, according to all witnesses, the financial affidavit that was available during the time of the parties' divorce settlement negotiations from September 1999 until the final agreement was reached in January 2000. During this period of time, extensive communications occurred between Attorney Hanson and 's lawyer, Attorney Ronna Wise. It appears that there were diligent efforts toward settlement – upon the urging of both clients – and, in September 1999, there was an agreement that Ms. C s interrogatories would not need to be answered by Mr. D if the case settled. Attorney Hanson testified that, with this agreement and with a settlement imminent, he did not continue to make efforts to obtain discoverable values of the disclosed assets. Attorney Wise testified that both she and Ms. C were well aware that they did not have the values for Mr. D s assets; indeed, Attorney Wise sent a letter to Ms. C notifying her that she was unable to recommend that she sign the Permanent Stipulation because they had no knowledge of Mr. D 's assets. Ms. C , nevertheless, signed a waiver for Attorney Wise because she wanted to proceed, and the case settled.

Mr. D filed a new financial affidavit dated January 4, 2000 to accompany the Permanent Stipulation filing. This one stated: "The respondent has significant investments and business interests. As of the date of this financial affidavit, the Respondent has not obtained complete financial information for a number of assets/business interests."

The parties' Permanent Stipulation includes an acknowledgement in Paragraph 24C that references the decision not to discover asset values, to wit: "... each party has had the opportunity to obtain expert valuations of the business interests and real estate holdings of the parties; ... any failure of either party to so obtain expert valuations has been of his or her choosing; ... each party has fully disclosed his/her assets and income to the other party; ...some assets have been valued and others have not..."

In her Petition, Ms. C claims that the duty of full disclosure on a court financial affidavit is mandatory and cannot be waived, citing *Shafmaster v. Shafmaster*, 138 N.H. 460, 467 (1994) and *IMO Rohdenburg and Rohdenburg*, 276 N.H. 276 (2003). In her opinion, this divorce case must be reopened to require Mr. D to file a complete financial affidavit and allow Ms. C full discovery so that an equitable property division may occur.

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[1] In the September 1999 and the January 2000 financial affidavits, the assets that had "unknown" values were: minority stock interests in the and (in the 2000 financial affidavit) Corporation; a minority interest in (9.5%); minority stock interests (7.14285%) in . and Group; a minority partnership interest (7.02411%) in ; a minority interest (7.142857%) in Associates; a beneficiary interest in two irrevocable trusts established in 1962; and an annuity held by the 1999 10-year GRAT. Other assets had approximate values attached: Trust, holding title to investment property in Wolfeboro, NH (approximate equity value in the 2000 financial affidavit $354,000) a minority interest in (37.42%) in (approximately $500,000 in 1999 and $250,000 in 2000); marketable securities (approximately $1.4 million); "cash" accounts with (cumulative total $379,000 in 1999 and $444,000 in 2000); and two trading accounts (approximately $1.2 million).

Property distributions or stipulations decreed by a court are not retained under the continuing jurisdiction of the court and will not be modified unless the complaining party shows that the distribution is invalid, due to fraud, undue influence, deceit, misrepresentation, or mutual mistake. *Shafmaster* at 464, citing *Leary v Leary*, 137 N.H. 161, 165 (1993). Having alleged fraud, the proponent must prove that the other party made a fraudulent representation for the purpose of or with the intent of causing that party to act upon it." *Id.*, citing *Proctor v. Bank of N.H.*, 412,414 (1978). Likewise, in the case of alleged misrepresentation, the proponent must prove negligent misrepresentation of a material fact and justifiable reliance thereon. *Wylie v. Lees*, 162, N.H. 406, 411 (2001), citing *Snierson v. Scruton*, 145 N.H. 73, 68 (2000). There is nothing in this line of cases that indicates a failure to disclose, by itself, can form the basis for reopening a final property settlement.

Ms. C , I think, relies on the following ruling from the *Shafmaster* case: "Therefore, to avoid a repetition of these circumstances, for the future, we hold that the full disclosure provisions of Superior Court Rule 158 [regarding the filing of financial affidavits] are mandatory and may not be waived by parties or the court." *Shafmaster* at 467. This ruling made clear that a court could not agree to allow the parties to waive the filing of financial affidavits, a previously common practice. Subsequently, the *Rohdenburg* case made clear that the financial affidavit needed to be completed in full, even though certain paragraphs may not appear to be relevant in a particular case. *Shafmaster* did not deal with the current circumstance; in this case, both parties submitted and exchanged their financial affidavits and each paragraph in each financial affidavit was completed (except that Ms. 's did not include anything in the income column and Mr. D s did not include anything in the retirement column). The NH Supreme Court in *Shafmaster* set aside the property settlement because the court found that Mr. Shafmaster failed to provide updated financial statements in violation of his duty to update, allowing Ms. Shafmaster to rely on information that Mr. Shafmaster knew was dated and false when she signed the permanent stipulation. The Supreme Court concluded "that the defendant fraudulently induced the plaintiff to sign the property settlement and that the plaintiff, *under these circumstances*, did not have a duty to conduct discovery or further investigate the defendant's representations." (Emphasis added). *Id.* Nothing in *Shafmaster* indicates to me that the full disclosure of a parties' lack of knowledge of values can, in and of itself, be the basis for reopening a divorce settlement. Likewise, *Shafmaster* does not mean to me that an opposing party *never* has an obligation to perform their own discovery or investigate the other party's representations.

Therefore, I find that Ms. C 's argument regarding a "*Shafmaster* claim" is without merit.

B. **Undue Influence**

In her Amended Petition, Ms. C claims that "[w]ithin a few months from filing the divorce petition [in July 1999], she "was pressured into settling the divorce without requiring Mr. D to disclose all of his assets and the value thereof." (Para. 121) She cites "the past history of severe mental, physical, and financial cruelty," ongoing "intimidation [and] harassment," and "the great disparity of the parties' bargaining power" for her claim that she "needed more than a couple of months to negotiate and reflect upon Mr. D 's proposal." (Para. 132,137) She refers to the Stipulation in this case as "a complicated an [sic] important agreement [that] requires more time for negotiation and reflection than what was presented to her." (Para. 133) Finally, Ms. C states that the Permanent Stipulation that she "was being pressured to sign was unconscionable on its face," calling for Mr. D to receive the bulk of the marital estate, to pay a relatively small sum in child support, and to "raid a trust fund established for the benefit of the children to pay his legal obligation of child support." (Para. 122) For the reasons set out below, Ms. C 's undue influence claim is also without merit.

(1) **Abuse during marriage:** Ms. C testified at some length about a history of abuse, both from her childhood and young adult period and during her marriage. It appears as though she believes her pre-marriage trauma made her particularly susceptible to experiencing further trauma during her marriage. She testified that, within two years of their marriage, "things started to get ugly." She said that Mr. D controlled her diet, her appearance, her choice of friends, and, overall, wanted her to be a traditional "good wife." According to her testimony, in 1994, after suffering a miscarriage, Ms. C asked Mr. D for support and, in response, he threw her against a wall. She testified that, when she was three months pregnant with , Mr. D forbade her from returning to law school, threatening that, if she did, he would have her declared an unfit mother and take the child from her or otherwise "make [her] disappear" like 's wife did.[2] She claims that, while she was pregnant in May 1995, Mr. D pushed her, she fell down the stairs, began to have contractions, and went to the hospital, but there were no medical repercussions. After was born and Ms. Cole graduated from law school, she said that Mr. D complained about and ridiculed her part-time work as a lawyer.

Ms. C testified about the many times that Mr. D would leave the home overnight for various lengths of time without telling her his location, making her feel abandoned and worthless. It appears that this pattern began in the spring of 1998. She stated that he left for five days after an argument over her using a silver spoon as a gardening tool; for two days after an argument about creating a post-nuptial agreement as they talked about the possibility of divorce; and for many days after an argument over social plans, all occurring in the fall of 1998.

In November 1998, according to her testimony, Ms. C had an emotional breakdown while drawing a bath. She curled up on the floor of 's room, naked, "wanting to die." She claims that Mr. D kicked her and then called the police, claiming that she had swallowed pills and was using a knife in a dangerous manner. The police came, arrested and handcuffed her, and took her to the police station, after which they transported her to the Westchester Medical Center Psychiatric Facility. Her testimony was that, after about eight hours, she was finally taken to see a physician; when she arrived, Mr. D was in the office with the doctor, and, when asked, confirmed that she had not taken pills after all; he left car keys for her with the doctor and did not return to the family for two weeks.

Ms. C testified that, on January 21, 1999, after Mr. D had moved into a lower floor bedroom, she barged into his room and he came out and smashed her head against the wall. Mr. D took her to the emergency room, where she reported that she had fallen on ice and was given post-visit instructions for a head injury. The next day, the parties signed the purchase and sale agreement on the home and made plans to move to New Hampshire. Ms. C testified about an incident when she fell on Mr. D and broke his ribs, confirmed that a friend (Karen) said that she was making gestures with a knife, and about a letter from Mr. D asking her to sign a postnuptial agreement because he now had "leverage," all occurring during that six month period before the D family moved to New Hampshire. Ms. C testified that, after the move to New Hampshire, Mr. D pelted her face with metal objects from a construction project. In July 1999, after returning from a road race in New York, the parties argued. Ms. C said that she was enlightened about Mr. D 's behavior when he told her that she had no friends – when she obviously did; so, when he asked for a divorce, she agreed.

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All in all, Ms. testified that she was physically and mentally abused during the marriage. According to her, this experience made it impossible for her to think clearly when it became time to negotiate a property settlement in the divorce. She stated that she wanted the marriage over for her own mental health and physical safety, and, as referenced further below, claimed she lacked the capacity to engage in meaningful negotiations and enter into a contractual relationship during the seven or eight months of settlement discussions.

Mr. D has a different memory of the parties' marriage. In his opinion, Ms. C had the upper hand in their relationship; despite his opinion on a particular subject, according to him, they always ended up doing whatever Ms. C wanted to do. For example, before the marriage, upon recommendation of a family attorney, he requested that Ms. C agree to execute a prenuptial agreement; she refused, and one was never created. He said that, despite a disagreement about whether Ms. C should finish law school after 's birth, she did, in fact, complete law school and took the New York Bar Exam. When it became time to look for work, Mr. D arranged for her to obtain part-time employment with a family friend, Attorney Howard Miltenberg. In 1996, the Wolfeboro lake house became available for purchase; Mr. D testified that he was opposed to buying the home – he preferred to travel than to have a second home – but Ms. C wanted to buy it, and it was done. Mr. D also testified that they both wanted to learn to fly, but he acquiesced to her starting before he did (they couldn't both learn at the same time because of work and child care responsibilities), and then she moved on to obtaining her instrument rating and flying the requisite hours to keep her license and rating; Mr. D never did learn to fly. Later, on several occasions, Mr. D requested that Ms. C consider entering into a postnuptial agreement – particularly in regards to the Cornish home; Ms. C objected, and no postnuptial agreement was ever signed, although the Cornish home was purchased.

It was Mr. D 's testimony that the parties' marriage was fraught with arguments. He said that he did, indeed, leave the house on many occasions. Because, in his opinion, there was no negotiating with his wife, arguments would continue indefinitely until Ms. C got her way. In order to stop an argument (which were often in front of the children), he would choose to leave. He testified that this was not intended to be an "abandonment" of the family or a way to punish his wife; it was, instead, a way to protect the children from observing their parents in anger and to protect himself from the stress of the relationship.

Mr. D admitted that the parties' altercations would sometimes turn violent. His memory of the 1994 incident was that the parties fought over whether Mr. D should stay home with his wife after her miscarriage or go to a previously planned event; during the fight, Ms. C kicked her husband in the groin and then kicked him in the ribs. He testified that, in March 1999, she again kicked him in the groin and then kicked him in the ribs when he was on the floor; an X-ray confirmed a broken rib. He said that there were three occasions when, during an argument, she scratched and bruised his face. He also testified about the time in January 1999 when they were having mutual combat on the floor of the master bedroom; Ms. C hit her head on the floor and lost consciousness. According to him, this was, in fact, the incident that resulted in the January 21, 1999 hospital records, not any incident in which he slammed her head against a wall, as she stated.

Mr. D 's version of the incident that occurred in November 1998 is that he and Ms. C were again arguing; during the argument, she told him that she had taken a bottle of prescription pills, then that she had flushed them down the toilet. He remembered her then running into the kitchen, where she held a ginzu knife to her stomach, then rubbed the knife against her wrists, and told him to come and take the knife from her. Mr. D called the police and Ms. C was arrested and handcuffed after she resisted them. He called the children's grandparents to come and help and, when the doctor said that she was safe to leave, he gave Ms. C the car keys and her wallet and

left, because he did not think it was safe for them to be in the same car – or the same house – together.

According to Mr. D , he feels that Ms. C manipulated their relationship through her histrionic behavior and stubborn attitude. Rather than controlling her, he believes that she was the controlling person in the relationship, getting what she wanted at every turn.

Ms. C retained Harold Bursztajn, MD as an expert witness to testify about her capacity to negotiate and knowingly agree to a divorce settlement in late 1999 and early 2000. Dr. Bursztajn testified that he interviewed C C for four and a half hours in the fall of 2011. He also reviewed material that she provided to him, including witness statements, medical reports, and depositions. He diagnosed C C with Complex PTSD, which is a post-traumatic stress disorder that occurs over time instead of resulting from a one-time trauma. He testified that Ms. C 's capacity was severely impaired by cumulative years of emotional and physical abuse and that she was suffering from Complex PTSD during the time of the divorce negotiations in 1999 and 2000. As a result (as well as alleged ongoing harassment and duress by Mr. D during this time – to be discussed below), she lacked substantial executive functioning capacity to contract knowingly. Although asked, Dr. Bursztajn could not completely explain how it is that an evaluation conducted in 2011 could diagnose a patient's disorder twelve years earlier.

In addition to the parties and Dr. Bursztajn, I heard testimony regarding the parties' relationship during the marriage from Maria (Ms. 's running partner and friend), P C (Ms. C 's father), John (Mr. D 's longtime friend), Kevin (a friend of the couple who resided with them for a few months), Laurie , MD (who saw Ms. C in therapy in 2007), and Attorney Miltenberg (Ms. 's former employer). It is my opinion that Ms. C has failed to establish a pattern of abuse during the marriage that could form the basis of an undue influence claim. I understand that her testimony was that the pattern of abuse continued following the parties' separation and during the divorce negotiations, and I will discuss that more in the next section. However, as a preliminary matter, it is clear to me that the parties had a dysfunctional marital relationship that manifested itself in both verbal and physical altercations. It may well be that Ms. C suffered a concussion during one of their arguments, but it is also true that Mr. D had a broken rib from at least one incident. They both seemed to lack a certain self-control when it came to their anger toward each other, but at least Mr. D had the presence of mind to absent himself from the home before matters escalated or the children experienced additional damage. Finally, there is no evidence at all to substantiate Ms. C 's claim that Mr. D controlled her during the marriage. It appears that the contrary is true: he funded her law school career even while questioning it; he arranged for employment for Ms. C in a law firm doing the kind of legal work she wanted; he never pursued either a prenuptial agreement or a postnuptial agreement, despite both being clearly indicated for his and his family's protection, because Ms. C objected; she was able to spend hours each week flying and/or running, despite some misgivings Mr. D had about her responsibilities at home; and they purchased two pieces of property – one in Wolfeboro and one in Cornish – neither of which were desired by Mr. D .

(2) **Duress during separation/disparity in bargaining power/speed of negotiations:** The parties separated in mid-July 1999. Ms. C 's father, a practicing New Hampshire attorney at the time, recommended that she retain Attorney Ronna Wise, a lawyer in Concord, NH, because of her excellent reputation as a family law attorney and "her aggressive personality." Ms. C met with Attorney Wise and her associate almost immediately and filed a Petition for Divorce, alleging fault grounds (extreme cruelty and conduct injurious to health and reason) on July 27, 1999. Mr. D also consulted with Ms. C 's father and retained Attorney Jon Hanson, a Wolfeboro lawyer with a general practice, in August 1999.

Both attorneys testified at trial that their goal was to try to settle the case expeditiously, since those were both their clients' instructions. Interrogatories were propounded on both sides. A temporary stipulation was filed with the court on September 28, 1999, along with both parties' financial affidavits. Communications between counsel continued, along with an agreement that interrogatory answers were unnecessary if the parties reached a final agreement. The first proposal for a Permanent Stipulation came on September 28, 1999, from Ms. C through counsel, asking for, among other things, $2 million and $11,400 per month in support. Mr. D , again thorough counsel, made a counter-proposal on November 2, 1999, that, among other things, Ms. C would receive the Cornish and Wolfeboro homes, $1 million and $6,666 per month in child support, or, alternatively, $1.5 million and the Wolfeboro house would be sold and proceeds divided equally (Cornish and child support as already offered). On November 8, 1999, Attorney Wise offered three counter-proposals, one of which was that Ms. C would receive the Cornish and Wolfeboro homes, $1 million and child support in the amount of $11,500 per month. In November 1999, discussions occurred about the details of the financial settlement (financial responsibility for private school and for college, utilization of trusts to pay the children's expenses, and the modifiability of the child support order).

On December 17, 1999, the parties and counsel met to discuss settlement. It appears that most of the discussion at that settlement conference focused on the parenting schedule and each party's rights and responsibilities regarding the children. There was some discussion of finances, but not in great detail. The parties left that meeting without an agreement. From that meeting until the end of January 2000, letters went back and forth regarding specific provisions that would be required for a settlement. A Permanent Stipulation was reached and then filed on February 18, 2000, seven months after the divorce action was started.

Obviously, Ms. C 's allegation that she had "a couple of months" to review the agreement is erroneous, as is Dr. Bursztajn's assertion that there were "weeks" between Ms. C 's filing for divorce and signing the divorce agreement. A seven month negotiation period, during which counsel were in energetic communication is not unreasonable in the context of this case.

Ms. C testified that she felt pressured into signing the final agreement both from Mr. D personally and from her own lawyer. She testified that Mr. D told her that all she would ever receive from him was $1 million, which she felt was an ultimatum. She also testified that he would come by the house in Cornish and argue with her about the settlement figures and threaten that he would challenge her for custody, raise her psychiatric hospitalization, and track down her first husband (a painful memory). When Mr. D 's attorney sent interrogatories regarding her allegations of abuse, asking for her medical and mental health records, and raising her hospitalization and the police involvement, she took this as further evidence of his intimidation and harassment. In addition, Ms. C testified that Mr. D claimed that it would cost a great deal of money and time if he were required to provide full disclosure of his asset values; she took that to mean that he would wear her down, financially and emotionally, unless she capitulated to his demands. Ms. C also felt that she did not feel protected by her attorney, whose abrupt manner during the settlement conference upset her. She further complained that whatever she and Attorney Wise proposed "kept getting chiseled down."

There is little evidence to support Ms. C 's claim of intimidation and duress during this negotiation period. Her testimony itself vacillated between claiming helplessness and describing intentional and informed decision-making. Undoubtedly, there were unpleasant discussions between the parties over the seven months of negotiations - after all, why should their relationship change after separation? But Ms. C did not discuss them with her lawyer, nor did she ever seek protection from harassment, and I really did not hear evidence of anything other than more of the parties'

dysfunctional communication style. There is no evidence at all that Ms. C 's lawyer pressured her into settlement, either. First, it appears that Ms. C herself was very much involved in making proposals for settlement, as evidenced in counsels' communications; Attorney Hanson, in fact, testified about Ms. C 's assertive and informed involvement during the four-way settlement meeting. Secondly, Attorney Wise, on February 10, 2000, sent Ms. C a letter that that she was unable to recommend to Ms. C that she sign the final stipulation because they did not have full knowledge as to the value of Mr. D 's assets. In response, Ms. C signed a waiver asking that the settlement go forward; Ms. C testified that she thought she could get more if she went to court, but that she knew she was facing a long legal battle with a cruel opponent, and chose settlement instead.

(3) **Unconscionable on its face** Ms. C claims that the Permanent Stipulation is unconscionable on its face because, in it, Mr. D (a) received the bulk of the marital estate, (b) was obligated to pay a relatively small sum in child support, and (c) was able access the children's trust fund to pay child support.

Both Ms. C and Attorney Wise testified that Ms. C did not want to make a claim against the family wealth during the divorce. Indeed, the principal of the two irrevocable family trusts established in 1962 would not be part of the marital estate. See *In re Chamberlin*, 155 N.H. 13 (2007). According to Seth Weber, Ms. 's expert, the remaining estate was worth about $11 million in 2007; the 2000 values would have been less. The actual values known and disclosed by Mr. D in 2000 were about $3.5 million (not including real estate). Because of the distance in time, it is not altogether clear to me what the actual value of the estate was in 1999 and 2000. Considering that it was something less than $11 million, much of the differential between the values that were identified and those that were not comes from the value of the J D 1999 10-year GRAT. It was funded with $5.3 million; of that, $4.7 million would be considered the marital share, subject to division.

Whatever the amount, the reality is that most of Mr. D 's wealth came from the family business. Almost all of the minority interests he held in real estate and stock were family holdings. The GRAT was funded with family money. This was a short term marriage (six years) and one goal in short-term marriages is to leave the parties in no worse position than they were before the marriage. See *Rahn v. Rahn*, 123 N.H. 222, 225 (1983) *et al.* Ms. left the marriage with $1 million, two homes without mortgages ($775,000 for Cornish and unknown for Wolfeboro [both parties combined their Wolfeboro and Katonah property values]), an airplane ($40,000 - $54,000), and a motor boat, after coming to the marriage with no assets, just debt. Mr. left the marriage with the Katonah, NY home (see above re: value), investment property in Wolfeboro (about $350,000 equity), and $3.5 million in cash and securities, along with the GRAT and the other -funded investments. The Katonah home was purchased just prior to the marriage by Mr. alone. I cannot say that, on its face, the parties' ultimate agreement was an unconscionably one-sided contract. It is most likely that, given the short duration of the parties' marriage and the source of their wealth, Ms. would not have been awarded 50% of the marital estate; how much a court would have awarded her is speculative at best. The ultimate agreement is not outside the realm of possibility and seems to have been the result of substantial negotiation.

Regarding the "relatively small sum in child support," again, any ultimate child support and/or alimony awarded by the court after a contested hearing is merely speculative. The child support guidelines do not contemplate income in the amount disclosed on Mr. 's 2000 financial affidavit, and the substantially high income of the obligor is listed as a reason to deviate from the child support guidelines. RSA 458-C:5,I(b). Ms. C testified, and the evidence supports, that $11,500 per month was the amount that she requested in order to pay the expenses for two homes and the children's

costs; she also specifically requested that the amount be paid as child support and not alimony in order to avoid a tax liability. It is not impossible that a court would have ordered this amount in support, given the expressed need in her financial affidavit, and might have possibly even allocated some as alimony.

The parties' Permanent Stipulation provides that Mr. 's child support obligation could be paid from a trust fund established for the benefit of the children. Until 2009, Mr. D paid child support from whatever sources of income he had, including the annuity from the 10-year GRAT. When the GRAT transferred from an annuity to a trust for the children beneficiaries, Mr. D took advantage of that provision in the divorce decree. Ms. C complains that it is an ethical or moral failing of Mr. D 's that he chooses to pay child support from the children's own trust; however, if that is the case, it is a failing on both their parts since she agreed to it in the divorce. Anyway, Mr. D 's ethics are not at issue here. The trustee of the children's trust apparently believes that the payment of Mr. D 's child support from this trust is a valid exercise of the trustee's discretion; Attorney McDonald explained that if a trustee uses the trust for distributions outside of the trustee's fiduciary responsibility, it is the trustee's breach and the grantor (Mr. D) is not at fault. This could not be the basis to find the Permanent Stipulation unconscionable.

C. **Fraudulent Conveyance Pursuant to the NH Fraudulent Transfer Act, RSA 545-A**

In her Amended Petition, C C claims that Mr. D 's created the J D 10-year GRAT in order to hide $50 million in assets that would otherwise be considered part of the marital estate, subject to distribution at divorce. Indeed, the GRAT documents were executed on March 29, 1999, about four months before the parties separated and included the D children as remainder beneficiaries, not Ms. C , as was previously contemplated.

Three facts undermine Ms. C 's argument. First, as stated above, the GRAT is an established, legitimate estate planning tool for affluent individuals. According to Attorney MacDonald, it is typically funded by assets with limited marketability and control, usually a minority interest in some asset, which results in a discounted value for tax purposes. Mr. MacDonald testified that twelve of Mr. D 's siblings and cousins are GRAT beneficiaries, and many, if not all, of the GRATs were created at the same time as J D 's. Furthermore, while the parties had been discussing divorce and/or separation over a period of time, there were no plans to divorce in March 1999.

Secondly, the existence of the GRAT was disclosed on each financial affidavit filed by Mr. D . Clearly, there was no intent to hide the existence of the asset itself.

Finally, it effectively makes no difference to the marital estate whether the assets were funding a GRAT or whether they were otherwise available. The annuity that Mr. D received from the GRAT was mandatory, under a ten-year fixed payment schedule. As such, it is subject to division in the divorce. *In re Chamberlin, id.* The GRAT was funded with $5.3 million (not $50 million) in March 1999. Mr. D was scheduled to receive $4.7 million in payments over the ten-year life of the annuity, it is my understanding that the value of the funding assets for purposes of marital division would be $4.7 million. Therefore, Mr. D 's conversion of assets into the GRAT could not be evidence of an intent to defraud.

D. **Fraud, Deceit and Misrepresentation**

According to the parties' Permanent Stipulation, both parties were permitted to seek contribution from "the children's trusts" for all or a portion of the children's miscellaneous expenses. According to Ms. C 's Amended Petition, at the time of the divorce, Mr. D "represented that

there were trusts set up for the benefit of the children, and Ms. C would have access to these trusts for all the cultural, athletic, scholastic, and other miscellaneous activities [for the children]." In fact, the children's trust did not come into existence until 2009, when the 10-year GRAT annuity terminated. Ms. C claims that on "numerous occasions" she requested information about any trusts held for the benefit of the children, and that Mr. D failed to provide that information as requested. So, I think that she has a two-fold argument: one, that she gave up marital rights in return for access to a trust for the children that did not exist at the time of the divorce negotiations; and, two, that Mr. D never intended that she would, in fact, have access to the children's trusts, as evidenced by his subsequent behavior, thereby deceiving her into executing the Permanent Stipulations.

From the communications between counsel it is clear that there were discussions about Mr. D 's access to "family trusts" to pay child support. In a November 18, 1999 faxed letter to Attorney Wise, Mr. 's counsel, Attorney Hanson included a provision in paragraph 6 of the working stipulations: "The Respondent [ ] and Respondent's family have established Trusts which will in the future generate significant income which will be for the benefit of the parties' children....[child support] may be comprised by income from the Trust and/or directly from the Respondent." Counter-proposals from Attorney Wise did not include any reference to trusts, although Attorney Hanson insisted on it; the applicable provision in the finalized Permanent Stipulations states that in the event child support is paid "from a trust fund established for the benefit of the children, rather than directly from [ ], said trust payment shall be deemed child support for the purposes of this paragraph, but shall not preclude either party from requesting funds from the trust to pay for miscellaneous expenses of the children..."

To me, this is sufficient evidence that Mr. D , through counsel, informed Ms. C , through counsel, that there were trusts which would *in the future* generate income which would be for the benefit of the children. There was no assertion that the children had trust funds that were currently available. Ms. C 's statement that Mr. D "represented that there were trusts set up for the benefit of the children" is belied by the objective evidence, except insofar as there was a GRAT that eventually reverted to the children in trust. In addition, in a June 24, 2002 letter from Ms. C to Attorney Hanson in subsequent proceedings (only two years after the divorce), Ms. C acknowledges her understanding that "in another few years" Mr. D would have access to "the trust that comes into effect" in order to pay his child support. I do not believe Ms. C 's assertion that Mr. D asserted that there was available trust income to pay both his child support and miscellaneous expenses for the children, only that there would be money in the future for such use.

The other argument from Ms. C is that Mr. D never intended that she have access to the children's trust funds – when they vested – to pay her share of miscellaneous expenses. I do think that Mr. D was not particularly forthcoming with clear information in April and May 2009, which is when the children's trust came into effect. He suggested that J D was requesting certain information from Ms. C before she could access any trust money; it is clear, however, that J D had not been trustee since 2007. Notwithstanding, Mr. D provided accurate information about the current trustee in the beginning of May 2009, and Ms. C made contact with to ask for a contribution toward her share of Cardigan Mountain tuition. In subsequent months, apparently, trustee JP Morgan asked Mr. D (as grantor) for his opinion on providing funds to Ms. C , and he expressed his opinion that Ms. C should not receive more money.

None of this, of course, is evidence of Mr. D 's intent at the time of the divorce. Ms. C may feel "duped," but in order to support a fraud or misrepresentation claim, there must be some evidence that Mr. D "made a fraudulent representation for the purpose of or with the intent of causing [her] to act upon it." *Shafmaster* at 464. There is none.

Petition to Enforce and for Contempt and for Attorney's Fees

In her pleadings, Ms. C has asked that Mr. D be found in contempt of court for failing to comply with the court orders regarding the children's expenses (including tuition payments) since 2008, and for requesting distribution of funds from trust funds held for the benefit of the children without notifying Ms. C . She requests reimbursement for the children's expenses, reimbursement for the mediation with Harriet Fishman in 2011, and attorney's fees.

A. **Cardigan Mountain Tuition**

attended Cardigan Mountain School for 6th, 7th, and 8th grades. According to the parties' Permanent Stipulation, paragraph 6A, the children's "private secondary educational expenses" would be paid from any trust funds or other accounts held in the children's names in the first instance, and any remaining expenses would be Mr. D 's sole responsibility. That paragraph goes on to read that "the parties anticipate that the children will attend Kimball Union Academy if they are still residing in , New Hampshire at that time." As far as I can tell, the parties have each paid half of 's tuition for 6th, 7th, and 8th grades (6th grade twice) at Cardigan Mountain. Ms. believes that Mr. D (or the trust) should have paid the entire 's tuition, either because all of those grades should be considered "secondary educational expenses" or because the children's trust should have been made available to pay her share of 's tuition for 8th grade, after the creation of the children's trust.

First, in my mind, it is clear that the parties intended for paragraph 6A to refer to high school grades, thus the reference in that paragraph to Kimball Union Academy, which is a 9th through 12th grade academic program. The evidence at trial, including emails between the parties and with the trustee, supports this conclusion. Considering, then, that the Cardigan Mountain tuition would be considered a "miscellaneous expense" under paragraph 7 of the Permanent Stipulation, Ms. C complains about her ability to access the children's trust for the payment of her share of the Cardigan Mountain expenses for 's 8th grade year. She believes that Mr. D interfered with the trustee, whose discretion it is to distribute funds, so as to deny her trust distributions to pay for her share of the Cardigan Mountain tuition. As stated previously, under the Permanent Stipulation, each parent may seek reimbursement for their share of the children's miscellaneous (including educational) expenses from their trust.

From the emails that were submitted as evidence at trial, I can find the following. On December 6, 2010, Ms. C submitted a detailed request asking Louise , an administrator for the children's trust, to reimburse Ms. C for her "out-of pocket expenses for 's Cardigan tuition" as well as for "miscellaneous expenses specific to [the] children's athletic ventures." In the correspondence, she referenced a prior request in May 2009 for Cardigan Mountain tuition reimbursement, which was denied by the trustees because "[t]he trustees believed that [the $11,500 monthly child support payment] left sufficient funds for 's tuition," taking into account that the child support payments should not be used to support the entire household, but should be used solely for the benefit of the children. Apparently, Ms. Milligan submitted Ms. C 's second request to "the Committee." They requested that, as part of the due diligence process, her request be "vetted with J as he has intimate knowledge of the situation." On December 13, 2010, Mr. D responded. Mr. D provided an opinion that the trust should not be required to contribute additional monies beyond support payments, which, he believed would just go to defray Ms. C 's own house or property expenses, since "she cannot demonstrate that monies expended on and exceed the monies she receives as child support."

The trustees have not agreed to Ms. C 's requests for reimbursement, whether for miscellaneous expenses or for tuition. There is no evidence that Mr. D controls the outcome of any trustee decision; indeed, as Attorney MacDonald explained in his testimony, it is the trustees that have ultimate control – and responsibility – for distributions made from any discretionary trust. They have a fiduciary duty to defend the trust and if a trustee uses the trust for distributions outside his fiduciary responsibility to the trust, the trustee, not the donor, is liable. This family court has no jurisdiction to direct the actions of trustees; if the trustees thought it was within their due diligence to request Mr. D 's opinion about distributions, they had that right, insofar as this court's jurisdiction allows.

B. **Miscellaneous Expenses**

I agree with Mr. D 's position that I cannot assess Ms. 's claim for reimbursement for half of the children's miscellaneous expenses with the documentation and testimony that was provided to the court. In her Requests for Findings of Fact, Ms. C claims that Mr. D owes $27,032.33 "since the filing of the original Petition in July 2011," taking into account the amount of $5,419.16 that Mr. D paid. However, Ms. C submitted invoices beginning in 2009; in addition, the total expenses listed in Exhibit 48 are not consistent with the $27,032.33 figure. I am also not sure which items Ms. C claims were expressly agreed to or were part of a continuing assent.

Therefore, I will be asking Ms. to resubmit her requests to Mr. D : in an organized way, itemizing each expense, providing proof of payment, and indicating the origin of Mr. D 's consent. Mr. Du has an obligation to pay his share of those expenses, unless he can provide proof that he has already made payment or that he did not consent. I will not make a finding of contempt at this time, but if Mr. D : fails to be reasonable in his response to Ms. C 's resubmitted requests for reimbursement, the issue of contempt may be reviewed.

C. **Mediation Costs**

I understand that the parties tried to mediate the miscellaneous expense issue with mediator Harriet Fishman in April 2011, just prior to this action being filed. I understand that the parties and counsel met with the mediator for eight hours. At the end, no agreement was reached. I do not know a legal basis upon which the court can assess the mediator's fee against one party, especially when both parties attended and it was more than a perfunctory meeting. If bad faith can result in the assessment of mediation costs, there is no evidence of such bad faith in the record.

Petition to Bring Forward and Modify Child Support Pursuant to RSA 458:C-7

In their Permanent Stipulation, the parties agreed that Mr. D would pay child support in a certain amount, which was not in accordance with the child support guidelines by mutual agreement, until ____ reached the age of 18 or graduated from high school, whichever occurred first. The parties included a provision that "there shall be no increase or decrease in said child support regardless of any change in the financial circumstances of either party and regardless of any modification of the custodial arrangement." The Permanent Stipulation included each party's specific waiver of modification of child support "[i]n consideration for the division of property,... the [other party's] Waiver of Modification..., [Ms. C 's] waiver of her right to receive [Mr. 's] answers to interrogatories... regarding his trust, business and other financial interests (Paragraph 4B)... and [Mr. 's] other obligations..." (Paragraph 4C). They both acknowledged that the law did not permit the parties to agree that one or the other may not file an action to modify child support in the future, but

they each agreed "that there are no circumstances foreseeable or unforeseeable that would support a [modification] in child support and that the failure to grant a [modification] of child support would not render this Stipulation either improper or unfair." The Stipulation further provided that these provisions "may be entered as a complete defense to any action by [the other party] in the future to seek a [modification] in child support and that this provision is a quid pro quo" for the other terms of the Stipulation and the course of discovery.

Child support is reviewable by the court every three years, whether there has been a change of circumstances or not. RSA 458-C:7, I. A purpose of this statute is to resolve inequities in child support orders, and to allow the trial court to account for non-substantial changes in the parties' economic circumstances and the effect of those circumstances on the parties' need. *In the Matter of Carr & Edmunds*, 156 N.H. 498, 502 (2007). In the parties' Permanent Stipulation, they tried to forever waive modification of child support by asserting that there were no foreseeable or unforeseeable circumstances that would allow a child support modification. However, foreseeability is irrelevant to RSA 458-C:7, I. Indeed, since the purpose of child support is to provide economic support for the children, not the parent, the court has the authority to award a proper amount of child support to protect the children, particularly where the legislature has explicitly permitted parents *de novo* review of existing support obligations under RSA 458-C:7, I. *Id.* at 503.

Ms. C has requested a review of Mr. D 's child support obligation pursuant to RSA 458-C:7. In this case, special circumstances existed at the time of divorce and continue to exist in order to adjust application of the child support guidelines due to Mr. D 's high income. RSA 458-C:5, I(b)(1). It appears from the evidence at trial that the child support order that was entered at the time of divorce was based on a figure representing Ms. C 's need. While her expenses may have increased since then, Mr. D 's actual income has decreased markedly in the ensuing 15 years. Granted, his child support is being paid by the children's trust fund. But the parties specifically bargained for this method of payment in their Permanent Stipulation, and the trustees apparently consider it within their fiduciary duty to make these payments. , the remaining child eligible for child support, does not appear to be wanting under the current child support order. I have weighed the equities and determine that protecting the integrity of the parties' divorce agreement, which provides for a more than adequate amount of support especially considering 's attendance at prep school at his father's expense, outweighs any request for review of the amount of child support.

Although I decline to modify the amount of child support, I believe that modification of the duration of the child support order is required to meet 's best interests. The parties agreed, in the Permanent Stipulation, that child support would terminate when reached the age of 18 or graduated from high school, which ever occurred *first* (emphasis added.) I do not know the reason for this unusual provision, but it turns out that has already turned 18 years old while entering his junior year at KUA. The state of the law in New Hampshire is that child support continues until a child graduates from high school or turns 18 years old, whichever occurs later. RSA 461-A, IV. Consistent with the court's authority and obligation to award a proper child support award in order to protect children whose parents are before the court, *Id.*, I find it reasonable and in 's best interest for child support to continue until he graduates from high school. He has enjoyed a certain lifestyle in his mother's care and custody in large part due to his father's child support contribution. It would be contrary to his interest for that lifestyle to be compromised as he completed his last years of high school.

Petition for Accounting

In her Petition, Ms. C asked for "a full and complete accounting of each and every trust fund established for the benefit of the children to determine whether fiduciary duties have been violated

and to protect the rights of the children." I believe this request is now moot. Discovery has revealed that the only trust established for the benefit of the children is the result of the GRAT originally created in 1999. Ms. C is aware of the fiduciary's name and contact information, and I did not hear in the course of trial that she has need for court intervention to obtain an accounting. At any rate, this family court has no authority over the fiduciary or the trustees.

Petitioner's Verified Motion for an Award of Retrospective and Prospective Attorney's Fees/Respondent's Request for Fees

In March 2014, Ms. C filed her Motion seeking attorney's fees. Reference is made to the Order on Pending Motions dated May 9, 2014. In it, Ms. C 's Motion was held in abeyance pending the hearing on the merits and "if she prevails – if it is determined that Mr. D committed fraud or otherwise acted in bad faith requiring her to seek unnecessary judicial intervention – her right to request reimbursement for her attorney's fees is preserved." Ms. C has not prevailed in her action to reopen the parties' divorce case and I have made no findings that reflect fraud or other bad faith on Mr. D 's part. Therefore, her request for attorney's fees must be denied.

Mr. D has likewise requested attorney's fees and costs because: (a) Ms. C had no reasonable basis for her claim that Mr. D transferred up to $50,000,000 of marital assets into a GRAT: (b) her claims to vacate the Final Decree have been a "moving target," causing Mr. D unwarranted attorney's fees and costs; (c) Ms. C has not been truthful in deposition and court testimony. This has been a difficult case with multiple – and changing – lawyers, many different claims, and a huge amount of discovery. To make matters even worse, most events occurred almost two decades ago and people's memories are strained. I cannot say that Ms. C was completely disingenuous in bringing this action against Mr. D – their dysfunctional communications over the years certainly contributed to her suspicions about his actions and motivations. She has exaggerated certain claims, but that was partly due to lack of information (largely provided as the case went on) and partly to time passing. I do not believe that Ms. C brought this action in bad faith or with the intention of causing Mr. D to expend unnecessary attorney's fees. I think it is fair for each party to be responsible for their own attorney's fees and litigation costs.

Therefore:

1. All claims are denied except as specifically designated below.

2. Within 45 days, Ms. C shall resubmit her requests to Mr. D for payment of his share of the children's miscellaneous expenses, itemizing each expense, providing proof of payment, and indicating the origin of Mr. D 's consent. Mr. D shall pay his share of those expenses within 30 days of receipt. If he objects to the payment of any expense, he shall make payment on the ones he does not object to within 30 days of receipt, and, as for the remainder, he shall state the basis of his objection and provide proof that he has already made payment or that he did not consent, also within 30 days of receipt.

3. The child support order shall remain in full force and effect and shall terminate upon 's graduation from high school.

4. To the extent either party will file a Motion for Reconsideration, they are reminded to review the Rules of the Circuit Court of the State of New Hampshire – Family Division 1.26 (F), which limits a motion to reconsider to no more than 10 pages.

5. In the event of an appeal, paragraphs 2 and 3 above shall be the temporary orders of the court.

6. On Plaintiff's [sic] Requests for Findings of Fact: Granted – 1, 2, 76, 79, 80, 81, 144, 367. I cannot rule on most of the Requests because they are compound and argumentative.

7. On Plaintiff's [sic] Requests for Rulings of Law: See text of order.

8. On Respondent's Proposed Findings of Fact & Conclusions of Law: Granted – 1-4, 6-23, 29-31, 36, 37, 39, 40, 42, 44, 46-50, 52-57, 60-67, 69-71, 73, 80-81, 83, 86, 87, 95, 96, 98-100.

9. Pursuant to RSA 491:15 and applicable case law, *Geiss v. Bourassa*, 140 N.H. 629, (1996), *Holliday v. Holliday* 139 N.H. 213, 219, (1994), and *Howard v. Howard,* 129 NH 657, (1987), the narrative set forth in this order, and any proposed findings and rulings actually granted, constitutes the court's finding of fact and rulings of law in this order. Any of the parties' requests for findings and rulings not granted, either expressly or by implication are determined to be unnecessary for the resolution of this matter in light of the decision rendered.

10. This Order resolves all motions pending as of the date of signature.

Recommended:

1/26/15
Date

Deborah Kane Rein, Judicial Referee

So Ordered:

I hereby certify that I have read the recommendations and agree that, to the extent the judicial referee has made factual findings, she has applied the correct legal standard to the facts determined by her.

1/30/15
Date

Presiding Justice
John J. Yazinski
Justice