

# State of New Hampshire Supreme Court

NO. 2022-0693

2023 TERM

JUNE SESSION

In the Matter of  
Gregory Landgraf and Natasha Landgraf

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RULE 7 APPEAL OF FINAL DECISION OF THE  
BRENTWOOD FAMILY COURT

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BRIEF OF PETITIONER/APPELLEE, GREGORY LANDGRAF

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## **QUESTIONS PRESENTED**

- I. Are distributions received by a corporate shareholder that are necessary to pay the corporate tax liability income to the shareholder for calculating child support?

Preserved: INTERLOCUTORY APPEAL STATEMENT at 5.

- II. Are distributions received by a corporate shareholder that are necessary to pay succession insurance premiums income to the shareholder for calculating child support?

Preserved: INTERLOCUTORY APPEAL STATEMENT at 5.

## STATEMENT OF FACTS

### I. NEI Operated by the Landgraf Brothers

New England Industries (NEI) was founded in 1963 in Vermont. It moved to New Hampshire in 1985, expanded several times over the years, and now operates from a 50,000 square-foot facility it owns in Lebanon, New Hampshire. NEI's machinery stamps precision customized aluminum and steel components, which are sold primarily to the automotive industry. GREGORY'S FINDINGS OF FACT ¶¶ 36-38, 98-99 (Sept. 14, 2018), *Greg's Appx.* at 56.

The company was valued at about \$5.4 million in 2017. NEI BUSINESS VALUATION §II.C. (Dec. 31, 2017), *Greg's Appx.* at 6. However, numerous factors, including developments in automobile manufacturing, constraints on expansion, difficulty finding qualified workers, and international tariffs on the company's main ingredients, have leveled or decreased earnings. GREGORY'S FINDINGS OF FACT ¶¶ 40, 44-45, 47, 53; AFFIDAVIT OF GREGORY LANDGRAF ¶¶ 4, 10, 12-13 (Sept. 22, 2020), *Greg's Appx.* at 153.

Gregory and Michael Landgraf are brothers, and each owns half the stock of NEI. Established by their grandfather, Gregory started working at the company when he was a child, and the brothers inherited it from their father in the 1990s. Gregory is now 60 years old; Michael is 67. GREGORY'S FINDINGS OF FACT ¶¶ 8, 41. Despite not getting along, the brothers operate the business together. GREGORY'S FINDINGS OF FACT ¶¶ 35-40; AFFIDAVIT OF GREGORY LANDGRAF ¶ 2.

In his youth, Gregory attended a two-year technical school in machining, and then two years of business school, to obtain a bachelor's degree. GREGORY'S FINDINGS OF FACT ¶ 10. Gregory is responsible for technical operations at NEI. He is in charge of the factory floor, engineering, equipment

and tooling, information technology, maintenance of the property, and sale of scrap metal left over from the manufacturing process. GREGORY'S FINDINGS OF FACT ¶ 40; AFFIDAVIT OF GREGORY LANDGRAF ¶ 2; BUSINESS VALUATION §II.F. Despite holding the title of corporate Treasurer, Gregory has no financial duties.

Michael is President, and takes care of management, finances, contracts, human resources, compensation, payroll, purchasing, pricing, acquiring and selling assets, insurance, customer services, and sales. GREGORY'S FINDINGS OF FACT ¶ 40; AFFIDAVIT OF GREGORY LANDGRAF ¶ 2; BUSINESS VALUATION §II.F.



## II. Succession Planning and Mutual Purchase Agreement

As they have aged, and because Michael wants to retire, the brothers have discussed succession planning. GREGORY'S FINDINGS OF FACT ¶¶ 41-42. In 1995, they signed a "cross purchase agreement," setting the parameters for purchasing each other's stock. The agreement is guaranteed by mutual life insurance policies, each in the amount of \$2 million. GREGORY'S FINDINGS OF FACT ¶ 42; BUSINESS VALUATION §II.A. Thus, if one of the brothers dies, the other brother will have funds to help purchase the deceased brother's share, ensuring the business stays in the family. ANSWER TO CONTEMPT ¶ 7 (July 6, 2022), *Natasha's Appx.* at 135.

Although the insurance on each brother's life is designed to secure the successful continuation of the company after the death of one brother, the policies are personally owned by each and not by the corporation, and thus premiums are paid from personal funds. *Id.* ¶¶ 7-8; NEI SCHEDULE OF INSURANCE (July 19, 2017), *Greg's Appx.* at 3. Because the succession insurance is intended to maintain the functioning of the business, it is a business expense; sometime before the insurance premium is due, the corporation reimburses the brothers for the pre-tax cost of the premiums. ANSWER TO CONTEMPT ¶¶ 4, 9 (July 6, 2022). The succession insurance is expensive; in 2021, Gregory paid insurance premiums of \$41,460, and NEI's pre-tax reimbursement to him was \$43,570. *Id.* ¶¶ 5-6.

### **III. Change in Corporate Form and Pass-Through Business Taxes**

#### **A. Change in Corporate Form**

Before 2015, NEI was organized as a C Corporation, which is generally for complex entities with numerous shareholders, varied classes of stock, and the possibility of financing through public offerings. C-Corps pay taxes on earnings, and shareholders pay tax on dividends, meaning that a C-Corp's earnings may be effectively taxed twice. *See* 47B C.J.S. *Internal Revenue* § 358.

In July 2015, a year-and-a-half before the divorce petition commencing this case, Gregory and Michael elected to have NEI converted to an S Corporation. S-Corps are more suited for closely-held businesses – having a single class of stock, restricted ownership, and restricted financing – and allow tax savings. GREGORY'S FINDINGS OF FACT ¶ 70; BUSINESS VALUATION §II.B.; *see* I.R.C. § 301, *et seq.* (subchapter C); I.R.C. § 1361, *et seq.* (subchapter S).

Although a Subchapter S corporation may distribute income, it is not required to do so. Earnings are owned by the corporation, not by the shareholders. Subchapter S corporations may accumulate profits, referred to as “retained earnings.” Retained earnings are the net sum of a corporation's yearly profits and losses.

Subchapter S status provides an alternate method of taxing a corporation's income. In a Subchapter S corporation, income tax is paid by the shareholders rather than by the corporation itself. When the tax is paid by the individual, the corporation avoids income tax liability.

A Subchapter S corporation allocates various items of income to shareholders based upon the shareholder's proportionate ownership of stock. Allocations are itemized on an individual shareholder's Schedule K-1.

*In the Matter of Albert*, 155 N.H. 259, 264 (2007); *see* Matthew A. Melone,

*Passing Through or Staying Awhile? C Corporations and Pass-Through Entities After Tax Reform*, 49 U. MEM. L. REV. 397 (2019) (“There are numerous forms of pass-through entities – entities whose taxable income is wholly or partially taxed at the owner’s level, and their income, to the extent so taxed, is not taxed at the entity level.”).

## **B. Taxes Paid by Pass-Through**

Until 2018, Gregory and Michael were paid by “receiv[ing] a base salary and bonuses that were paid through payroll.” AFFIDAVIT OF GREGORY LANDGRAF ¶ 6. Thus, “taxes were withheld by NEI.” *Id.* Their salary was based on information from their professional association, and the bonuses were paid quarterly. GREGORY’S FINDINGS OF FACT ¶¶ 57-58.

In 2018, the federal “Tax Cut and Jobs Act” went into effect, Pub. L. No. 115–97, 131 Stat. 2054, prompting NEI’s long-time accountant to analyze its effect on NEI’s operations. The accountant suggested changes to the company’s compensation structure.

On August 6, 2018 on the advice of NEI’s tax accounting firm, the Company changed its shareholder payout procedure from a bonus scheme to that of paying dividends. As an S-corp it is in the shareholders’ best interest to reduce their tax liabilities by taking a reasonable salary for work performed and receiving dividends instead of bonus checks for additional distributable profits.

NEI will distribute available profits in the Company by way of a dividend check quarterly. It will be each shareholders [sic] responsibility to pay their Federal and State income tax liabilities directly to the respective tax authorities.

LETTER FROM CFO TO BLAKE (Dec. 17, 2018), *Greg’s Appx.* at 142; EMAIL FROM ACCOUNTANT TO NEI (Aug. 6, 2018), *Greg’s Appx.* at 52; AFFIDAVIT OF GREGORY LANDGRAF ¶¶ 5-6. The Family Court found that the changes to NEI’s compensation structure were not an effort to manipulate the divorce proceeding. ORDER ON MOTIONS FOR RECONSIDERATION AND CONTEMPT (Sept. 11, 2019) at 3, *Greg’s Appx.* at 149.

The result is that the corporate tax is passed through to the brothers and paid from their personal accounts. Gregory explained:

Prior to ... September 2018, I received a base salary and bonuses that were paid through payroll, so taxes were withheld by NEI. Because NEI is an S corporation, Michael and I pay Federal income taxes on NEI's net income. At the end of the summer of 2018, due to the tax advice NEI received (because of the Job Cuts and Tax Relief Act of 2017), NEI changed its profit distribution structure from bonuses to the shareholders (meaning it was paid through payroll and taxes were withheld) to distributions (which have no tax withholdings).

The profit distribution was estimated to cover the NEI income that would be deemed taxable to the shareholders. I have used these distributions to make estimated tax payments. It has not changed my tax obligation (nor my brother's) to the federal government and the state of New Hampshire. Because of this change, some of the distributions paid to me and Michael are used entirely by us to pay quarterly taxes.

AFFIDAVIT OF GREGORY LANDGRAF ¶ 6 (paragraph break added).

For example, in September 2018, Gregory received his first dividend in the amount of \$115,000; he then issued personal checks to the United States Treasury for \$110,000 and to the New Hampshire Department of Revenue Administration for \$5,000. In January 2019, Gregory received another dividend in the amount of \$70,000; he then again issued personal checks to the IRS for \$65,000 and to the DRA for \$5,000. ANSWER TO CONTEMPT ¶¶ 7, 10 (Mar. 15, 2019), *Greg's Appx.* at 143.

This advance reimbursement arrangement results in overall lower tax liability, and therefore benefits all parties. *Id.* ¶¶ 6, 12.

## STATEMENT OF THE CASE

Gregory inherited his share of NEI in the 1990s. He and Natasha first encountered each other online in 2002. They arranged to meet, were married in 2004, and lived in Orford. GREGORY'S FINDINGS OF FACT ¶ 1 (Sept. 14, 2018), *Greg's Appx.* at 56; NATASHA'S FINDINGS OF FACT ¶ 8 (Sept. 14, 2018), *Greg's Appx.* at 91. They have two children, born in 2005 and 2009. They last lived together, and divorce petitions were filed, in 2016. GREGORY'S FINDINGS OF FACT ¶¶ 3, 5. Natasha was a homemaker; she currently lives in Hanover and runs a jewelry business. ORDER ON MODIFICATION OF TEMPORARY SUPPORT (May 3, 2018), *Greg's Appx.* at 48. Gregory still lives in Orford.

Trial was held and a divorce decree was issued in September 2018. FINAL DIVORCE DECREE NARRATIVE (Sept. 30, 2018), *Greg's Appx.* at 119. Natasha appealed numerous issues, and among those remanded was the trial court's deviation from the child support guidelines. SUPREME COURT ORDER at 12-15 (Jan. 31, 2020), *Natasha's Appx.* at 26. Temporary orders have sprung back into effect; Gregory's child support payment is a base amount of \$3,665 per month, plus a specified percentage of his adjusted gross income for earnings beyond those listed in his 2020 financial affidavit. ORDER ON PENDING MOTIONS at 2-3 (Nov. 17, 2020), *Greg's Appx.* at 157.

Because adjusted gross income is calculated with regard to both bonuses and dividends, RSA 458-C:2, IV, the issue arose regarding whether the distributions – made from NEI to Gregory for his payment of succession insurance and corporate pass-through tax liability – are countable as income for child support; Natasha claiming they are and Gregory urging they are not.

The Family Court determined that the question is unanswered in New Hampshire, but that because the facts necessary to decide the matter had not been pled, “the court cannot rule as a matter of law [whether] the distributions did not constitute income” to Gregory. ORDER ON RECONSIDERATION at 7

(Aug. 9, 2021), *Addendum* at 32.

The parties requested an interlocutory appeal on the issue, ORDER at 4 (Aug. 3, 2022), *Greg's Appx.* at 166, which was approved by the Lebanon Family Division, (*Michael C. Mace, J.*). INTERLOCUTORY APPEAL STATEMENT (margin order) (Nov. 3, 2022) (omitted from appendix). This court accepted the appeal, which, involving construction of a statute, it reviews *de novo*. *In the Matter of Greenberg*, 174 N.H. 168, 172 (2021).

## **SUMMARY OF ARGUMENT**

Under New Hampshire's child support statute, earnings are countable for child support purposes when they are payable in money, the recipient has a legal right to obtain them, and they are available to the recipient for personal expenses.

Pass-through distributions for corporate tax and insurance obligations do not meet the criteria. While they are payable in money, they are required to be passed on to the entity or person to whom they are owed. Thus Gregory has no legal right to them, and they are not available to him personally. Accordingly, such corporate obligations are not included as "gross income" for child support purposes, and no further "net income" analysis is necessary.

This Court should thus order the Family Court to calculate Gregory's child support obligation without regard to the payments NEI distributes to him for paying taxes and insurance on the corporation's behalf.



## ARGUMENT

### I. Taxes and Insurance Reimbursements Are Not Gross Income Includable in Child Support Calculation

Distributions for corporate tax and succession insurance are not “gross income” for purposes of calculating child support, as Natasha argues. *See* NATASHA’S BRF. at 12-13.

#### A. To be “Gross Income” a Payment Must Meet Three Requirements

New Hampshire law broadly (albeit somewhat circularly) defines “gross income” for child support as “all income from any source, whether earned or unearned, including but not limited to” a variety of named sources of earnings. RSA 458-C:2, IV; *In the Matter of LaRocque*, 164 N.H. 148, 153 (2012) (“The statutory definition of gross income is broad; it is not limited to wages and wage equivalents.”).

In construing the clause “including but not limited to” in the statute, and therefore what constitutes “gross income” for child support, this court has discerned several requirements.

First, the payment must be “payable in money.” *In the Matter of Clark*, 154 N.H. 420, 423 (2006) (employer-provided housing is not income).

Second, the payment must be one which the obligor has a legal right to obtain.

[T]he items listed in RSA 458-C:2, IV are all things to which the recipient, generally speaking, has a legally enforceable right and which the provider has a legal obligation to give; in other words, items that, if withheld, may be obtained by resort to judicial compulsion.

*In the Matter of Fulton*, 154 N.H. 264, 267 (2006) (gifts are not income); *see also Clark*, 154 N.H. at 423 (in-kind employer benefits).

Third, the payments must be “available” to the obligor. *In the Matter of Greenberg*, 174 N.H. 168, 173 (2021) (“The child support guidelines turn on the

obligor parent's income *available* for support.”) (emphasis added); *In the Matter of Doherty*, 168 N.H. 694, 700 (2016) (“[A]ny portion of the ... payments that were not ‘*available*’ to Wife should not have been included in her gross income.”) (emphasis added); *In the Matter of Hampers*, 166 N.H. 422, 436 (2014) (“The child support guidelines turn on the obligor parent’s income *available* for support.”) (emphasis added); *In the Matter of Woolsey*, 164 N.H. 301, 305 (2012) (“Our prior cases recognize the importance of the *availability* of income to the obligor for child support.”) (emphasis added).

This court has determined that payments constitute “gross income” when all three requirements are met. *See, e.g., In the Matter of Maves*, 166 N.H. 564 (2014) (profit from sale of real estate); *LaRocque*, 164 N.H. at 148 (life insurance proceeds); *In the Matter of Sullivan*, 159 N.H. 251 (2009) (loan forgiveness); *In the Matter of Angley-Cook*, 151 N.H. 257 (2004) (social security benefits); *In the Matter of Hennessey-Martin*, 151 N.H. 207 (2004) (adoption subsidy).

**B. Gregory Has No Legal Right to Reimbursements, and They Are Not Available to Him**

Here, while the tax and insurance disbursements are payable in money, Gregory has no legal right to them, and they are not available to him personally.

As a corporate officer, Gregory has a fiduciary duty to abide by contracts pertaining to the corporation, and to assure payment of corporate obligations. *See, e.g., In re PHC, Inc. Shareholder Litigation*, 894 F.3d 419 (1st Cir. 2018). If he seized for himself the disbursements NEI intended for payment of taxes and insurance, it would be a breach of duty, a violation of the corporate status, I.R.C. 1361(b)(1)(D) (allowing only a single class of stock), and possibly a crime. *See* RSA 637:3 (Theft by Unauthorized Taking or Transfer); RSA 637:4 (Theft by Deception). Far from Gregory having a right, it would also give the corporation a claim against him to claw back malappropriated corporate funds.

Accordingly, the amounts NEI submits to Gregory to satisfy corporate taxes and pay insurance premiums pursuant to the mutual purchase agreement are not “gross income” – regular or “irregular” – within the child support statute. *See* RSA 458-C:2, IV(c). They are therefore not subject to any further child support analysis. *In the Matter of Feddersen*, 149 N.H. 194, 197 (2003) (“Pursuant to the legislative scheme, all items includable as ‘gross income’ must be used to determine the parties’ total support obligation.”).

Further, although this court has cautioned that construction of RSA 458-C:2, IV is not beholden to dictionary definitions, *In the Matter of State of New Hampshire & Taylor*, 153 N.H. 700, 703 (2006), the dictionary defines “income” as:

That which comes in as the periodical produce of one's work, business, lands, or investments (considered in reference to its amount, and commonly expressed in terms of money); annual or periodical receipts accruing to a person or corporation; revenue.

OXFORD ENGLISH DICTIONARY 162 (1987).

The distributions NEI makes to Gregory for his payment of taxes and succession insurance are not the “periodical produce of [his] work,” nor do they “accrue” to *him*. Rather, he is a conduit; the payments are corporate obligations, which pass through him, accruing to taxing authorities and the insurance carrier.

### **C. Statute Treats All Child Support Obligors Equally**

The child support statute treats all obligors equally, by calculating the support obligation based on each parent's net income. RSA 458-C:1, III ("The percentage of net income paid for child support should vary according to the number of children and according to income level."); see *Hampers*, 166 N.H. at 435 ("[T]he objectives of the child support guidelines differ from the objectives of the federal income taxation statutes."). Holding that NEI's reimbursements of corporate tax and insurance obligations are income countable for child support would be contrary to that intent.

For ordinary wage earners – those who receive a salary after their employer deducts taxes – “net income” is after taxes. For them, section IV includes ordinary wages, and then section VI deducts the employer's standard withholding. RSA 458-C:2, VI (“... which an employer withholds ...”).

For others, who have no employer withholding taxes for them, their business expenses (such as taxes and insurance) are not included in “gross income.” Therefore, business expenses do not enter the child support calculation, and such obligors (like their wage-earning fellows) calculate child support with regard to net income.

The statute does not discriminate between ordinary wage earners and people who receive income some other way. It does not, as Natasha appears to argue, NATASHA'S BRF. at 14-16, allow ordinary wage earners to pay child support on net income, but demand other types of obligors calculate on gross income.

If, for example, NEI had remained a C-Corp whose taxes are paid by the business, or if its succession arrangement were a typical “key man” policy paid by the business, see NATASHA'S BRF. at 10 n. 1, it is apparent that those expenses would not enter into the calculation of Gregory's child support income. NEI's distributions function identically, and should be treated equally.

## II. Taxes and Insurance Reimbursements are Business Expenses

### A. Taxes and Insurance Reimbursements are not Corporate Profits

In her brief, Natasha says that NEI's advance reimbursements for Gregory's payment of taxes and life insurance are "merely corporate profits under another name." NATASHA'S BRF. at 11. Her claim confuses what constitutes profits.

Business profits which are "includable for the calculation of child support [are] gross receipts net of legitimate business expenses." *Maves*, 166 N.H. at 569. Such "business expenses must be 'actually incurred and paid' and 'reasonable and necessary for producing income.'" *Id.*; *Woolsey*, 164 N.H. at 306 ("[S]uch expenses may be deducted where they are reasonable and necessary for the production of income.").

Reimbursements for business and travel expenses by one's ... employer should not be considered by the court in determining one's ability to pay ... child support. Unlike personal living expenditures, business and travel expenses are costs incurred by the taxpayer in earning gross income, and reimbursements therefor are not properly considered as part of his net accession to wealth.

*Thayer v. Thayer*, 119 N.H. 871, 873 (1979) (interpreting prior statute); *see also* BLACK'S LAW DICTIONARY 1090 (5th ed. 1979) (profit: "[T]he gross proceeds of business transaction less the costs of the transaction; *i.e.*, net proceeds. ... Gain realized from business or investment over and above expenditures."); OXFORD ENGLISH DICTIONARY 1432 (1987) (profit: "The pecuniary gain in any transaction; the amount by which value acquired exceeds value expended; the excess of returns over the outlay of capital; ... the surplus product of industry after deducting wages, cost of raw materials, rent, and charges.").

Corporate taxes are a government-mandated expense, nonpayment of

which would jeopardize the continuing operation of the business. They are thus normally deducted from gross receipts in the calculation of profit. *See, e.g., In re Marriage of Brand*, 44 P.3d 321, 328 (Kan. 2002)<sup>1</sup> (“[A]mounts distributed to respondent were for the sole purpose of paying his share of the corporation’s taxes and were not available to pay support.”); *Roberts v. Roberts*, 666 N.W.2d 477, 484 (S.D. 2003) (Amount shareholder-father “received from the corporation was not income, it was merely an obligation to pay taxes on the corporation’s retained income.”).

Succession insurance premiums pursuant to the brothers’ mutual purchase agreement are also necessary to maintain the sustained operation of NEI. It is a legal obligation of each brother, and avoids an eventuality where one brother would be forced to co-own and co-operate the business with whomever inherited the deceased brother’s share. Unlike *Trojan v. Trojan*, 208 A.3d 221 (R.I. 2019), where the business-owner’s daughters were beneficiaries, the succession insurance here is designed to benefit the corporation.

Nonpayment of the corporate obligations would harm all the parties.

To embrace a rule that a child support obligation takes precedence over the self-employed obligor’s business expenses could create the untenable situation that the expenses associated with the production of income be held in abeyance until the child support is paid. The inevitable result of such a disposition of resources, in circumstances such as are present here, would be the eventual loss of all income when the business reached the point where it was no longer a viable, going concern.

*Woolsey*, 164 N.H. at 306.

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<sup>1</sup>*Brand* has been cited with approval by the New Hampshire Supreme Court in three child support cases: *In the Matter of Maves*, 166 N.H. 564, 569 (2014); *In the Matter of Hampers*, 166 N.H. 422, 440 (2014); *In the Matter of Albert*, 155 N.H. 259, 264-65 (2007).

Corporate distributions to Gregory to pay his share of NEI's corporate taxes, and to pay his side of the succession insurance, are business expenses, and not "merely corporate profits under another name." They therefore should be omitted from the child support calculation.



## **B. “Earmarking” is Not a Criteria**

The determination of whether a payment is income for child support does *not* turn, as Natasha implies, NATASHA’S BRF. at 13-14, on whether it is “earmarked” – a word that does not appear in any New Hampshire child support case. In *Doherty*, 168 N.H. at 694, for example, the obligor, who was compensated for being a foster care provider, argued that because the money was intended to care for the foster children, it was not “income.” This court held that the portion of the foster care payments that were reasonable and necessary expenses were not “income,” but that the rest “remained available” for calculation of child support. *Id.* at 700. *Doherty* has nothing to do with “earmarking,” but rather makes an appropriate distinction between legitimate business expenses and the “periodical produce of one’s work.” OXFORD ENGLISH DICTIONARY 162 (1987).

Whether a payment is countable for child support likewise does not turn on the “purpose” of payments, as Natasha also suggests. NATASHA’S BRF. at 13. In *In the Matter of Jerome*, 150 N.H. 626 (2004), which Natasha cites for the proposition, NATASHA’S BRF. at 14, the obligor had settled a personal injury case that was paid through an annuity, which was intended to make her whole for personal injuries. This court held that because “annuity” was “[p]lainly ... listed in the statute,” it was “income” for child support. *Id.* at 629.

### **C. Taxes and Insurance Reimbursements Are Not Manipulated Retained Earnings**

To the extent that Natasha alleges, NATASHA'S BRF. at 20-21, that Gregory has participated in inflating the corporation's retained earnings in an effort to reduce his apparent income, *see, e.g., Woolsey*, 164 N.H. at 306 (obligor's "theoretical ability to pay himself rather than his business creditors"); *In the Matter of Albert*, 155 N.H. 259, 261 (2007) (whether obligor "had voluntarily reduced his income"), there is a body of law regarding how courts determine whether such manipulation has occurred.<sup>2</sup>

While the law is developing, and there are outlying opinions taking a categorical approach, most jurisdictions regard the matter as fact-based, and apply a number of factors to make the determination:

We follow the lead of these cases, and similarly conclude that a determination whether and to what extent the undistributed earnings of an S corporation should be deemed available income to meet a child support obligation must be made based on the particular circumstances presented in each case. Such a fact-based inquiry is necessary to balance, *inter alia*, the considerations that a well-managed corporation may be required to retain a portion of its earnings to maintain corporate operations and survive fluctuations in income, but corporate structures should not be used to shield available income that could and should serve as available sources of child support funds.

*J.S. v. C.C.*, 912 N.E.2d 933, 942 (Mass. 2009).<sup>3</sup>

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<sup>2</sup>In its orders, the court referenced a potential complication regarding retained earnings and corporate distributions. ORDER ON MOTIONS FOR RECONSIDERATION (Aug. 9, 2021), *Addendum* at 32.

<sup>3</sup>*See In re Marriage of Brand*, 44 P.3d 321, 330 (Kan. 2002) ("There are many factors to be (continued...)

New Hampshire has already adopted such a fact-based approach.

Whether to deduct reasonable and necessary expenses from the business's income distributions when calculating a parent's income for child support purposes is a highly fact-specific determination.

*In the Matter of Hampers*, 166 N.H. 422, 440 (2014).

If the appropriateness of retained earnings were subject to further litigation in this case, it would potentially involve experts opining on the reasonableness and business necessity of disbursements, the historical magnitude of retained earnings, analysis of the market in which NEI exists, and the validity of NEI's business model. *See, e.g., Diez v. Davey*, 861 N.W.2d 323, 325 (Mich. App. 2014); *Pickrel v. Pickrel*, 717 N.W.2d 479 (Neb. App. 2006) (remand for facts regarding reasonableness of unappropriated earnings).

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<sup>3</sup>(...continued)

considered when determining what amount of a Subchapter S corporation's income should be included as income for purposes of calculating support. Some of those factors include past earnings history of the corporation, ownership share, and the shareholder's ability to control distribution or retention of the net profits of the business. In those cases where income can be manipulated because of the ability to control distributions, heightened scrutiny should be exercised."); *J.S. v. C.C.*, 912 N.E.2d 933, 942 (Mass. 2009) (courts should consider obligor's level of control over corporate disbursements, existence of legitimate business interests, and obligor's attempts to shield income); *In re Marriage of Williams*, 217 P.3d 67 (Mont. 2009); *Trojan v. Trojan*, 208 A.3d 221, 234 (R.I. 2019) (factors to be considered are: "(1) the shareholder's level of control over corporate distributions as measured by his or her ownership interest; (2) the legitimate business interests justifying the decision to retain corporate earnings – if the purpose was to maintain the business, ... those earnings should not be included in gross income; and (3) whether there was affirmative evidence of an attempt to shield income by means of retained earnings.) (quotations omitted); *Nace v. Nace*, 754 N.W.2d 820, 823 (S.D. 2008) ("The factors include the following: 1) comparison of the amount of retained income versus the parent/obligor's gross income and percent of ownership; 2) a history or pattern of past retained income; 3) the company's need to retain income to maintain or increase past or current levels of income production as opposed to unnecessary, premature, unrelated or overly aggressive expansion of business; 4) whether the retained income is acquired from the current year's profits or out of past year(s)' savings; 5) comparison of the ordinary rate of return for a similar investment; 6) the ability to receive favorable or fictitious loans (constructive distributions) from the company; and 7) any other factor that bears on the issue of whether the obligor is manipulating his or her income in an effort to avoid the proper payment of child support.") (quotations and citations omitted).

On the record here, however, there is no evidence of corporate manipulation. Gregory and Michael are equal owners, no dividend can be declared unless both agree, and Gregory has no independent ability to control corporate disbursements. While he holds the title of Treasurer, Gregory's job is operating the factory; his brother, as President, makes financial decisions. There is no evidence Gregory has attempted to manipulate corporate retained earnings, nor solicited his brother (with whom he does not get along) to participate in a ruse to artificially reduce their incomes to favor Gregory in his divorce.

To the extent Natasha has alleged manipulation of distributions, because the facts in this case do not suggest any such gimmickry, there is no need for further fact-finding.

## **CONCLUSION**

Under New Hampshire's child support statute, earnings are countable for child support purposes when they are payable in money, the recipient has a legal right to obtain them, and they are available to the recipient for personal expenses.

Pass-through distributions for corporate tax and insurance obligations do not meet these criteria. While they are payable in money, they are required to be passed on to the entity or person to whom they are owed. Thus Gregory has no legal right to them, and they are not available to him personally. Accordingly, such corporate obligations are not included as "gross income" for child support purposes, and no further "net income" analysis is necessary.

This Court should thus order the Family Court to calculate Gregory's obligation without regard to the payments NEI distributes to him for paying taxes and insurance on the corporation's behalf.

Respectfully submitted,

Gregory Landgraf  
By his Attorneys,

Dated: June 9, 2023

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**CERTIFICATIONS & REQUEST FOR ORAL ARGUMENT**

A full oral argument is requested.

I hereby certify that the decision being appealed is addended to this brief. I further certify that this brief contains no more than 9,500 words, exclusive of those portions which are exempted.

I further certify that on June 9, 2023, copies of the foregoing will be forwarded to Andrew J. Piela, Esq., and to Jonathan Shirley, Esq., through this court’s e-filing system.

Dated: June 9, 2023

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Joshua L. Gordon, Esq.

**ADDENDUM**

Order on Motions for Reconsideration (Aug. 9, 2021) . . . . . [32](#)