State of New Hampshire
Supreme Court

NO. 2015-0588

2016 TERM

AUGUST SESSION

In the Matter of Caren Logan and James Logan

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

REPLY BRIEF OF CAREN LOGAN

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ARGUMENT

I. Caren Has Suffered Prejudice by Disclosure of Her Therapy Records

In his reply brief Jim claims that Caren has suffered no prejudice from allowing her therapy records into evidence, and therefore has no cause for concern. REPLY BRF. at 15.

Caren has suffered plenty of prejudice.

First, Caren lost her psychotherapeutic privacy. Second, Jim's lawyer had an on-going advantage of knowing Caren's thoughts and feelings *during* litigation. Third, Caren cannot be expected to ever again trust a therapist, and therefore is unlikely to engage in therapy – defeating the purpose of the privilege. *In re Berg*, 152 N.H. 658, 664–65 (2005), citing *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996). Fourth, to the extent Caren engaged in counseling at the request of the GAL and co-parenting coordinator acting under color of state authority, *Trial* at 649, 817, 1441-42, admission of them into evidence may be regarded as coercive. Caren's prejudice is demonstrated by the ramifications of her privacy's breach – invasion by unauthorized disclosure of therapy records is probably a tort, *see Karch v. BayBank FSB*, 147 N.H. 525, 535 (2002) ("invasion of privacy by public disclosure of private facts"); *Lisnoff v. Stein*, 925 F. Supp. 2d 233 (D.R.I. 2013) (therapist published book based on plaintiff's case history); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984), and possibly a crime. RSA 644:11. *See generally* Richard B. McNamara, *The Hierarchy of Evidentiary Privilege in New Hampshire*, 20 N.H.B.J. 1, 19 (1978). Given the nature of the prejudice, the specific content of the records is not significant.

Although in his reply brief Jim alludes that admission of the therapy records was based on Caren's assertion of fault grounds, REPLY BRF. at 15, this is not so: the court was clear its reason was Caren's request for sole parenting. ORDER REGARDING DISCOVERABILITY OF THERAPEUTIC RECORDS (June 25, 2015), *Appx*. at 41. Jim conceded the basis for admission was that Caren

"assert[ed] the best interst of the parties' two children would be best served by being placed in her primary residual [sic] care." REPLY BRF. at 16-17. Accordingly, Jim's citation to cases involving proof of adultery is not relevant. REPLY BRF. at 15, citing *Yergeau v. Yergeau*, 132 N.H. 659 (1990) and *In re Hampers*, 154 N.H. 275 (2006).[1]

Jim further asserts that admission of therapy records is justified because they are "the only source of material" available to Jim. This is not so. The GAL issued two extensive reports and testified at length, half the trial was devoted to issues regarding care of the children, and there has never been any suggestion that Caren is an unfit mother. Moreover, this court has held that, in determining whether to admit therapy records, it is *not* valid to consider whether they are the only or the best evidence. *In re Grand Jury Subpoena for Medical Records of Payne*, 150 N.H. 436, 443 (2004) ("Invasion of the privilege can never be justified just because a defendant's medical records might be the best evidence of "serious bodily injury" or provide the least burdensome means to pursue a felony prosecution.").

Jim cites to a Kansas case, *In re Kiister*, 777 P.2d 272 (1989), REPLY BRF. at 17, but it is not instructive here. First, in *Kiister*, the therapy records were admitted because there was evidence that the parent, having physically and sexually abused the children, was unfit. Second, in jurisdictions applying the Kansas rule there is generally statutory authority. *See* Amy J. Amundsen, *Balancing the Court's Parens Patriae Obligations and the Psychologist-Patient Privilege in Custody Disputes*, 28 J. AM. ACAD. MATRIM. LAW. 1 (2015); Kay A. Schwarzberg, *Privileges in*

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[1]Proof of fault was overwhelming and undisputed. Jim conceded that from the day Caren learned of his adultery she became distrustful and the marriage fundamentally changed. *Trial* at 1049-50. The court did not need therapy records to find that Caren was "shocked, angry, sad, grieving, overwhelmed and scared," or developed an "inability to sleep, eat or concentrate," REPLY BRF. at 16; Caren and other witnesses testified to these feelings and consequences. *Trial* at 40-48, 780-82. Moreover, those findings establish only that Caren "suffer[ed] substantial pain and mental suffering," NARRATIVE DECREE at 14, *Appx.* at 53, which, because of the prenup, the court understood would not affect her allocation. *Id.* at 2.

Custody Cases: Uses, Non-Uses and Alternatives, 71 MICH. B.J. 290 (1992).

In his brief Jim suggests that the standard of review for the admissibility of Caren's therapy records is an unsustainable exercise of discretion. REPLY BRF. at 18. But the family court several times made clear its rationale was categorical:

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

Trial at 708-09 (paragraphing altered); ORDER REGARDING DISCOVERABILITY OF THERAPEUTIC RECORDS (June 25, 2015), *Appx*. at 41 ("[T]he affirmative assertion of a parenting issue is almost systemic."); *Trial* at 648 ("It's child focused when there's custody questions involved, and all aspects of both parents, physical, mental and emotional wellbeing are potentially at stake.").

Finally, it must be noted that Jim did not address the exception to New Hampshire's therapy records privacy law – that to be admissible the records must address harm that is more than merely "generic." *Desclos v. Southern New Hampshire Medical Center,* 153 N.H. 607, 613-14 (2006). And here, as the court made clear in its categorical ruling, there are only generic issues.

Accordingly, this court should find as a matter of law that the family court erred in admitting into evidence Caren's psychotherapy records.

II. Preservation of Prenuptial Percentage

In his brief Jim argues that Caren did not adequately preserve the issue of whether the prenuptial percentage should be 11 percent or 12 percent. REPLY BRF. at 1-4.

First, Jim waived the issue. In the parties' stipulation on enforcement of the prenuptial agreement, they agreed: "The percentage to be used in the formula is 1% of James' separate property … for every full year he is married to Caren, up to a maximum of 13 years (or a total of 13% of James' separate property)." STIPULATION REGARDING PRENUP (Dec. 18, 2014), *Jim's Appx*. at 2. Later during trial, Caren's expert testified on cross-examination by Jim's lawyer:

> Q: Now, the longer this case goes and the longer Caren Logan is married to James Logan for a full year, her percentage goes up, does it not?
>
> A: [I]f the divorce was not final by next June it would be another year, that's correct.
>
> …
>
> Q: And so if there's a ruling in this case and there's an appeal and it's not resolved until June of '16, you'd be back here saying she's entitled to 12 percent, not 11, wouldn't you?
>
> A: [I]f the marriage had not ceased, then next June it would be 12 percent.

Trial at 387-89. By eliciting the testimony, Jim cannot now claim he or the court was unapprised of the issue. *State v. Town*, 163 N.H. 790, 792 (2012) ("The purpose underlying our preservation rule is to afford the trial court an opportunity to correct any error it may have made before those issues are presented for appellate review."). And the family court clearly was aware. NARRATIVE DECREE at 2 ("Next, the parties disagreed over the term of the marriage, which obviously impacts the size of the percentage of James' separate property, which Mrs. Logan will be eligible to receive under the prenuptial agreement.").

Second, and as noted in Caren's opening brief, throughout the proceeding Caren's lawyer repeatedly requested 11% – reflecting the duration of the marriage at that point – but also repeatedly expressed her understanding that the percentage would be eventually recalculated in

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

Third, Jim notes that at the end of its decree, the court wrote: "[T]o the greatest extent allowed by New Hampshire law, the parties' divorce will become effective on the appropriate date in 2015, if an appeal is taken." NARRATIVE DECREE ¶ 11 at 25, 14, *Appx* at 53. Jim points out that Caren did not challenge in the lower court that portion of the order regarding "the appropriate date in 2015." JIM'S REPLY at 3-4. The family court, however, has no jurisdiction to adjust supreme court rules. *See e.g.*, *LaMontagne Builders, Inc. v. Brooks*, 154 N.H. 252, 259 (2006) (lower court lacks authority to award fees for appellate litigation provided by supreme court rule). As explained in Caren's opening brief, CAREN'S BRF. at 20, pursuant to supreme court rules, a divorce that is appealed is not final until this court issues its mandate. SUP.CT.R. 24; FAM.CT.R.2.29-B; *Gray v. Kelly*, 161 N.H. 160 (2010); *Carleton, LLC v. Balagur*, 162 N.H. 501, 506 (2011); *State v. Gubitosi*, 153 N.H. 79, 82 (2005) ("the effective date of our decision was the date the mandate was issued"). Nothing the family court says can alter that. Thus, any failure to object to the "appropriate date in 2015" language is without effect. This is particularly so in light of Caren's repeated preservation of the percentage issue in other contexts, as noted *supra*.

Fourth, there was no reason to attack the "2015" date in the lower court, as the issue was

not yet ripe. The parties were married in May 2004. When the divorce decree was issued in August 2015, the marriage was still in its eleventh year. Had Jim not appealed, the decree would have gone into effect before the twelfth anniversary – which has now passed – and the prenup percentage issue would not have been before any court.

Fifth, Jim argues that Caren's notice of appeal did not state the percentage question. Not so. The rules of this court provide:

> While the statement of a question [in the brief] need not be worded exactly as it was in the appeal document, the question presented shall be the same as the question previously set forth in the appeal document. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.

SUP.CT. R. 16(3)(b). Question II in Caren's brief is identical to Question V in her notice of appeal, except for, as Jim notes, truncation of the last few words which were a non-restrictive example of the court's property award error. Because the question briefed is mere truncation, it is "subsidiary." *In re James N.*, 157 N.H. 690, 693 (2008) (preservation sufficient where notice of appeal question "contains reference" to issue briefed). This court has liberally interpreted the wording-of-the-question rule in mandatory appeals. *Id.*; *City of Keene v. Cleaveland*, 167 N.H. 731, 742 (2015) (notice of appeal question regarding balancing public employee's right to work with private party's right to protest "fairly encompasses the injunction issue before us"); *Town of Barrington v. Townsend*, 164 N.H. 241, 245 (2012); *Axenics, Inc. v. Turner Constr. Co.*, 164 N.H. 659, 668 (2013); *Lassonde v. Stanton*, 157 N.H. 582, 588 (2008) ("[W]e find the issue raised … in their notice of appeal fairly encompassed the core question presented by their brief. While the phrasing of their argument was somewhat fluid over time, the[y] consistently raised a perceived lack of support for the trial court's final ruling that they … breached the parties' written contract. We will consequently address the merits of that claim."); *In re Juvenile 2003-187*, 151 N.H. 14, 16

(2004) ("Under the facts and circumstances of this case, the sufficiency of the evidence of the juvenile's *actus reus* is inextricably linked with, and fairly comprises a subsidiary question to, the ultimate issue of the sufficiency of the evidence as to the juvenile's *mens rea* with regard to that action."); *State v. Jimenez*, 137 N.H. 450, 452 (1993) (remedy subsumed in question regarding merits of issue in notice of appeal); *Samyn-D'Elia Architects v. Satter Companies of New England, Inc.*, 137 N.H. 174, 176-77 (1993) (issue of intervener status subsumed in notice of appeal question regarding merits of issue raised); *Hillside Associates of Hollis, Inc. v. Maine Bonding & Cas. Co.*, 135 N.H. 325, 330 (1992) (issue of mutual mistake subsumed in notice of appeal question regarding "whether … [insurance company] was obligated to supply coverage").

Sixth, the purpose of listing questions in a mandatory appeal is:

> to provide evidence of preservation of the issues for appeal and apprise the respondent and the court of the issues presented on appeal, as well as to ensure that the record before us is sufficiently developed to support a decision on the merits.

State v. Thiel, 160 N.H. 462, 464 (2010) (quotations omitted). In *Thiel*, this court noted that in other cases, failure to adequately preserve "left in doubt … the very issues in dispute." *Id.* Here, the court and the parties were put on notice that Caren contested the percentage distribution because it hinged on the end-date of this litigation. Morever, Jim's technical objection should not stand in the way of resolution of legitimate issues.

> During Chief Justice Doe's stewardship of this court … the common law era ended, and one could no longer prevail in an action merely on a procedural technicality. The requirement of strict precision in form was thus relaxed, shifting to a focus on what justice required. Chief Justice Doe stated that "judgment, and any necessary process for carrying it into effect, being directed to the ends of justice, cannot be obstructed by imaginary barriers of form." Chief Justice Doe's ideas remain worthy, and they have not diminished in importance in the years since his tenure.… Our present system of pleading and procedure is thus the legacy of Chief Justice Doe.

In re Proposed New Hampshire Rules of Civil Procedure, 139 N.H. 512, 515-16 (1995) (quotations and citations omitted).

Finally, it must be pointed out that, except for his preservation argument, Jim did not address in his brief Caren's argument on the merits regarding the provision of the prenuptial agreement which pegs the percentage as of the date of "judgment." Accordingly, this court should remand for recalculation of its award in accord with the new percentage occasioned by the now twelfth anniversary of the parties' marriage.[2]

[2]If there are further proceedings preventing finality pushing past the thirteenth anniversary, the percentage would increase once again to the prenuptial agreement's upper limit of 13%.

III. Value of Promissory Notes is Face Value Printed on the Notes

In her brief Caren argued that promissory notes owed to Jim should have been valued at their face value, rather than at the value of the assets underlying the notes. CAREN'S BRF. at 22-23. Jim's response is that the notes are worth the value of underlying assets, citing two cases, *Matter of Spenard*, 167 N.H. 1 (2014), and *Dombrowski v. Dombrowski*, 131 N.H. 654 (1989). REPLY BRF at 10-12.

The two cases are not helpful to Jim's position.

In *Spenard*, at the time of trial the party had already sold the notes and thus there was conclusive proof of their actual value. *Spenard,* 167 N.H. at 5-6. Here, at the time of trial Jim still owned the promissory notes as notes; their face value thus continues to evidence the amount of debt owed to Jim by Jim's promissory debtor.

In *Dombrowski,* the dispute was the value of the parties' "numismatic coin collection" – whether the coins should be valued at their purchase price, or the market value at the time of trial. Unremarkably, this court held that value is current market value. *See e.g., Rattee v. Rattee*, 146 N.H. 44, 50 (2001). The *Dombrowski* court held that it was error to use purchase price as value. Here, unlike otherwise un-valued assets such as the coin collection in *Dombrowski* or the corporate stocks in *Rattee*, the face value of the promissory notes is the only indication of the amount of debt the debtor owes Jim.

A promissory note, until extinguished, is a contract for debt, the amount of which is the face value of the note, and failure to pay is a breach of the contract. *Don E. Williams Co. v. C.I.R.*, 429 U.S. 569, 582-83 (1977) ("promissory note, even when payable on demand and fully secured, is still, as its name implies, only a promise to pay"); *Sabine v. Leonard*, 322 S.W.2d 831, 837-38 (Mo. 1959) ("A promissory note is a written contract for the payment of money and a failure to

pay any installment thereof when it becomes due would be a breach of contract.).

Whether Jim's debtor pays the entire debt owed to Jim, or something less, is a matter between Jim and his debtor, not between Jim and Caren. Because there was no default by the debtor, assignment of the notes (if they are negotiable), or extinguishment by some other means, their value as assets is printed on their face. Valuation at anything less is error.

Additionally, if Jim's position prevails, it would create a loophole. In any case requiring totaling a party's assets, one could easily avoid an asset being counted: establish an LLC, write a check to it, and have the LLC give the party a promissory note in any amount most advantageous to the party's purposes.

IV. Patent Stipulation Unambiguously Grants Court Authority to Determine Caren's Percentage

The patent stipulation states that, regarding Jim's patent interests, "Caren is awarded a certain percentage, *as determined by the Court*." PATENT STIP. ¶ 3A, *Jim's Appx*. at 14 (emphasis added). In her brief Caren argued the stipulation means precisely what it says – that Caren is awarded a certain percentage, as determined by the court. CAREN'S BRF. at 24-28. Jim's response is varied – that the parties did not mean what they said, that if they did mean what they said they would have acted differently, or that the court took undue notice of Caren's allotment under the prenup. REPLY BRF. at 5-10.

But Jim's major argument appears to be based on the caption of the stipulation, which says it is "pursuant to" the prenup, and that the court improperly ignored the caption. REPLY BRF. at 7-10. Jim correctly notes that captions may be indicative of interpretation, whether of contracts or statutes, but only when there is an underlying ambiguity in the document captioned. REPLY BRF. at 7-8.

Nowhere in Jim's argument, however, is any ambiguity alleged. This is because there is none. The stipulation could not be clearer in giving the court authority to determine Caren's appropriate percentage – "Caren is awarded a certain percentage, as determined by the Court."

The court awarded Caren half the value of the patents, in accord with the authority explicitly granted in the stipulation, and there is no error.

Respectfully submitted,

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Dated: August 23, 2016

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CERTIFICATIONS

I hereby certify that on August 22, 2016, copies of the foregoing will be forwarded to Doreen F. Connor, Esq.

Dated: August 23, 2016

Joshua L. Gordon, Esq.