

2011 WL 9684663 (N.H.) (Appellate Brief)  
Supreme Court of New Hampshire.

In the Matter of Eric J. DUBE and Jeannie Dube.

No. 2011-0075.  
September Term, 2011.  
September 1, 2011.

Appeal from the Derry Family Division

**Brief of Appellee Eric J. Dube**

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## \*1 STATEMENT OF CASE AND UNDERLYING FACTS

Mrs. Dube claims the Family Division unsustainably exercised its discretion when granting a fault based divorce, distributing an unequal portion of the marital estate to Mr. Dube, and denying Mrs. Dube's request for alimony after she set fire to the marital home and was imprisoned for attempted arson and criminal mischief. (Appellant's Brief, p. 8). At the time of Mrs. Dube's attempted arson, the couple had been married eleven years. The couple has one child who is currently age 10. (Appendix, hereinafter "App." 42). Mr. Dube also has a daughter and son from a prior marriage who live with him, as do his parents in an attached in-law apartment. (Transcript, hereinafter "T"-51-52).

On November 30, 2008 Mrs. Dube found a photo of another woman in her husband's wallet. (T- 87-89). When asked about the photo Mr. Dube admitted one occasion of unfaithfulness. (T-89-90). Immediately after his admission, Mrs. Dube asked her husband to admit his affair to his parents who lived with the couple in an adjoining in-law apartment. (T-90). The couple told Mr. Dube's parents they intended to work through the affair. (T-90). Neither party suggested they consider a divorce. (T-92, 214). Mrs. Dube recalled her husband said, "he loved [her] and wanted to work on the marriage." (T-214).

Mr. Dube stayed home two days following his admission of infidelity before returning to his job as an Air Marshall. (T-214). On December 2, 2008, Mr. Dube was working as an Air Marshall. Even though he was aboard the aircraft and not able to take calls, Mrs. Dube called her husband and left him \*2 multiple phone messages. (T-93-94). When Mr. Dube arrived in New York from a Florida flight on December 3, 2008 he had 15-20 voicemails. (T- 94). Mr. Dube called his wife and reassured her that her he loved her. He also asked her to reassure him that their marriage could be saved. (T-94). Mrs. Dube, in response, told him, "You need to come home. You need to kill Aaron [their son]. You need to kill Emily [his daughter]. You need to kill your parents and kill me." (T-94). Mr. Dube was understandably shocked and told his wife not to say such things. She replied, "fine. If you're not going to do it, I'm going to do it" and she hung up. (T-95). Mr. Dube immediately called his mother to check on Mrs. Dube. (T-95).

Mr. Dube's mother went downstairs and found Mrs. Dube dousing the home garage and doorway with gas. (T-95). Eric Dube told his mother to hang up the phone and call the police. (T-95). The **elder** Mrs. Dube called the police and she yelled to her husband. Eric Dube called back a few minutes later to confirm that his mother had reached the police. (T-95). During this call he was told that Mrs. Dube had begun smashing the house and furniture with an axe. (T-95). Mrs. Dube was taken into custody and ultimately convicted of one count of attempted arson and one count of criminal mischief. (App. 20). She is currently serving a two to four year prison sentence for those crimes. (App. 20).

Immediately following the December 3, 2008 incident, Mr. Dube sought a restraining order, as he was fearful that his wife might attempt to harm the family once again. Mr. Dube also sought medical treatment for his inability to sleep following the incident. (T-148). He also brought the couple's son to a counselor. \*3 (T-149). On December 4, 2008, Mr. Dube received a Restraining order against his wife and he filed a Petition for Divorce alleging irreconcilable differences. (App. 20). On January 7, 2009, he moved to amend his Petition to seek a fault-based divorce on grounds of treatment to seriously injure health and/or endanger pursuant to [RSA 458:7\(V\)](#). (App. 11). In his Petition to Amend, Mr. Dube noted that his wife had threatened to kill him, his children and parents after she attempted to burn down the family home and that she thereafter had attempted to kill his father with an axe while causing significant damage to the home. (App. 12).

When the divorce matter was tried, Mr. Dube testified that he did not originally plead fault grounds based upon his wife's likely conviction of a crime, as he did not know whether her sentence would exceed one year. (T-102). His request for a fault-based divorce, based upon conduct to endanger, arose out of the conduct for which she was ultimately convicted. (App. 12). When the divorce case was tried Mrs. Dube had been convicted of a crime with a prison sentence in excess of one year. Based upon that sentencing, Mr. Dube asked the Court to issue a fault based divorce based upon his wife's conviction, "[b]ecause my wife tried to murder everybody in my family." (T-103-104). The Family Court granted a divorce based upon Mrs. Dube's conviction of a crime punishable by more than one year. (App. 32)

At the time of Mrs. Dube's attempted arson the couple lived in Candia, New Hampshire in a home with an alleged fair market value between \$324,900 \*4 and \$349,900. (App. 59, Request 69). The couple's primary mortgage and home equity loans against the home totaled \$300,708.21. (App. 59, Request 70). Mr. Dube's parents lived in an in-law apartment attached to the marital residence in which they invested \$181,606.63. (App. 38). The Family Division found de minimus equity in the marital home. The Family Court rejected Market analysis estimates because they predated the real estate downturn. (App. 29). The Family Court concluded that if the home were sold, it was likely the Dubes would "have to come to the closing with cash in hand." (App. 29).

The Court decided the marital home should not be sold, since Mr. Dube was now solely responsible for providing a home to the couples' minor son and the marital home also included an in law apartment for Mr. Dube's parents into which they had invested more than \$180,000. (App. 29, 38). The Court also observed that Mr. Dube had paid the home's carrying costs totaling \$13,477 since his wife's arrest in December of 2008 through the final hearing in July of 2010. (App. 21, 38).

As a result of Mrs. Dube's attempted arson, Mrs. Dube incurred significant personal debts, which the Court allocated to her. The couple also had significant marital debt. The court allocated a greater percentage of the marital debt to Mr. Dube since he had ongoing employment. (App. 38). Specifically, Mr. Dube was ordered to pay marital debt totaling \$56,511.61. Mrs. Dube was ordered to pay marital debt totaling \$39,242.54 plus her arson related medical and legal debt totaling \$8,016.99. (App. p.37).

\*5 The Court found that its allocation of debt, combined with Mr. Dube's responsibility for all child care costs for the couple's 10 year old son, left Mr. Dube financially unable to pay alimony under [RSA 458:19](#). (App. 25; Request for Finding #85, App. p.56). The Court further found that that Mrs. Dube had no need for alimony while she is incarcerated as her living costs are provided by the state and she continues to receive disability payments in the amount of \$243.00 per month. (App. 25, T -169).

### SUMMARY OF ARGUMENT

This Court has repeatedly recognized that it allocates broad discretion to the Family Court in matters of property settlement and divorce and will set aside its determination of fact sensitive discretionary rulings "only where the appealing party can demonstrate a clear **abuse** of discretion." *McAlpin v. McAlpin*, 129 N.H. 737, 740 (1987). Mrs. Dube has failed to demonstrate an unsustainable exercise of discretion, as there is evidence in the record to support each of the Family Court's discretionary rulings.

Mrs. Dube's attempt to revoke her consent to the Stipulated Parenting Plan was not presented to the Family Court and is not preserved for review. Furthermore, her challenge concerns the July 2010-2011 aspect of the Parenting Plan, which has concluded and thus her appeal is moot.

Mrs. Dube's challenge to the Court's factual finding, that her attempted arson caused the marital breakdown as opposed to Mr. Dube's infidelity, is rebutted by her own testimony. Mrs. Dube's testimony confirms that she did not \*6 contemplate a divorce and intended to work through her husband's infidelity. Neither party contemplated a divorce until Mrs. Dube attempted to set the marital home on fire and threatened to kill the Dube family.

Mrs. Dube challenges the Family Court's decision to issue a fault- based divorce based upon her conviction of a crime with a prison sentence in excess of one year because her sentencing post-dated her husband's Libel. The foregoing fault ground, however, contains no language that makes it unavailable to the facts of this case. Moreover, there are alternate grounds to support the fault-based divorce including conduct to endanger, which Mr. Dube pled.

Mrs. Dube disputes the Family Court's finding that there was de minimus equity in the marital home. This factual finding is supported by the record, but even if one were to accept Mrs. Dube premise of equity totaling \$37,000, the Court's decision to award that equity to Mr. Dube was appropriate since he must provide a home for couple's minor son. The distribution of up to \$37,000 in home equity to Mr. Dube is further supported by his payment of \$13,000.00 in carrying costs for the home

following Mrs. Dube's arrest and it recognizes his parents' contribution and investment of \$181,000.00 into the home when constructing an adjoining in-law apartment.

Mrs. Dube also challenges the Family Court's decision to award Mr. Dube an unequal allocation of this Thrift Savings Plan. The Court awarded Mr. Dube \$22,000.00 in additional proceeds under the Plan. This allocation is roughly \*7 equivalent to the additional \$17,000.00 in marital debt allocated to Mr. Dube since Mrs. Dube is incarcerated and had no means to pay the marital debt.

Mrs. Dube's last appeal challenges the Family Court's refusal to award alimony. The record fully supports the Court's factual findings that Mrs. Dube has no financial need while incarcerated and it also supports the Family Court's factual findings that Mr. Dube is financially incapable of providing support while simultaneously paying the marital debt assigned to him and maintaining a home for the couple's minor son.

## ARGUMENT

### I. The Appellant Failed To Preserve Any Challenge To The Stipulated Parenting Plan.

Prior to their contested hearing addressing the division of their marital assets and debt and Petitioner's claim for alimony, the parties, with the Guardian ad Litem's help, agreed upon a Parenting Plan. (App. p.41). Mrs. Dube agreed, while imprisoned, that she would renew contact with her minor son through written correspondence for a one year time period. Thereafter, if the minor child was emotionally ready, the Parenting Plan anticipates potential prison visits once per month, supervised by a third-party. (App. 43). The Plan further provides that if the minor child wishes to see his mother more frequently at the prison, he shall be allowed to do so. Likewise, if he does not feel comfortable visiting his mother while in prison, he shall not be required to visit. (App. p.43).

\*8 In her appeal, Mrs. Dube now claims the one-year period of communication by mail was the functional equivalent of a termination of her rights. She further maintains that she would not have agreed to that Parenting Plan proposal had she not been “suffering from mental and emotional distress.” (Brief, p.18). The Family Court, however, refused to find that Mrs. Dube was mentally unstable. (App. p.52; Request 16).

Mrs. Dube's appellate challenge to the stipulated Parenting Plan was not preserved as she failed to revoke her consent to that Plan when this case was tried below. Mrs. Dube's failure to challenge the Parenting Plan before the trial court precludes her from now arguing on appeal the Parenting Plan should be revoked because she was emotionally distressed. See [Miller v. Blackden](#), 154 N.H. 448 (2006); [Amica Mut. Ins. Co. v. Zinck](#), 130 N.H. 357 (1988).

Mrs. Dube's challenge to the one-year correspondence period is also moot, as the one-year time frame was concluded in late July of 2011. See generally, [In the Matter of Miller and Todd](#), 161 N.H. 630 (2011); [In the Matter of Martin and Martin](#), 160 N.H. 645 (2010). At this point the parties' minor child has the option of visiting his mother in prison at a frequency he controls. This Court should decline to address Mrs. Dube's argument regarding the Parenting Plan as it was not preserved for appeal and the one aspect of the Plan she challenges has been rendered moot by the passage of time.

### \*9 II. The Family Court Did Not Unsustainably Exercise Its Discretion When Granting A Fault-based Divorce Following Mrs. Dube's Attempt To Set Fire To The Marital Home.

Mrs. Dube argues the Family Court **abused** its discretion by granting a fault-based divorce because Mr. Dube was not “an innocent party.” Mrs. Dube's reference to her husband's single episode of sexual intercourse outside the marriage does not preclude him from acquiring a fault-based divorce, as that one encounter was not the cause of the marriage's breakdown. After Mr. Dube admitted his unfaithfulness, Mrs. Dube admits they agreed to work through the infidelity. (T-226, 249). The couple verified their intent to work through the issue when discussing the incident with Mr. Dube's parents. (T-90). In her brief, Mrs.

Dube states she “believed that the marriage was wonderful throughout its duration” and that she was committed to “work through the affair and focus on rebuilding their relationship.” (Brief, p. 7, T-215; 90).

Neither party contemplated filing a Petition for Divorce until Mrs. Dube announced her intent to kill the family, which she then acted upon by dousing the family home with gasoline. When Mr. Dube's father stopped her, she picked up an axe and began destroying the home. (T-95). Mr. Dube's concern that his wife might act upon her threats to harm the family, including the couple's 10-year-old son, caused the irremediable breakdown of the couple's marriage. (T-96-97, 99-100). Mr. Dube first sought a restraining order and filed his Libel for Divorce after Mrs. Dube's attempted arson on December 3, 2008. (T-99-100). Mr. Dube was an innocent party with respect to Mrs. Dube's attempted arson. The record \*10 confirming the parties' intent to save their marriage up to the time of Mrs. Dube's attempted arson supports the Family Court's conclusion that Mrs. Dube's threats to harm the Dube family coupled with her attempted arson caused the marriage's breakdown. Accord, *In the Matter of Hampers and Hampers*, 154 N.H. 275 (2006)(husband's threat to kill his wife was precipitating cause of the couples' divorce, since both had agreed to work through their earlier marital discord.).

Mrs. Dube also alleges the Court unsustainably exercised its discretion when granting a fault-based divorce based upon her conviction of a crime with an imprisonment of more than one year. Mrs. Dube correctly notes that Mr. Dube's original pleadings sought a fault-based divorce based upon conduct to seriously injure health or endanger reason. Mr. Dube's request for a fault-based divorce based upon conduct to endanger referenced the very same conduct that ultimately led to Mrs. Dube's imprisonment for more than one year. (App. 14).

When Mr. Dube filed his Libel, his wife had been arrested, but not convicted. (T-103). Without confirmation of a conviction and prison sentence in excess of one year, Mr. Dube was unsure whether he could seek a fault-based divorce based upon this ground. (T-103). When Mr. Dube's divorce case was tried in July of 2010, he knew with certainty that his wife would be imprisoned for more than one year and consequently asked the Court to consider a fault-based divorce based upon conviction of a crime, with a prison sentence in excess of one year. (T-103). Mrs. Dube does not contest that she was convicted of a crime “punishable with imprisonment for more than one year and actual imprisonment \*11 under such conviction” as required by [RSA 458:7 \(IV\)](#). She claims however that it was improper for the Court to consider this fault ground as the imprisonment post-dated her husband's Petition for Divorce, even though the conduct giving rise to her imprisonment did not and even though that conduct was the cause of the parties' irremediable marital discord.

Pursuant to [RSA 458:7 \(IV\)](#) a spouse is entitled to a fault based divorce based upon criminal conduct with a sentence in excess of one year whenever that criminal conduct “causes” the irremediable breakdown of the couple's marriage. Mrs. Dube testified that her marriage was “wonderful throughout its duration” confirming no intent on her part to seek a divorce. (Appellant's brief, p. 7; T-215). Mr. Dube testified that his wife's efforts to set the marital home on fire caused him to seek a divorce. (T-99). Because Mrs. Dube's attempted arson was the precipitating factor that caused Mr. Dube to file for divorce it was proper for the Court to grant a fault based divorce based upon Mrs. Dube's criminal conduct. (Appellant's Brief, p. 7, T-99; 215).

On appeal, Mrs. Dube argues that a fault based divorce based upon her criminal conduct was improper because her sentence post-dates Mr. Dube's decision to file for divorce. The fault ground based upon criminal conduct with a sentence in excess of one year in [RSA 458:7](#) does not limit the ground to divorces that postdate the other spouse's conviction and sentencing. If this Court were to accept Mrs. Dube's argument, spouses could have to wait 2-3 years while criminal proceedings and appeals were exhausted before commencing divorce litigation. \*12 That same spouse could then face another 2-year delay in the Family Court. Forcing couples to remain married under such circumstances for 4-5 years is contrary to public policy especially when there is no statutory language in [RSA 458:7\(IV\)](#) limiting its application to convictions that pre-date a spouse's divorce litigation. If the legislature intended to restrict the availability of this ground to convictions that pre-date divorce actions it could and would have added language confirming that the criminal conviction must precede the divorce litigation. Absent such qualifying language it was proper for the Court to grant a divorce under this ground, as soon as Mrs. Dube began serving her sentence in excess of one year.

If, for any reason, this Court concludes a fault based divorce for criminal conduct punishable for more than one year should not have been awarded since Mrs. Dube's conviction post-dated her husband' decision to file for divorce, it should still affirm the issuance of a fault-based divorce because Mrs. Dube's attempted arson qualifies as conduct to seriously injure health or endanger reason. *Slater v. Planning Board of Town of Rumney*, 121 N.H. 212 (1981)(Supreme Court will sustain decision of lower court even if based on mistaken grounds, if there are valid alternate grounds to support it.). In his original motion to seek a fault-based divorce, Mr. Dube expressed concern over his wife's threats to kill him, his children and his parents. (App. p.12). During the July 2010 trial, Mr. Dube confirmed that he had difficulty sleeping following the December 3rd arson attempt. He explained that when his wife was out on bail, he was worried she \*13 might come back and act upon her threats to kill him and his family. (T-100). Mr. Dube testified that he was easily startled during the night and did not enjoy a good night sleep until Mrs. Dube began serving her sentence in June of 2008, six months thereafter. (T-100). During the six months preceding her sentencing, Mr. Dube was prescribed sleeping pills, but he had trouble taking them given his employment as a Federal Air Marshal. (T-100-101).

Mrs. Dube's attempted arson and her threat to kill Mr. Dube and his family support a fault-based divorce on treatment to endanger health and reason. *In the Matter of Hampers and Hampers*, 154 N.H. 275, this Court affirmed the issuance of a fault-based divorce based upon treatment to endanger health and reason even though Dr. Hampers had not acted upon his verbal threats. Mrs. Hampers testified that Dr. *Hampers* threatened to kill her and that he had guns staged throughout the house. Unlike Hampers, in this case Mrs. Dube verbally threatened to kill Mr. Dube's children and parents, and she then took action upon those threats when she attempted to set the marital home on fire and began smashing it to pieces with an axe. The combination of her verbal threats and physical acts upon those threats supports the issuance of a fault-based divorce based upon treatment to endanger health and reason. *See also, In the Matter of Gronvaldt and Gronvaldt*, 150 N.H. 551 (2004)(excessive drinking and verbal **abuse** supported a fault based divorce based upon treatment to endanger).

**\*14 III. The Record Supports The Family Court's Factual Findings That Mr. Dube Did Not Have The Financial Ability To Pay Alimony Nor Did His Incarcerated Spouse Need Alimony.**

On appeal, Mrs. Dube argues that the Family Court unsustainably exercised its discretion when denying her request for alimony. Mrs. Dube's request for alimony is based upon her anticipated difficulty with future employment, brought about by her own actions. In her brief, Mrs. Dube acknowledges that her felony conviction "will likely prohibit her from working in education." (Brief, p. 16). She further acknowledges that her criminal acts will reduce her employability. Mrs. Dube's potential difficulty with employment at some unknown, future date, did not present sufficient grounds for alimony in calendar year 2010. Moreover, any difficulties that Ms. Dube may have with future employ ability, due to her own actions, are not a basis for ongoing support. *See In the Matter of Canaway and Canaway*, 161 N.H. 286 (2010)(change in financial condition due to fault or voluntary wastage does not support modification of alimony).

[RSA 458:19](#) grants the Family Court discretion to award alimony when the party in need lacks the means to provide for their reasonable needs, the party from whom alimony is sought is able to meet their own reasonable needs while also meeting those of the party seeking alimony and the party in need is unable to be self-supportive. The Family Court properly found that Mrs. Dube did not "lack the means to provide for her reasonable needs" since all of her current needs are and will continue to be provided to her at no cost during her incarceration. (App. 25). Furthermore, Mrs. Dube receives military payment in the amount of \$273.00 \*15 on a monthly basis, which will more than cover any personal expenses she has while incarcerated. (T-169). An alimony award based upon Mrs. Dube's potential difficult re-entry into the job market is both speculative and premature since no party currently knows when Mrs. Dube will be released from prison and no party knows with certainty whether Mrs. Dube will or will not encounter difficulty securing employment. (App. p.23-24). The record concerning the documented absence of any current financial need confirms the Family Court did not unsustainably exercise its discretion when denying alimony.

In addition to its finding that Mrs. Dube demonstrated no need for alimony, the Family Court also found that Mr. Dube did not have the financial ability to pay alimony. (App. p.25). The Court's factual finding is based upon the significant marital debt allocated to Mr. Dube and his costs in providing a home to the couples' minor son. Although Mr. Dube has steady employment,

he assumed marital debt totaling \$56,511.61, in addition to a principal mortgage in the amount of \$272,898.47. (App. 37-38). Mr. Dube's ability to remain current with respect to the foregoing debt will require all of his disposable income. Mr. Dube testified in July of 2010 that he lives paycheck to paycheck in order to meet his share of the marital debt, the primary mortgage and living expenses for his family. (T- 119). The Family Court's factual finding, that Mr. Dube lacked financial ability to pay alimony, is supported by Mr. Dube's testimony and does not rise to the level of an unsustainable exercise of discretion. *See generally* \*16 *Kidder v. Kidder*, 135 N.H. 609 (1992)(factual finding confirming spouse's ability to pay is a pre-requisite for awarding alimony).

#### **IV. The Family Court's Allocation Of The Marital Estate Does Not Constitute An Unsustainable Exercise Of Discretion.**

The Family Court acknowledged that the parties had an “extensive debt load” including joint marital debt and personal debt attributable to Mrs. Dube's December 3, 2008 attempted arson. (App. 26). The Court allocated a greater percentage of the marital debt to Mr. Dube as he had ongoing employment and someone needed to assume the joint marital home debt, to provide a home for the couple's minor son and to secure Mr. Dube's parents adjoining apartment in which they had invested \$181,606.63. (App. 28) Mr. Dube was ordered to assume \$56,511.61 in marital debt, whereas Mrs. Dube was assigned \$39,242.54. (App.28).

The marital estate assets included the marital home and Mr. Dube's Thrift Savings plan. Although the Family Court awarded the marital home to Mr. Dube, it found that asset had de minimus value. (App. 29) The Court concluded that if the parties attempted to sell the property in today's real estate market after deducting realtor's fees, sale costs and transfer costs, “It is more likely than not that the parties would have to come to the closing with cash in hand.” (App. 29) The record supports the Family Court's factual finding that there was little to no equity in the marital residence. Although Mrs. Dube challenges the Court's \*17 factual finding, she did not submit expert witness testimony confirming the value of the home. (App. 29).

The only real estate documentation provided to the Court indicated the home had a median fair market value totaling \$337,000. (App. 29). The Court questioned the accuracy of this report, based upon “the devalued condition of the real estate market in Southern New Hampshire.” (App. 29). Without local real estate market expert testimony, the Court indicated it was “hesitant to attempt to determine the equity.” (App. 29).

The Court also noted that Mr. Dube's parents had invested \$181,606.63 into the home, which Mrs. Dube did not contest. (App. 28). Mr. Dube asked the Court to characterize the \$181,606 investment as a loan in the first instance and alternatively he asked the Court to consider this investment when dividing the marital estate. The Court refused to characterize the investment as a loan as Mr. Dube's parents had not obtained a promissory note nor had they filed a lien against the property to protect their investment. (App. 28). Although Mr. Dube's parents had not filed a lien or partitioned the Court to protect their investment, it was proper for the Court to consider their investment of \$181,606 as a gift on Mr. Dube's behalf when awarding any de minimus equity in the home to Mr. Dube. *See Henderson v. Henderson*, 121 N.H. 807 (1981).

Mrs. Dube contests the Court's conservative estimate of the home's value and argues the Court should have accepted the median value from the submitted real estate estimate. (Brief, p. 11). If this estimate was accurate the Court could \*18 have found equity totaling \$36,691.79. (Id.). The Court's award of zero to \$36,691.79 in home equity to Mr. Dube is justified because of his parent's investment of \$181,606 into that home. In *Henderson*, 121 N.H. 807 (1981), this Court affirmed a property distribution of \$80,000 to Mrs. Henderson and \$10,000 to Mr. Henderson when the majority of these marital assets were gifted to the couple by Mrs. Henderson's mother. Under RSA 458:16-a (II)(n) one of the statutory factors the Family Court may consider when awarding an unequal property division includes assets acquired by gift. Mrs. Dube does not contest the \$181,606 gift investment of her in-laws into the marital home and thus, even if the home had equity totaling \$36,691.71 it was not an unsustainable exercise of discretion for the Family Court to award the equity to Mr. Dube since his parents had invested that sum plus another \$145,000 into the home awarded to their son. *See also, McAlpin v. McAlpin*, 129 N.H. 737 (1987)(Court affirmed distribution of camp sale proceeds to the spouse who purchased the camp with personal inheritance funds).

The Family Court's distribution of any marital home equity to Mr. Dube is also supported by his need to provide a home to the couple's minor son, during his spouse's incarceration. Once again, [RSA 458:16-a](#) recognizes “[t]he need of the custodial parent...to occupy or own the marital residence” as a special circumstance supporting an unequal division of the marital estate. [RSA 458:16-a\(II\)\(e\)](#).

**\*19** Finally, the Court recognized that Mr. Dube had assumed, without assistance, both the primary mortgage and home equity loan for one and a half years following Mrs. Dube's attempted arson. The Court found that during this time frame, Mr. Dube paid down the mortgage by \$4,750 and he paid down their home equity \$8,727. (App. 38). Mr. Dube's payment of \$13,477 in carrying costs is roughly equivalent to the maximum fifty percent home equity distribution sought by Mrs. Dube in the amount of \$16,643.83. (Brief, p. 12). Mr. Dube's assumption and payment of these costs further justifies the Family Court's decision to award any speculative equity in the marital home to Mr. Dube. [RSA 458:16-a \(II\)\(f\)](#).

The only marital asset other than the marital home, was Mr. Dube's Federal Thrift Savings Plan, which totaled \$55,479.44 at the time of the couple's separation. (App. 35). The court awarded Mr. Dube 70% of the Thrift Savings Plan and awarded 30% of it to Mrs. Dube. (App. 35). On appeal, Mrs. Dube argues the court erred in not distributing the Thrift Savings Plan on a 50/50 basis. The trial court unequal distribution of the Thrift Savings Plan is offset by the Court's allocation of an unequal amount of marital debt to Mr. Dube. (App. 35). The Court's distribution of the Thrift Savings Plan awarded Mr. Dube \$22,192.00 more than Mrs. Dube. Mr. Dube's allocation of an additional \$22,192 was roughly equivalent to the additional \$17,269 in additional marital debt allocated to Mr. Dube.

**\*20** The unequal distribution of Mr. Dube's Thrift Savings Plan is also supported by Mrs. Dube's fault, which caused the breakdown of the marriage and results in substantial economic loss to the marital estate. Prior to Mrs. Dube's attempted arson she was gainfully employed as a part-time teacher. Following her felony conviction for arson, she concedes it is unlikely she will ever work in education again. In fact, Mrs. Dube argues she may face substantial obstacles in any type of employment given her conviction for arson. Mrs. Dube's decision to douse the marital home with gasoline and her decision to thereafter take an axe to the marital home supports the trial court's unequal distribution/award of an additional \$22,000.00 to Mr. Dube. [RSA 458:16-a \(II\)\(1\)](#).

The Family Court's decision to distribute an additional 20% of the Thrift Savings Plan to Mr. Dube is also supported by Mrs. Dube liquidation and distribution of a \$39,600 account shared with her mother days after Mr. Dube filed his Libel for Divorce. (T-246-247). Mrs. Dube confirmed that she had historically deposited her monthly VA pension payment into a joint account with her mother. (T-196). Although the Family Court heard testimony that this account also included funds that belonged to Mrs. Dube's mother, the co-mingling of marital funds into that account made it part of the marital estate similar to Mr. Dube's parents investment into the marital home. The Court found that Mrs. Dube's liquidation of that account to her mother violated the Court's anti-hypothecation prohibition and it also found her in contempt for withholding discovery addressing this asset. (App. 39). The Court's award of that \$39,600 account to Mrs. Dube **\*21** offsets the additional \$22,000 awarded to Mr. Dube from his Thrift Savings Plan. (App. 38).

## CONCLUSION

The Family Court's discretionary, fact sensitive rulings with respect to fault, property division and alimony should be affirmed as the underlying record supports those findings. Mrs. Dube's appeal should be denied in its entirety.