State of New Hampshire
Supreme Court

NO. 2017-0487

2018 TERM

MARCH SESSION

In re Simone Garczynski Irrevocable Trust

RULE 7 APPEAL OF FINAL DECISION OF THE
NASHUA PROBATE COURT

BRIEF OF THE APPELLEE, SIMONE GARCZYNSKI IRREVOCABLE TRUST

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

This case is about when a court order regarding the sale of a house in Goffstown, New Hampshire became effective, and whether the deadline in that order should have been extended. To determine the matter, it is necessary to trace the order's genesis.

I. Mother Provided For Her Quarrelsome Children

Simone Garczynski had four children: Dennis, James, Michael, and Marlene.[1] In 1992 she created the Simone Garczynski Irrevocable Trust, into which she put bank accounts and personal property, her condominium, and a modest suburban home in Goffstown, New Hampshire where the children grew up and where Michael and James continue to live. SIMONE GARCZYNSKI IRREVOCABLE TRUST (Nov. 24, 1992), *Appx*. at 1; SUMMARY STATEMENT (Aug. 19, 2015), *Appx*. at 35; PETITION FOR PROBATE JURISDICTION (Apr. 13, 2015), *Appx*. at 21. The probate court was aware of long-standing grievances among the siblings, the nature of which is not in the record. PETITION FOR PROBATE JURISDICTION ¶3, 10; ANSWER TO PETITION FOR PROBATE JURISDICTION ¶3 (July 15, 2015), *Appx*. at 25; MOTION TO CONTINUE ¶4 (Aug. 4, 2015), *Appx*. at 31; MOTION TO COMPEL TRUST ACCOUNTING (Sept. 1, 2015), *Appx*. at 39; EMAIL FROM WILBERT TO HIGHAM (Nov. 20, 2015), *Appx*. at 53; LETTER FROM WILBERT TO MICHAEL (Mar. 16, 2016), *Appx*. at 50; OBJECTION TO MOTION TO REMOVE ¶4 (Apr. 19, 2016), *Appx*. at 72; MOTION FOR DEFAULT JUDGMENT (July 13, 2016), *Appx*. at 82.

The trust allowed Simone, who was under a guardianship in her last years, to live rent-free in her condominium, but still be eligible for Medicaid. For the children, the trust maintained the house, and distributed Simone's estate to them in equal shares upon her death. ORDER at 2

[1]Because of shared and changing names, the members of the Garczynski family are referred to herein by their first names. No disrespect is intended.

(June 20, 2017), *Appx*. at 164. The trust document made Dennis and Michael the beneficiaries of a special needs trust – their share is held in trust for their support rather than being distributed outright. TRUST ¶¶1.3, 5.1.1, 5.2.b. Initially Michael and Marlene were the trustees; if they were unable or unwilling, the trust specified that James "shall serve." TRUST ¶2.1.

In 2005, unbeknownst to James, Marlene withdrew as trustee, explaining in a note that "lack of trust by my mother," "lack of support" by her siblings, and lack of cooperation by her co-trustee Michael, "cause me to be ineffectual in my position." LETTER FROM MARLENE (Sept. 16, 2005), *Appx*. at 20.

When Simone died in November 2014, twenty-two years after she executed the trust, most of the rest of her assets became part of the trust. PETITION FOR PROBATE JURISDICTION ¶2; SUMMARY STATEMENT ¶1. Because of this case, however, the assets of the trust have yet to be distributed. SUMMARY STATEMENT ¶10-11; ANSWER TO PETITION FOR PROBATE JURISDICTION; LETTER FROM WILBERT TO MICHAEL & JAMES (Nov. 5, 2015), *Appx*. at 50.

II. Co-Trustees and an Attempt to Cooperate

Although Michael administered the trust after 2005, the terms of the trust document suggest he became disqualified upon Marlene's withdrawal, and that James should have become the sole trustee. TRUST ¶2.1; PETITION FOR PROBATE JURISDICTION ¶¶6-7; ANSWER TO PETITION FOR PROBATE JURISDICTION ¶¶5, 7, 9. James did not know of the trust, however, until their mother's death, SUMMARY STATEMENT ¶19, and then asserted his duty to serve as trustee.

To resolve the matter, the trust petitioned the probate court to accept jurisdiction. PETITION FOR PROBATE JURISDICTION. James argued Michael was disqualified under the terms of the trust, had done a sloppy job administering the trust while he was in charge, and had used trust money for personal expenses. SUMMARY STATEMENT ¶¶12-19; LETTER FROM WILBERT TO MICHAEL (June 15, 2016), *Appx*. at 80; MOTION FOR ACCOUNTING (Sept. 1, 2015), *Appx*. at 39; OBJECTION TO ACCOUNTING ¶¶8-9 (Sept. 4, 2015), *Appx*. at 42; ORDER (Oct. 7, 2015), *Appx*. at 46 (allowing discovery but deferring accounting). Marlene absented herself from the matter. NOTICE OF STRUCTURING CONFERENCE (July 29, 2015), *Appx*. at 30; MOTION FOR ALTERNATIVE SERVICE (Apr. 20, 2016), *Appx*. at 74; NOTICES OF DECISION (Apr. 25 & 27, 2016), *Appx*. at 76 & 77.

After a court hearing and a mediation session, James, Michael, Dennis, and the trust reached an Agreement, which provided:

- James and Michael would serve as co-trustees;
- Current trust bank accounts would be closed, and new accounts opened;
- Michael would pay trust bills and make records available to James;
- James would arrange for new locks on the condo, and share the keys with Michael;

- Upon receiving the condo keys from James, Michael would make arrangements, with three specified real estate brokerages, for three independent market appraisals of the condo and the Goffstown house;
- The condo would be listed for sale as soon as possible;
- The Goffstown house would continue to be owned by the trust;
- "Michael will communicate his living situation decision" – whether or not he wished to continue living in the Goffstown house – by March 15, 2016;
- Whenever a property is conveyed, the price will be the highest of the three appraisals;
- "If no family member expresses an interest in purchasing the house by the time Michael communicates his interest (or lack) in buying the house, then the house will be put on the market as soon as practicable";
- Attorney Jody Wilbert would be the trust's lawyer, with Attorney Maureen Higham "as co-counsel as needed";
- Upon court approval of the Agreement, the petition for probate would be withdrawn.

AGREEMENT (Oct. 26, 2015), *Appx*. at 47.The Nashua Probate Court (*Patricia B. Quigley*, J.), accepted the Agreement as an order, and the case was closed. NOTICE OF DECISION (Nov. 23, 2015), *Appx*. at 54; NOTICE (Jan. 6, 2016), *Appx*. at 57.

III. Does Michael Genuinely Want The House?

Ten days after the Agreement, the trust's lawyer, Jody Wilbert, wrote to Michael and James a detailed letter enumerating the next steps, including specifying that a new bank account was to be opened in the name of the "Simone Garczynski Irrevocable Trust." The letter noted that because of Michael's disabilities, James had already done many of the tasks delegated to Michael under the Agreement, and stressed that Michael must communicate "whether or not he will buy the house … no later than March 15, 2016." LETTER FROM WILBERT TO MICHAEL & JAMES (Nov. 5, 2015), *Appx*. at 50.

Michael continued to be in touch with Higham, who regularly corresponded with Wilbert. A series of emails between the lawyers in November and December show there were difficulties getting Michael to cooperate on such matters as utilities and closing the old bank account, and incidents where Michael called the police on James. EMAILS FROM WILBERT TO HIGHAM (Nov. 20, Dec. 1, Dec. 10, 2015), *Appx*. at 53, 55, 56. On March 9, 2015, just before the March 15 deadline, Higham told Wilbert, by letter, that Michael intended to buy the house, but that Wilbert should communicate directly with Michael about the details. LETTER FROM HIGHAM TO WILBERT (Mar. 9, 2016), *Appx*. at 58.

The day after the March 15 deadline, Wilbert wrote Michael a letter noting the highest of the three market analyses was $179,900, and therefore that was the price of the house. Wilbert's letter questioned whether Michael would be physically able to live alone in the house, whether owning real estate would affect his ability to receive need-based nursing home care, and whether he had the means to purchase – especially given that his distribution from the trust would not be in cash but held in a special needs trust. Wilbert suggested Michael consult a lawyer, and recommended that he consider living in the condo or transitioning to a nursing

home. LETTER FROM WILBERT TO MICHAEL (Mar. 16, 2016). Michael did not respond.

A few weeks later, Wilbert wrote Michael another letter, reiterating her concerns about him buying the Goffstown house, again suggesting consultation with a lawyer, and questioning a significant withdrawal from the trust bank account for personal expenses. Wilbert noted that although she remained open to cooperation, "[g]iven that you will not respond to me," she planned to imminently file a motion to have him removed as co-trustee. LETTER FROM WILBERT TO MICHAEL (Apr. 5, 2016), *Appx*. at 62. Again Michael did not respond.

In May, Wilbert wrote a third letter to Michael in which she again summarized her concerns, lamented the delays Michael was causing in not responding to her, implored him to "please contact me immediately to make arrangement to enter into a purchase and sales agreement" for the house, and set a June deadline to either buy the house or to have it "proceed to market." LETTER FROM WILBERT TO MICHAEL (May 4, 2016), *Appx*. at 78. When the June deadline passed, Wilbert wrote a fourth letter complaining Michael had not contacted her, deploring that Michael had again spent trust money for personal support, and urging him to consult a lawyer. LETTER FROM WILBERT TO MICHAEL (June 15, 2016), *Appx*. at 80. Still Michael did not respond.

IV. Petition to Remove Michael as Co-Trustee Gives Him a Second Opportunity to Buy the House

Meanwhile, in April 2016, James in his capacity as co-trustee petitioned the probate court to reopen the case and remove Michael as co-trustee. Sharing Wilbert's concerns, James averred that Michael had not implemented the terms of the mediation Agreement, had obstructed James's efforts to administer the trust, and had taken yet more trust money for personal purposes. MOTION TO REOPEN (Apr. 8, 2016), *Appx*. at 70; MOTION TO REMOVE (Apr. 8, 2016), *Appx*. at 65; MOTION TO SET ASIDE AGREEMENT (Aug. 23, 2016), *Appx*. at 92; OBJECTION TO SET ASIDE AGREEMENT (Aug. 30, 2016), *Appx*. at 94.

Dennis, *pro se*, objected generally. OBJECTION (Aug. 19, 2016), *Appx*. at 90. While Higham also objected, Michael filed nothing, prompting James to request a default judgment on Michael's removal, which the court granted. OBJECTION TO MOTION TO REMOVE; MOTION FOR DEFAULT JUDGMENT; ORDER (July 27, 2016), *Appx*. at 86. Unclear what the meaning Michael's removal would be, Higham requested clarification, MOTION FOR CLARIFICATION (Aug. 3, 2016), *Appx*. at 87, and the court scheduled a hearing in September 2016, which everyone attended.

On the motion to remove Michael as trustee, the court recited Michael's various nonfeasances, and removed him. As to the Agreement, the court regretted its silence on specifics of transferring the house from the trust to Michael, and found that Wilbert's letters and Michael's inaction had created a "miscommunication" such that Michael "did not have an appropriate opportunity to effectuate the transfer." Accordingly, the court enforced the Agreement, gave Michael a second opportunity to purchase the house, and in numbered paragraphs set forth precisely how it would happen:

- Michael can buy the house for the agreed-upon appraised price of $179,900, and if he wants to buy, Michael must give written notice to Attorney Wilbert within 10 days.
- The house will be sold without guarantees or conditions, and there is a specified apportionment of closing costs and taxes.
- Michael is responsible for preparing closing documents and deeds, and as he is no longer a co-trustee, Michael need not sign the deed.
- If Michael buys the house, James shall vacate within 30 days, with an apportionment of utilities during that time, specifying rent and penalties if that time is extended.
- If Michael does not buy the house, James "shall have the opportunity to purchase the property on the same terms and conditions as stated herein," and Michael is "subject to the same terms and conditions as stated herein for vacating the premises." If James does not purchase, the property will be marketed for sale.

Most important here:

- "Michael Garczynski has 60 days *from the date of this order* to close on the property, unless otherwise agreed by the parties in writing prior to the expiration of 60 days."
- "At the closing, Michael Garczynski shall provide a bank check made payable to the Simone Garczynski *Irrevocable* Trust for the full amount owed by the purchaser."

ORDER at 5 (Oct. 18, 2016), *Appx*. at 100 (emphasis added).

The enumerated order was dated October 18, 2016, and the clerk's notice of decision was dated October 24, 2016. *Id.*; NOTICE OF DECISION (Oct. 24, 2016), *Appx*. at 106. These two dates form the issues around which this appeal is based.

Michael gave timely notice of his intent to buy. James filed a motion for reconsideration, limited only to the issue of how much time he would be allowed for moving out of the residence, to which Michael objected. The court denied the reconsideration by a margin order dated November 15, and a clerk's notice dated November 16. MOTION TO RECONSIDER (Oct. 28, 2016), *Appx*. at 107 (with margin order); OBJECTION TO MOTION TO RECONSIDER (Nov. 1, 2016), *Appx*. at 109; NOTICE OF DECISION (Nov. 16, 2016), *Appx*. at 111.

V. Michael Undermined His Professed Intent to Purchase

After Michael gave notice of his intent to buy, the lawyers coordinated a closing. Michael was represented by Attorney Donald Kennedy of Manchester and also by Higham of Manchester, James was represented in his personal capacity by Attorney David Craig of New Boston, and the Simone Garczynski Irrevocable Trust (on whose behalf this brief is submitted) was represented by Wilbert of Nashua.

Correspondence among the lawyers indicates they all understood, rightly or wrongly, that the final possible closing date contemplated by the court's October 18 order was Saturday, December 17, as that was 60 days from October 18. During negotiations about setting the date, it was never suggested that counting should be otherwise. *Trn*. at 26-28, 53.

Wilbert proposed the afternoon of Friday, December 16. LETTER FROM WILBERT TO KENNEDY (Dec. 1, 2016), *Appx*. at 112. Kennedy insisted instead on Thursday, December 15, because in his experience Friday afternoon closings butting up against deadlines are fraught and leave no time for fixing glitches, because he had another engagement on Friday afternoon, and because he would be leaving for Florida with his family on Saturday and would be gone for part of the following week. LETTER FROM KENNEDY TO WILBERT (Dec. 7, 2016), *Appx*. at 115. In an email chain, the lawyers negotiated various issues, including language of the deed and description of an easement, and agreed on the location, date, and time of the closing – 1:00PM on December 15 at Wilbert's office. EMAILS AMONG LAWYERS (Dec. 13, 2016), *Appx*. at 116; *Trn*. at 16.

Attorney Kennedy notified that Michael would not be present at the closing due to his disability, but that Kennedy would "be bringing checks and making payments consistent with the closing statement." LETTER FROM KENNEDY TO WILBERT (Dec. 7, 2016), *Appx*. at 115. The

closing statement, and Wilbert's December 1 letter to Kennedy, both noted that the check should be in the amount of $179,770.30 ("as adjusted"), and that it should be payable to the Simone Garczynski Irrevocable Trust. LETTER FROM WILBERT TO KENNEDY (Dec. 1, 2016), *Appx*. at 112; ALTA SETTLEMENT STATEMENT (Dec. 15, 2016), *Appx*. at 120.

On the "afternoon of December 15," Michael went to his bank, accompanied by Attorney Kennedy, to get a treasurer's check. Michael presented a driver's license that had expired nine years before, plus "a pharmaceutical card and another couple of pieces of paper with Michael Garczynski's name on them," which the bank would not accept as identification. Thus Michael could not get the check. AFFIDAVIT OF SERGE BYAMUNGU, BRANCH SUPERVISOR, ST MARY'S BANK (Jan. 5, 2017), *Appx*. at 130. Kennedy immediately emailed Wilbert and told her that the afternoon closing was off, then followed up by letter, explaining the identification problem, and also asserting there was still time to close before the deadline. LETTER FROM KENNEDY TO WILBERT (Dec. 15, 2016), *Appx*. at 121.

Late on Friday, December 16, Wilbert responded to Kennedy by emailed letter. She noted the problem, but asserted that the 60 days would expire the following day, Saturday, December 17. Recalling Michael's "eight-and-a-half … week" lacuna, Wilbert insisted that unless Michael closed by 11:59PM on December 17, the right to buy under the court order would pass to James. To facilitate a weekend closing, Wilbert provided her personal contact information. LETTER FROM WILBERT TO KENNEDY (Dec. 16, 2016), *Appx*. at 123.

The following Thursday, December 22, Kennedy, still in Florida, had his office fax a letter to Wilbert saying that he had "from my client a treasurer's check … in the amount of $179,786.35 dated 12/17/16 payable to the Simone Garczynski *Revocable* Trust, a copy of which is enclosed." Kennedy proposed that he "will be back in my office on Monday, December 26,

2016. We could have a closing on Monday or Tuesday" – presumably meaning December 26 or 27. LETTER FROM KENNEDY TO WILBERT (Dec. 22, 2016), *Appx*. at 126 (emphasis added).

The enclosed check, however, was made out to the wrong payee; Simone Garczynski's trust is an *irrevocable* trust. TREASURER'S CHECK (Dec. 17, 2016), *Appx*. at 128. Moreover, Michael was tasked by the court order with drawing the transaction documents, but the proffered settlement statement had Michael erroneously signed as "seller." ALTA SETTLEMENT STATEMENT (Dec. 15, 2016), *Appx*. at 120.

On the same day, December 22, Wilbert replied to Kennedy by emailed letter, saying that Michael's opportunity to purchase had expired at midnight on December 17, and thus there would be no closing the following week. LETTER FROM WILBERT TO KENNEDY (Dec. 22, 2016), *Appx*. at 129.

Kennedy later told the court his office could have made the closing happen on December 23. *Trn.* at 24. That date was never proffered, however; nor was a check with the actual payee nor a settlement statement with the correct signatory. *Trn*. at 43-44.[2] Wilbert told the court that the wrong payee was not a minor error, given that Michael had long served as trustee – and thus knew better – and because the precise payee was specified in the October 18 court order. *Trn.* at 29.

[2]In his brief, Michael suggests that at some point there was a check made to the proper payee. *Michael's Brf.* at 18. No such check is known nor in the record.

VI. James, a Willing Buyer at Top Price, Buys the House; Michael Tries to Nullify

On January 6, 2017, the trust sold the house to James, at the highest price established by the three market analyses. ALTA SETTLEMENT STATEMENT (Jan. 6, 2017), *Appx*. at 132.

Having failed in his second opportunity to buy, Michael filed a motion demanding invalidation of James's purchase and compelling sale to Michael. MOTION TO CONVEY (Jan. 11, 2017), *Appx*. at 133. The trust objected, arguing that the October 18 order was already a second chance following Michael's long period of inaction, observing that Michael had months to close but did not, recalling that Michael had insisted on the December 15 closing date, pointing out that Michael waited until literally the last moment to obtain a bank check, and noting that he tried to use a nine-year expired identification. OBJECTION TO MOTION TO CONVEY (Jan. 18, 2017), *Appx*. at 137. James in his personal capacity also objected, noting he was a legitimate buyer and that his purchase complied with the court order in every particular. OBJECTION TO MOTION TO CONVEY (Jan. 19, 2017), *Appx*. at 146.

Also, Michael requested a stay, with which James mostly concurred, and the court granted, such that Michael continues to live in the Goffstown house pending this court's resolution. MOTION TO STAY (Jan. 19, 2017) (margin order), *Appx*. at 144; OBJECTION TO MOTION TO STAY (Jan. 27, 2017), *Appx*. at 149; MOTION TO STAY (Aug. 17, 2017) (margin order), *Appx*. at 180; NOTICE OF DECISION (Oct. 11, 2017), *Appx*. at 182.

The court held a hearing on Michael's request to convey the house to him, the transcript of which is in this court's record. The Nashua Probate Court briefly reviewed the procedural history of the case, on which the same judge has sat throughout. The court recounted that in 2016, after Michael initially expressed an interest in buying the house, he "made no further attempt to respond or to take any action to secure purchase of the property." ORDER at 2 (June

20, 2017), *Appx*. at 164.

The court wrote that it had given Michael a "second chance" to purchase the property, provided that he comply with the court's unambiguous manner of effectuating the transaction. *Id.* at 2-3, 6. It then ruled that the 60 days it had specified ran from the clerk's notice (October 24) rather than the date of the order itself (October 18), and that therefore the expiration date for Michael to complete the transaction had been Friday, December 23, 2016, rather than Saturday, December 17. *Id.* at 3.

The court also noted Michael's last-minute effort to procure a bank check with an invalid identification, his lack of any other effort to rectify the situation after the December 15 closing failed, *id.* at 3-4, the wrong payee on the bank check despite Michael's long involvement with the trust, and that Michael had earlier been "removed [as trustee] because of his non-cooperation in settling the affairs of the trust," several examples of which the court listed. *Id.* at 4.

The court found that "Michael Garczynski has been fully aware since the Agreement signed by the parties in November 2015 of his right to purchase the property," but "has been dilatory and neglectful in taking steps necessary to complete the purchase," *id.* at 4-5, that Michael "did not timely act due to his own conduct," *id.* at 5, that he "was well aware of his requirement to obtain bank funds … prior to the closing date," and that "[h]is delay in even attempting to obtain such funds until the day before[3] the scheduled closing was of his own doing." *Id.* at 5.

The court rejected Michael's assertion that the 60 days in the court's October 18 order was not a hard deadline, explaining that this was not a contractual transfer. *Id.* at 5. The court ruled:

[3]It was actually the day of.

> Attorney Wilbert … was mistaken in stating that Michael['s] … right to purchase the property under the court order expired on December 17, 2016. However, this mistake does not excuse Michael['s] … neglect to act. He had 60 days from the clerk's Notice of Decision to close on the real estate, *i.e.* until December 23, 2016. Michael … suggested that the closing be re-scheduled for December 26 or 27, past the date allowable under the court order. Michael did not seek agreement of the parties or court permission to extend the deadline for closing on the property.

Id. at 5. The court again commented on the wrong payee on the bank check, listed the several reasons that Michael knew better, and intoned that Michael's having "proffered a check with an incorrect name of the property owner was his own mistaken, neglectful or deliberate act." *Id.* at 5-6.

The court thus held that "a closing for the purchase of the real estate by Michael … did not occur pursuant to the court order because of the dilatory and neglectful actions of Michael." *Id.* at 6. Given that, the court recognized that the right to purchase had passed to James, which he exercised. *Id.* at 6. Despite Michael's claims, the court found that the trust was justified in selling the house to James because Michael did not "act[] in a reasonable fashion, nor [was] he ready, willing and able to close on the property under the terms of the court order." *Id.* at 7.

Accordingly, the court denied Michael's various motions to undo the sale to James, and ruled that James's purchase was "a valid conveyance." *Id.* at 7-8.[4]

Finally, Michael requested reconsideration, to which the trust replied that even if James's purchase failed, the remedy would be to put the house on the market, not to revive Michael's right of purchase. The probate court was unmoved, MOTION TO RECONSIDER (June 29, 2017),

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[4]Michael raised several minor issues, which the court termed "specious," alleging that James's notice of intent to buy was not appropriately delivered, or not within proper time frames. The court held that James's expression of intent was timely and manifest. ORDER ON MOTION TO CONVEY ¶¶ 6-7 (June 20, 2017), *Appx*. at 164; MOTION TO AMEND (Jan. 19, 2017), *Appx*. at 142; OBJECTION TO MOTION TO AMEND (Jan. 27, 2017), *Appx*. at 149; SECOND MOTION TO AMEND (Feb. 28, 2017), *Appx*. at 153; OBJECTION TO SECOND MOTION TO AMEND (Mar. 7, 2017), *Appx*. at 156; OBJECTION TO SECOND MOTION TO AMEND (Mar. 9, 2017), *Appx*. at 159. Those issues have been withdrawn from this appeal. *Michael's Brf.* at 1.

Appx. at 172; OBJECTION TO MOTION TO RECONSIDER (July 6, 2017), *Appx*. at 175; ASSENT TO OBJECTION (July 10, 2017), *Appx*. at 178; NOTICE OF DECISION (July 21, 2017), *Appx*. at 179, and Michael appealed.

SUMMARY OF ARGUMENT

The trust first presents the law, now well-established, that the effective date of a court order is when it was "rendered," which may be before the clerk's notice of decision. The order here mandated action within 60 days, and was signed on October 18, 2016. The trust thus argues the order required Michael to buy the house, if he chose, on or before December 17. Because he did not, his opportunity was foreclosed.

The trust further argues that, even if December 17, 2016 were not the deadline, it is undisputed that December 23 was, and that Michael took no action between those dates to assert his interest in buying; he did not insist on a closing by December 23, or even ask forbearance for extra time. His own inaction caused the loss of his opportunity to purchase.

Finally, the trust's interest was in promptly selling the house at the highest possible price. It was therefore justified in declining further extensions to benefit Michael, who had already demonstrated two years of procrastination, and in accepting an offer by James and consummating the sale in January 2017.

ARGUMENT

I. Court Deadline Order Was Effective Upon Rendition

The notion of "finality" in New Hampshire practice has been taken to mean at least two things: (1) the deadline by which an appeal is due, and (2) the date upon which an order becomes effective. Michael conflates them.[5]

A lower court order is timely appealed if it is appealed within 30 days, *Rollins v. Rollins*, 122 N.H. 6, 9 (1982), and untimely if not appealed within 30 days. *Guardianship of Luong*, 157 N.H. 429, 437 (2008); *Estate of Heald*, 147 N.H. 280, 282 (2001). An order does not go to "final judgment" until the disposition of a timely appeal, or if there is no appeal taken, on the thirty-first day after the lower court's order. *In re Nyhan*, 151 N.H. 739, 745 (2005); *Germain v. Germain*, 137 N.H. 82, 84 (1993).

An order is *effective*, however, even if appealed, unless there is a stay, *Rollins*, 122 N.H. at 9, or some other adjustment made by the lower court. *Nicolazzi v. Nicolazzi*, 131 N.H. 694, 696 (1989). An order is effective upon "rendition." *Bricker v. Sceva Speare Memorial Hospital*, 115 N.H. 709, 712 (1975).

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[5]In his brief, Michael contends this issue was not preserved because it was not cross-appealed. No cross-appeal was necessary, however, because the question presented in Michael's notice of appeal and his brief put the issue before this court. The question presented is:

> The Trustee insisted that the closing date was to be no later than 12/17/16 and refused to close any time after that date. The Court said the closing should have occurred on or before 12/23/16. Did the Trustee's actions in refusing to allow Michael Garczynski to close deny him the right to purchase the property?

Michael's Brf. at 1, question III; *Michael's NOA* at 3, question 2. The answer to the question is "no" in part because, as explained herein, the law mandates how to count, resulting in a closing date no later than December 17.

Moreover, the statutory standard of review includes a plain-error prong: "The findings of fact of the judge of probate are final unless they are so *plainly erroneous* that such findings could not be reasonably made." RSA 567-A:4 (emphasis added). Even if not preserved by a cross-appeal or in Michael's questions-presented, the matter was squarely ruled on below, and this court should therefore address the issue.

> A judgment routinely goes through three stages: (1) rendition, (2) signing, and (3) entry. The judgment becomes effective once it is "rendered." A judgment is "rendered" when the matter submitted to the court for adjudication is officially announced either orally in open court or by memorandum filed with the clerk. The subsequent reduction of the pronouncement to a writing signed by the court is a ministerial act of the court. A judgment is "entered" when it is spread upon the minutes of the trial court by a purely ministerial act of the clerk of the court, and "entered" is synonymous with neither "signed" nor "rendered" when used in relation to a judgment or the date of the judgment.

State v. Looney, 154 N.H. 801, 803-04 (2007) (ellipsis and brackets omitted) ("In the context of a criminal case, a judgment is 'rendered' when the sentence has been imposed by the trial court.").

In *Gray v. Kelly*, 161 N.H. 160 (2010), this court applied *Looney* to a non-criminal case. In *Gray*, Kelly got a domestic violence order in the family court against Gray which was "issued" on February 7. The order included a provision that "Gray shall retrieve his belongings from Kelly's residence in 30 days" or Kelly could dispose of them. Gray went to get his things on April 1, learned they had already been discarded, and filed a variety of legal actions. Gray argued (like Michael does here) that the 30 days in the order should be counted from the end of the period in which he could appeal it, which for him was April 9. Gray claimed that "because a judgment does not become final until thirty-one days after the date of the trial court's last order, … the order did not take effect until the conclusion of the appeal period." *Id.* at 167. Citing *Looney*, this court again distinguished between "final" and "effective," and held that "while filing a timely appeal prevents a judgment from becoming final, a judgment is nonetheless effective from the time it is rendered unless a party files an appeal or obtains a stay." *Id.*

Accordingly, the effective date of an order is the date it is "rendered."

If a judge announces a decision in open court, that is "rendition," and the order is effective immediately. *Looney*, 154 N.H. at 803. If the judge does not announce orally, the order

is effective when the judge announces "by memorandum filed with the clerk." *Id.* The time a judgment is "entered" – "spread upon the minutes of the trial court by a purely ministerial act of the clerk" – does not determine when it is effective.

In New Hampshire practice, an order is "rendered" when the judge gives the written decision to the clerk, and "entered" when the clerk issues a notice of decision. Because an order becomes effective when rendered, the order is effective when the judge gives it to the clerk. In other words, "[i]t is axiomatic that an order is effective from the time it is signed by the court." *State v. Martin*, 145 N.H. 362, 366 (2000).

In the instant case, the only indication of when the judge gave the order to the clerk is the date it was signed – October 18, 2016. Thus, under *Martin*, *Looney*, and *Gray*, October 18 was its effective date. The lawyers were correct in their initial assumption that Michael would have to consummate his purchase within 60 days from October 18, which was December 17. The probate court's later extension to December 23, which was 60 days from the October 24 notice of decision, was overly generous and "plainly erroneous as a matter of law." *Estate of Couture*, 166 N.H. 101, 105 (2014).

Michael did not close by December 17, and therefore he lost his opportunity.

Even if the probate court was correct that December 23 was the last date by which Michael could purchase, Michael did not take any action between December 17 and December 23. At most, on December 22 he offered a closing date of December 26, which was too late. He did not insist on a closing before the purported December 23 deadline, or even request the trust's assent to extend the deadline. Nothing done or not done by James, his attorney, or the trust's attorney, prevented Michael from proposing a timely closing.

Because this court's statutory standard of review is that "findings of fact of the judge of

probate are final unless they are so plainly erroneous that such findings could not be reasonably made," RSA 567-A:4, it "will not disturb the probate division's decree unless it is unsupported by the evidence or plainly erroneous as a matter of law." *Couture*, 166 N.H. at 105. The probate court's two years of experience with Michael's dilatoriness was enough to not further excuse it, and this court should affirm.

II. No Justification for Further Opportunities

Michael argues that the trust or the court should have extended the deadline, and suggests that because the court did not include extra words emphasizing the importance of the 60-day period, the trust or the court was obligated to extend it. Analogizing to private contracts, which require "time is of the essence" language to compel performance by a fixed date, he suggests the court's 60-day window was not absolute.

Unlike private contracts, however, deadlines in court orders *are* absolute, without any extra language. This is so across eras, and without regard to subject matter. *See, e.g.*, *In re Morse*, 160 N.H. 538 (2010) (lawyer disbarred for, among other things, failing to file trust accounting within deadline that had been extended by court 12 times); *In re Stall*, 153 N.H. 163 (2005) (party held in contempt for failure to comply with court order to "forward by common carrier all of the children's personal effects within 10 days"); *Lakeview Homeowners Ass'n v. Moulton Const., Inc.*, 141 N.H. 789 (1997) (default judgment affirmed where court order required party to file appearance within 30 days, but party did not); *Morriss v. Towle Hill Assocs., Inc.*, 138 N.H. 452 (1994) (default judgment for failure to file appearance by return date); *Town of Nottingham v. Bonser*, 131 N.H. 120 (1988) (party held in contempt for refusing to remove mobile home within time ordered by court); *Carroll County Elderly Housing Assocs. v. Merrimac Tile Co.*, 127 N.H. 538 (1985) (party must comply with appropriate return date specified in court order, even if mistaken return date was an obvious typographical error); *Bonser v. Courtney*, 124 N.H. 796, 802 (1984) (jury trial waived, where court ordered that party shall, "within 30 days of this order" submit proposed issues of fact to the court, and if not, party "will be deemed to have waived their request for trial by jury," but party "never took advantage of this offer within the required thirty-day deadline"); *Simoneau v. Town of Enfield*, 112 N.H. 242 (1972) (dismissal of claim

affirmed where tort claimant "was ordered to file his statement of claim 'within 60 days from the date hereof,'" but did not); *Woodsville Fire Dist. v. Cray*, 88 N.H. 264 (1936) (evidence excluded where court had allowed party to produce evidence "before the end of the term," but party did not produce); *Wilbur v. Abbot*, 58 N.H. 272, 273 (1878) (where judgment specifies day from which interest is to be calculated, that is the day from which it must be calculated); *State v. Matthews*, 37 N.H. 450 (1859) (husband jailed for contempt for violating anti-hypothecation order in divorce case); *State v. Town of Canterbury*, 28 N.H. 195 (1854) (town criminally prosecuted for failing to build bridge across Merrimack River after being ordered by state road commission).

The court recognized that it had accepted jurisdiction of the trust in April 2015, that there had been an Agreement, lots of delay, and several court orders, but that by June 2017 the time had come to bring the matter to conclusion. Both the trust and the probate court had witnessed numerous instances of Michael's dilatory and negligent conduct, and understood that his most recent failure to purchase was again self-precipitated, or even a "deliberate act." ORDER at 6 (June 20, 2017).

The probate court was thus justified, and supported by the law, in construing its own deadline to mean what it said. *Matter of Sheys*, 168 N.H. 35 (2015) ("a court decree or judgment is to be construed with reference to the issues it was meant to decide"). Neither the court nor the trust was unreasonable in declining to offer third or fourth opportunities.

CONCLUSION

Michael had two years of opportunities to buy the family house, but managed at every juncture to muddle it. In response, the court provided him straightforward and understandable procedures that, if he were genuine about purchasing, were accessible and not difficult to follow. The probate court observed Michael sabotaging each opportunity, and was justified in protecting the interests of the trust – and ultimately maximizing the trusts's assets – by ratifying a prompt buyer at top dollar. This court should affirm.

REQUEST FOR ORAL ARGUMENT

Because this case raises several issues regarding the finality of court orders, of interest to all courts and litigants, this court should schedule oral argument.

Respectfully submitted,

Simone Garczynski Irrevocable Trust, James Garczynski, Trustee
By its Attorney,
Law Office of Joshua L. Gordon

Dated: March 12, 2018

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CERTIFICATIONS

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

I further certify that on March 11, 2018, copies of the foregoing will be forwarded to Doreen F. Connor, Esq.

Dated: March 12, 2018

Joshua L. Gordon, Esq.