State of New Hampshire
Supreme Court

NO. 2018-0202

2018 TERM

NOVEMBER SESSION

Evelyn Tarnawa

v.

Richard Goode

RULE 7 APPEAL OF FINAL DECISION OF THE
HILLSBOROUGH COUNTY (NORTH) SUPERIOR COURT

BRIEF OF PLAINTIFF/APPELLEE, EVELYN TARNAWA

November 20, 2018

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STATEMENT OF FACTS

The parties, Evelyn Tarnawa and Richard Goode, are sibling co-inheritors of their mother's home in Manchester, New Hampshire. For many years after their mother's death, Evelyn[1] forbore from selling her share, while Richard continued living in the house. The issues in this case arose from Evelyn learning from the City that Richard had not been paying real estate taxes during his long residence, and that he had been untruthful with her about it, prompting Evelyn to consummate her long-expressed intent to exit the co-ownership.

I. Siblings Jointly Own Deceased Mother's House in Manchester

Evelyn's and Richard's mother, Stella Goode, owned an urban residence in Manchester, New Hampshire. The lot is about 100 feet square, and the house was the siblings' childhood home. *Trial*[2] at 18, 76; ORDER (Jan. 29, 2018); APPRAISAL OF SINGLE FAMILY RESIDENCE (Dec. 29, 2008), *Appx*. at 90 (¼ acre ±); FIDUCIARY DEED (Nov. 21, 1968), *Appx*. at 127.

Evelyn has long made her life in Connecticut. *Trial* at 76. Richard has resided in Stella's home since 2004, and continues living there. *Trial* at 17, 26-27, 96, 105-09. In 2006 Stella executed a will, leaving the house "in equal shares" to Evelyn and Richard. WILL (June 22, 2006), *Appx*. at 5.

As she aged, Stella became a ward, with the Office of Public Guardian serving as conservator of her estate. CERTIFICATE OF APPOINTMENT (Oct. 3, 2008). Evelyn and Richard were appointed co-guardians of Stella's person, but Evelyn declined because Stella wished to remain in her New Hampshire house, and Evelyn felt she could not be effective from Connecticut, *Trial* at 44, 99, 108, making Richard guardian of Stella's person. CERTIFICATE OF

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[1]First names are used herein due to shared surnames. No disrespect is intended.

[2]*Trial* refers to the transcript of the December 19, 2017 trial, in the appellate record.

APPOINTMENT (Feb. 27, 2008). Toward the end of her life, Stella was committed to the New Hampshire Hospital. NOTICE OF CHANGE (July 2, 2009).[3]

[3]What appears to be the entire prior record of probate court proceedings were made a part of the superior court record in this matter, as "Defendant's Exhibit A," and admitted as a full exhibit. EXHIBIT LIST - BENCH TRIAL (Dec. 19, 2017), *Appx*. at 32; *Trial* at 16; PORTIONS OF PROBATE RECORD, *Appx.* at 77. The probate court record contains numerous documents related to both the probate of Stella's will, *Estate of Stella Goode*, Hills.Cnty.Prob.Ct. No. 316-2009-ET-01621, and to the guardianship of Stella's estate and person. *Guardianship Over Stella A. Goode*, Hills.Cnty. Prob.Ct. No. 316-2007-GI-02474. There appears, however, to be no provision in the superior court record for maintaining confidentiality of the guardianship record, RSA 464-A:8, VI, but no dispute regarding their contents. Consequently, guardianship documents cited herein are omitted from the appendix to this brief.

II. Summary Administration of Mother's Estate

Stella died in July 2009 with Evelyn and Richard as devisees of Stella's will. As co-executors, both hired lawyers for the probate proceeding. Evelyn employed Attorney Daniel W. O'Shaughnessy, of Manchester; Richard employed Attorney J. Marlin Hawthorne, of Pembroke, Massachusetts.

During administration of the estate, an appraisal was done, which estimated the house was worth $135,000 in 2008. APPRAISAL OF SINGLE FAMILY RESIDENCE (Dec. 29, 2008), *Appx*. at 90. Although the estate had sufficient liquidity to pay its obligations, HOME EXPENSES (July 13, 2009), Exh. H, *Appx*. at 30, it appears some estate expenses were paid by Evelyn or Richard personally. *Trial* at 89, 103, 113. The siblings did not talk about administration expenses, however, *Trial* at 81, and Evelyn did not pay any real estate taxes. *Trial* at 88, 89, 102-03, 113.

The will was uncontested, and the probate estate was closed in January 2011 pursuant to a jointly-filed Summary Administration. RSA 553:33. Both Evelyn and Richard attested "there are no outstanding debts, obligations or unpaid or unresolved claims attributable to the deceased's estate." MOTION FOR SUMMARY ADMINISTRATION (Dec. 13, 2010) (granted by margin order (Jan. 24, 2011)), *Appx*. at 14; NOTICE TO TOWNS AND CITIES (of real estate passed by inheritance) (Jan. 12, 2011), *Appx*. at 152.

III. Negotiations About Future Co-Ownership, No Written Agreement, Oral Understanding, Conduct of the Parties

During administration of the estate, Attorneys O'Shaughnessy (for Evelyn) and Hawthorne (for Richard) recognized that issues might arise post-probate regarding Richard and Evelyn sharing expenses for the jointly-owned property. Accordingly, starting shortly after Stella's death, and continuing for several months, they traded letters attempting to negotiate an agreement. Although their attempt at a written agreement ultimately failed, the parties reached an understanding, and conducted themselves accordingly.

A. Attempts at Written Agreement

In July 2010, O'Shaughnessy sent a proposed agreement to Hawthorne, noting the siblings are "tenants in common," and proposing that Evelyn would "defer the sale" of her inheritance while assenting to Richard residing in the house. (PROPOSED) AGREEMENT (July 9, 2010) (unsigned), Exh. B, *Appx*. at 7. In exchange, Richard would timely pay "all expenses associated with … use and occupancy … including … taxes, insurance, utilities, upkeep and maintenance"; keep the property "clean and habitable"; and not sublet. O'Shaughnessy proposed that Richard's failure to comply with these terms would allow Evelyn to sell at an agreed-upon price, and Evelyn would provide four months' notice of sale. *Id.*; *Trial* at 58.

In his cover letter asking Hawthorne to obtain Richard's signature, O'Shaughnessy observed to Hawthorne that, "given that [Evelyn] is forbearing on the sale of the homestead …, this is a reasonable request." LETTER FROM O'SHAUGHNESSY TO HAWTHORNE (July 9, 2010), Exh. B, *Appx*. at 9. Hawthorne issued a quick reply, noting he forwarded the proposed agreement to Richard. LETTER FROM HAWTHORNE TO O'SHAUGHNESSY (July 15, 2010), Exh. C, *Appx*. at 10.

Two weeks later, Hawthorne wrote another letter to O'Shaughnessy, replying to a communication not in the record. Richard had had medical issues

and was hospitalized for a period, and wanted to avoid paying costs during the time he was away. Thus, Hawthorne wrote that Richard's "offer to pay [costs] from the time he came home from the hospital was more than reasonable. Now that you tell me that Evelyn wants [Richard] to be responsible for the taxes from the date of Stella's death, it would appear that we do not have an agreement." LETTER FROM HAWTHORNE TO O'SHAUGHNESSY (July 28, 2010), Exh. D, *Appx*. at 11. Hawthorne then noted:

> Our options at this point would ordinarily be to … list the property for sale by the estate or to close out the estate and deed the home to the two of them as tenants in the entirety.[4] The problem with the latter option, however, is that [Richard] has apparently paid some of the estate bills himself, which leaves us with unsettled distribution. The problem with the former alternative is that the property would be very difficult to sell in this market.

Id.[5]

Several month passed, and no agreement was signed. A letter in the probate court record from Hawthorne to his client Richard reveals in detail why Richard rejected Evelyn's proposal, and why the future-costs issue was abandoned. LETTER FROM HAWTHORNE TO RICHARD (Oct. 15, 2010), Exh. A, *Appx*. at 13. Hawthorne wrote to Richard:

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[4]This is clearly an error, as Richard and Evelyn are (obviously) not married, and tenancy by entirety "was abolished in New Hampshire in 1860." *Boissonnault v. Savage*, 137 N.H. 229, 231 (1993).

[5]Hawthorne also expressed chagrin that "the home should have been gifted to [Richard] under the caretakers exemption," citing a federal statute. It is understood, however, that the "caretakers exemption" is a benefit that would accrue to Stella, allowing her to avoid loss of Medicaid in the event she had deeded the property to Richard. It is not a method of gifting as Hawthorne implies, and there are no facts in the record to determine whether the exemption would have benefitted Stella. *See* 42 U.S.C. 1396p.

> I have already told Attorney O'Shaughnessy to tell his client that we reject the proposed agreement. In the interim that leaves us with an impasse as to who is responsible for what bills. *During this impasse however you have possession of the home*. If Evelyn wants to advance the matter of selling the house, the principal asset, she can do so, however you can buy a lot of time that way. You have to agree upon a sales price and it [is] hardly a market where things are selling. Despite all the mounting difficulties of an unsettled agreement, where your personal situation is recovering, *you benefit more form* [sic] *not having to worry about moving right away*. For that reason I have not sought to advance judicial determination of the dispute. The other reason for not seeking judicial determination of the disputes is that attorneys fees could easily eat up the estate, which I am trying to avoid. Therefore, *my recommendation in that regard is that we not push the issue, because it is a stalemate with you in possession of the fort*.

Id. (emphasis added).

A few days later, O'Shaughnessy wrote to Hawthorne reiterating Evelyn's "generous offer" of forbearing from selling and accepting Richard's continued residence. LETTER FROM O'SHAUGHNESSY TO HAWTHORNE (Oct. 19, 2010), Exh. E, *Appx*. at 15. O'Shaughnessy expressed frustration that Richard was "willing (as from his perspective he should) to allow the status quo to continue indefinitely." O'Shaughnessy said, however, that Evelyn was not so willing, "unless she receives some good faith indication that all matters can be [timely] resolved." In the absence of that, Evelyn would go to court seeking "rent from [Richard] for the period … he has resided at the homestead, and sale of the homestead." *Id.*

Finally, Hawthorne answered O'Shaughnessy, denying any generosity by Evelyn, firmly rejecting the written agreement, and explaining Richard's

understanding:

> The estate is responsible for taxes, insurance, non-routine maintenance, and structural repairs until the house is sold or transferred. [Richard] is responsible for utilities while he resides there, but not while he was in the hospital and the house was vacant. I believe there are unpaid real estate taxes and possibly insurance. If Evelyn does not want to pay for needed repairs to the house, so be it. Sale of the house is a non-issue. I would agree to listing the house for sale now, if Evelyn would prefer.

LETTER FROM HAWTHORNE TO O'SHAUGHNESSY (Oct. 22, 2010), Exh. F, *Appx*. at 16.

B. Oral Understanding and Conduct of the Parties

In trial testimony, O'Shaughnessy, Evelyn, and Richard all agreed that at the time of the estate administration, it was probably in nobody's interest to divide and sell the property. *Trial* at 23-24, 62-63, 67-68, 88. Richard had a sentimental attachment to the Manchester house, was living rent-free, and his alternative housing options were limited. Evelyn understood it was a poor sellers' market, but knew she could not afford expenses of the Manchester house and also maintain her Connecticut home. *Trial* at 100, 125, 128, 133-34.

Evelyn believes their "impasse" or "stalemate," combined with conversations, nonetheless created between them an oral agreement. *Trial* at 9. She and Richard would co-own the premises, Evelyn would for the time being forbear from realizing her real estate inheritance, and Richard would have free, solitary use and enjoyment of the house. In exchange, Richard would maintain the property. *Trial* at 76, 85, 87-88, 92, 103-04. Evelyn understood these were the terms both because of the impasse, and because when she orally proposed those terms to him, Richard appeared to acquiesce. *Trial* at 81.

Richard has vacillated on whether an oral agreement existed. In his Answer and in one interrogatory, Richard seems to concede that an oral agreement existed, though he disagrees with Evelyn as to its terms. COMPLAINT ¶ 8 (Dec. 6, 2016), *Richard's Appx*. at 3; ANSWER ¶ 8 (Feb. 17, 2017), *Richard's Appx*. at 7; INTERROGATORIES ¶¶ 4.1, 4.2 (Mar. 27, 2017), *Appx*. at 22, 27. In a separate interrogatory and in his testimony, Richard denied the existence of an agreement. INTERROGATORIES ¶ 3; *Trial* at 48, 116.

Richard concedes that at the time of the estate administration, he understood that Evelyn did not have sufficient funds to maintain the New Hampshire house, *Trial* at 90-91, 100, but that Evelyn had rejected his alleged offer to buy her out for half the $135,000 appraised value. *Trial* at 30, 120. Richard nonetheless claims to have believed that Evelyn would nonetheless be

responsible for expenses of the property. *Trial* at 12-13.

In the years since, the parties appear to have acted in accord with some agreement. Evelyn forbore from selling the house, made no claim to its use or enjoyment, and assumed no responsibility for its costs or maintenance.

Richard continued living on the property. *Trial* at 90-91, 94, 99-101, 116-17, 136. He paid some of the costs of maintenance, including real estate taxes through 2011. He paid for household expenses including lawn care, an exterminator, and repair or maintenance of stairs, windows, and a porch. ORDER (Jan. 29, 2018) at 2, 4, 5 n.4, *Richard's Appx*. at 58; *Trial* at 15, 117, 122; INTERROGATORIES ¶ 4; RECEIPTS FOR HOUSEHOLD EXPENSES (Jan. 1, 2016), Exh. K, *Appx*. at 48; INSURANCE BILL (Jan. 6, 2014), Exh. G, *Appx*. at 42; MISC. BILLS & RECEIPTS (Apr. 13, 2015), Exh. J, *Appx*. at 34-67; EXTERMINATOR INVOICE (Aug. 20, 2012), Exh. I, *Appx*. at 39; CITY OF MANCHESTER TAX COLLECTOR ACCOUNT SUMMARY (Dec. 4, 2017), Exh. 3, *Appx*. at 68; MEMO FROM TAX COLLECTOR (Dec. 7, 2017), Exh. 5, *Appx*. at 71.

The siblings were in regular contact over the years, with Richard staying at Evelyn's home in Connecticut from time to time. *Trial* at 46, 77. Except for one insurance bill in 2012 (which Evelyn declined), Richard never asked Evelyn to share any expenses of the property, never told her he was behind on tax or utility bills, never suggested she had tax or utility obligations, and never consulted her before making infrastructure changes or improvements to the house. *Trial* at 76-79, 81-84, 88-94, 116-19, 135; INTERROGATORIES ¶ 4.2.

IV. Evelyn Aghast When Told of Tax Arrearage

From 2009 on, as the resident, Richard was the recipient of Manchester city tax bills, *Trial* at 129, but he did not tell Evelyn anything about them, and Evelyn knew nothing. ORDER at 2 (Jan. 29, 2018). In 2016, with no forewarning, Evelyn received a call from the Manchester tax collector. The City apprised her that real estate taxes and water utilities had not been paid on the house for seven years, that tax and utility arrearages were over $35,000, and that she was responsible for payment. *Trial* at 10, 77, 79-80, 92-93; ORDER (Jan. 29, 2018) at 2, 6. Evelyn testified that during the phone conversation, "they didn't even know who I was – or until I told them that Richard Goode was my brother. Then they said, well you realize he's behind? And I says, no. This was his responsibility, not mine." *Trial* at 92.

As of December 2017, real estate taxes due were $25,479.09, interest and penalties were $8,290.50, and interest was accruing at $11.17 per day. There was a total tax and penalties arrearage of $33,803.13, and there was an additional arrearage for water and sewerage utilities. CITY OF MANCHESTER TAX COLLECTOR ACCOUNT SUMMARY (Dec. 4, 2017), Exh. 3; MEMO FROM TAX COLLECTOR (Dec. 7, 2017), Exh. 5. When the tax clerk told her this, Evelyn said, "I was devastated. And when she told me the amount that was due, she said would you like to hear more, and I said no. I just couldn't even comprehend what she had just told me." *Trial* at 80.

Richard claims he paid some taxes – variously saying he paid all the 2010 taxes, or that he paid a total of $14,000 to $16,000 since 2011, or that he has always paid one-half of all taxes representing what he considered his share, or that he paid some amount from time to time "to pacify them." *Trial* at 117, 118, 122. The court noted, however, that Richard provided no documentation of payment, ORDER (Jan. 29, 2018) at 5 n.4, and City tax records show no taxes paid since 2011 or "levy year 2012." CITY OF MANCHESTER TAX COLLECTOR

ACCOUNT SUMMARY (Dec. 4, 2017); MEMO FROM TAX COLLECTOR (Dec. 7, 2017).

Richard also gave as excuse that he had several municipal tax refunds or abatements then pending. He claimed an appraisal error filed in 2009, *Trial* at 129; INTERROGATORIES ¶ 6 (including attachments), entitlement to an unspecified credit on 2010 taxes, INTERROGATORIES ¶ 6, asserted that he was awaiting another credit from the City, *id*., claimed that he had sought a reduction based on disability, *Trial* at 118, 130, and also that he was awaiting a reassessment. *Trial* at 119. A letter from the tax collector admitted into evidence contradicts Richard's account:

> The prior owner of this property, Stella A. Goode, had been receiving an elderly exemption … until 2009. In 2010 the exemption was removed. There is no record of exemption application activity for this property after 2010. There is no record of abatement activity on this property since at least 2006.

LETTER FROM BOARD OF ASSESSORS TO ATTORNEY ROY (Dec. 7, 2017), Exh. 6, *Appx*. at 70; *Trial* at 131-32.

Richard testified he has enough money to pay the taxes owing. *Trial* at 122. He said he believes the house is still worth what it was appraised for in 2008. He also testified he would like to buy out Evelyn's share – which would satisfy Evelyn – but he does have not enough money for that. *Trial* at 30-31, 80; INTERROGATORIES ¶ 6.

After recovering from the initial shock of potential liability, Evelyn felt betrayed by her brother – who had regularly visited her home and knew she struggled to maintain it, and whose living costs she had subsidized for nearly a decade – that he would so mislead her and then blame her. Evelyn felt the time had come to separate her finances from Richard's. Evelyn had no need for the house, having not visited since her mother died, and having no intention to

move there. In addition, the recovered housing market recalibrated their former stalemate. *Trial* at 46, 77, 80, 83, 91, 94-95, 100-02, 136. She tried to talk with Richard about it, but he did not respond. *Trial* at 10, 93.

Evelyn felt quick action was necessary in order to minimize additional arrearage interest, and to forestall municipal action. Although there was no tax lien against the house, Evelyn is over 80 years old, and she knew the City could at any time commence efforts to seize the property for back taxes. *See* RSA Ch. 80; ORDER (Mar. 27, 2018), *Richard's Appx*. at 99.

STATEMENT OF THE CASE

In December 2016, Evelyn filed in the Hillsborough County (North) Superior Court a petition to partition the property. She requested sale of the house, equitable division of the proceeds, and an order that all outstanding deficiencies be paid from Richard's share. COMPLAINT (Dec. 5, 2016), *Richard's Appx*. at 3.

Richard filed a motion to dismiss claiming the probate court, rather than the superior court, had jurisdiction, to which Evelyn objected, and about which both parties filed memoranda.[6] MOTION TO DISMISS (May 10, 2017), *Richard's Appx*. at 10; OBJECTION TO MOTION TO DISMISS (May 12, 2017), *Richard's Appx*. at 16. The court ruled that the case was properly before the superior court. ORDER (Aug. 9, 2017), *Richard's Appx*. at 19.

Richard then moved for summary judgment, arguing that Evelyn's partition action was barred by *res judicata*, to which Evelyn objected. MOTION FOR SUMMARY JUDGMENT - *RES JUDICATA* (Aug. 17, 2017), *Richard's Appx*. at 25; OBJECTION TO MOTION FOR SUMMARY JUDGMENT - *RES JUDICATA* (Aug. 25, 2017), *Richard's Appx*. at 36.[7] The court ruled the case was well plead. ORDER (Sept. 22, 2017), *Richard's Appx*. at 41.

Richard also sought summary judgment claiming that his and Evelyn's devise from Stella was not as tenants in common, but the court held the issue was inconsequential to the equities of partition, *id.,* and it was not pursued.

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[6]Both parties filed two memoranda, all of which are omitted from the appendix. *See* MEMORANDUM IN SUPPORT OF PLAINTIFF'S OBJECTION TO DEFENDANT'S MOTION TO DISMISS (June 29, 2017); MEMORANDUM IN SUPPORT OF MOTION TO DISMISS (July 7, 2017); REPLICATION IN SUPPORT OF PLAINTIFF'S OBJECTION TO DEFENDANT'S MOTION TO DISMISS (July 14, 2017); RESPONSE TO PLAINTIFF'S REPLICATION TO DEFENDANT'S MEMORANDUM (July 31, 2017).

[7]Both parties filed additional pleadings on the issue, which are omitted from the appendix. RESPONSE TO OBJECTION TO MOTION FOR SUMMARY JUDGMENT (Aug. 30, 2017); REPLICATION IN SUPPORT OF PLAINTIFF'S OBJECTION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Sept. 8, 2017).

In December 2017 the superior court held a bench trial (*Amy B. Messer*, J.) on Evelyn's petition to partition, at which Richard, Evelyn, and (retired) Attorney Daniel O'Shaughnessy testified. In January 2018, the court issued an order deciding the matter. ORDER (Jan. 29, 2018), *Richard's Appx*. at 58.

Regarding partition, the court found that the property could not be conveniently split. It found that while Richard contributed to the general upkeep of the house and Evelyn did not, Richard's expenditures were incidental to day-to-day ownership, he lived rent-free, and his occupancy prevented the house from being otherwise leased or sold. The court held that the parties' positions are therefore equitably even, and ordered the sale of the house, with the proceeds divided equally. *Id.* at 3-5.

As to the taxes owing, the court held that, as joint owners, both Richard and Evelyn are equally liable, and thus ordered equal payment. *Id.* at 5.

Regarding "the resulting accumulation of costs and interest," the court found Richard neglected to inform Evelyn of the arrearage, thus "robb[ing] her of the opportunity to either pay the outstanding taxes herself or take some other action that would mitigate her damages." *Id.* at 6. Accordingly, the court held Richard "liable for the entire amount of costs and interest that have accrued since 2012." *Id.* at 6.

After trial Richard made an argument regarding the existence and enforcement of a contract, and laches, to which Evelyn objected. MOTION FOR RECONSIDERATION (Feb. 19, 2018), *Richard's Appx*. at 64; OBJECTION TO MOTION FOR RECONSIDERATION (Feb. 19, 2018), *Richard's Appx*. at 92. The court rejected the arguments, and rejected reconsideration of the facts. ORDER (Mar. 27, 2018), *Richard's Appx*. at 99.

The superior court also denied postponement of the sale of the house, *id.*, but this court later granted a stay pending this appeal. SUPREME COURT ORDER (May 11, 2018).

SUMMARY OF ARGUMENT

Evelyn cites evidence in the record to support the court's finding that the house could not be partitioned in any way other than by sale, and shows that such result is equitable.

Evelyn then demonstrates, by citation to statutes, that the superior court had jurisdiction to reach the result. Evelyn also points out that a partition cause of action did not and could not have arisen in the probate proceeding, and thus argues there is no *res judicata* bar to the superior court having heard the case.

Evelyn shows that contract damages would be inadequate and unavailable, and that therefore any contract argument does not apply. She also shows that Richard benefitted from her forbearance from selling the house, and that therefore his laches argument also does not apply.

Finally, Evelyn discusses several instances of Richard's deceit, and the need to separate their financial relationship. She thus argues that the court appropriately ordered partition, sale of the house, split of taxes, and assignment of penalties to Richard.

ARGUMENT

I. Partition is Equitable, Reversible Only Upon Plain Error

Partition is "a division into severalty of property held jointly or in common or the sale of such property by a court and the division of the proceeds." *Pedersen v. Brook*, 151 N.H. 65, 66-67 (2004). New Hampshire law provides that "[a]ny person owning a present undivided legal or equitable interest or estate in real or personal property … shall be entitled to … partition or division." RSA 547-C:1. Although the right to partition is waivable, *Hunt v. Wright*, 47 N.H. 396 (1867), "[i]t is essential to an estate in common to be subject to partition." *Spaulding v. Woodward*, 53 N.H. 573, 574 (1873). "The right of partition is incident to all estates owned by tenants in common," *Valley v. Valley*, 105 N.H. 297, 299 (1964), including those who acquired by will. *Kelly v. Kelly*, 41 N.H. 501 (1860). "The right of partition is a remedial right and should be construed liberally." *Wallace v. Stearns*, 96 N.H. 367, 369 (1950); RSA 547-C:30.

While "the primary method of partition is by division of the land itself by metes and bounds," *DeLucca v. DeLucca*, 152 N.H. 100, 104 (2005) (quotations omitted), the statute allows partition by "other distinct description." RSA 547-C:11. A court may order sale of partitioned property when it "is so situated or is of such a nature that it cannot be divided so as to give each owner his or her share or interest without great prejudice or inconvenience," RSA 547-C:25, which the court must expressly find. *DeLucca*, 152 N.H. at 105. The court may also partition by awarding the real estate to one party, and ordering a buy-out. *Warner v. Eaton*, 78 N.H. 515 (1917); RSA 547-C:22.

The court in this case noted that the small residential lot Stella devised to Richard and Evelyn is physically "impossible" to divide. ORDER (Jan. 29, 2018) at 3. Richard admitted he does not have enough money to buy out

Evelyn's share, even at a depressed 2008 appraisal price. "Accordingly," the court held, "the property must be sold." *Id*.

Given these circumstances, this court should affirm the partition and sale.

II. Superior Court Had Concurrent Jurisdiction, and Properly Heard Partition Action

Although Richard has not suggested how the probate court might decide differently from the superior court, he claims that the probate court should have heard this matter and that the superior court lacks jurisdiction. *Richard's Brf.* at 12-14.

A. Superior Court Jurisdiction Statute

The superior court jurisdiction statute delineates jurisdiction for partition actions between the superior and probate courts. It provides:

> The superior court shall have the powers of a court of equity in the following cases: … the affairs of partners, joint tenants or owners and tenants in common; … cases in which there is not a plain, adequate and complete remedy at law; and in all other cases cognizable in a court of equity, *except that the court of probate shall have exclusive jurisdiction over equitable matters arising under its subject matter jurisdiction authority in RSA 547 [and] RSA 547-C*.

RSA 498:1 (emphases added).

Richard ignores the general partition power granted to the superior court in the first clause of the statute, and instead focuses on the exception in the last clause. *Richard's Brf.* at 12-14. It is apparent, however, that the two courts share concurrent jurisdiction over partition, and that the superior court jurisdiction statute, RSA 498:1, defers to the probate court jurisdiction statute, RSA 547, and the partition statute, RSA 547-C, regarding jurisdictional sharing.

B. Probate Court Jurisdiction Statute

The probate court jurisdiction statute, RSA 547, contains several provisions that are of interest in this context, but not particularly informative. In his brief, Richard points to the following:

• RSA 547:3, I(a) – "The probate court shall have exclusive jurisdiction over … [t]he probate of wills."

That the probate court probates wills is undisputed, and not at issue here.

• RSA 547:3, I(c) – "The probate court shall have exclusive jurisdiction over … [t]he interpretation and construction of wills."

That the probate court interprets wills is also undisputed and not at issue here.

To the extent that there might be probate court jurisdiction based on the need to interpret Stella's will, initially Richard claimed there was a dispute regarding whether the will created a joint tenancy or a tenancy in common. After the superior court found that the difference was inconsequential to the equities of partition, however, ORDER (Aug. 9, 2017) at 4-5; ORDER (Sept. 22, 2017) at 2-3, Richard abandoned the issue, conceding that no will interpretation is implicated in this case.

• RSA 547:3, II(e) – "The probate court shall have concurrent jurisdiction with the superior court over … [p]etitions for partition pursuant to RSA 547-C."

This statute largely repeats the similar provision in the superior court jurisdiction statute, RSA 498:1, *supra*, which makes clear the two courts share jurisdiction over partition.

• RSA 547:3-b – "The probate court shall have the powers of a court of equity in all cases within its subject matter jurisdiction in which there is not a plain, adequate, and complete remedy at law."

This statute makes clear the probate court is an equity court, not an issue in dispute here (although historically there was doubt, *see generally,* 10 DeGrandpre & Zorn, *New Hampshire Practice, Probate and Administration of Estates, Trusts & Guardianships* §§ 5.2 & 5.3.1, at 5-3 & 5-10 (4th ed. 2008)).

• RSA 547:9 – "All proceedings in relation to the settlement of the estate of a person deceased shall be had in the probate court of the county in which his will was proved or administration on his estate was granted."

This is a venue statute, not at issue here.

C. Partition Statute

The partition statute, RSA 547-C, also contains provisions of interest in this context, but also not particularly informative. In his brief Richard points to:

• RSA 547-C:22 – "Whenever property is so situated or is of such a nature that it cannot be divided so as to give each owner his or her share or interest without great prejudice or inconvenience, the whole or a part of the property may be assigned to one of them, the assignee paying to the others who have less than their share such sums as the court shall award or order."

This statute, cited *supra*, gives a partitioning court authority to accomplish a partition by awarding the real estate to one party, and ordering a buy-out. *See, e.g., Warner v. Eaton*, 78 N.H. at 515.

• RSA 547-C:2 – "A petition [for partition] may be filed … in the superior or probate court …; provided, however, where there is a *related pending matter* in either court, jurisdiction for the related partition action shall lie with the court having jurisdiction over the underlying matter." (emphasis added)

When there is a "related pending matter," a partition action gets filed in the court where it is pending. "Related" has its usual meaning.

Appeal of Kelly, 167 N.H. 489, 492 (2015) ("Employment-related risks," include "injuries generally recognized as industrial injuries, such as fingers being caught in gears."); *State v. Schonarth*, 152 N.H. 560, 562 (2005) ("Related offenses are those that are based upon the same conduct, a single criminal episode or a common plan."). "The word 'pending' means 'remaining undecided.'" *Buswell v. Babbitt*, 65 N.H. 168 (1889) (quoting *Clindenin v. Allen*, 4 N.H. 385, 386 (1828)).

There was no pending case between these parties in any court when Evelyn filed her petition.[8] *See In re Estate of Porter*, 159 N.H. 212, 214 (2009) ("[T]he probate court has jurisdiction to resolve issues involving real estate of the decedent if the property is 'in' the estate of the decedent."). Accordingly, RSA 547-C:2 also does not illuminate any issue here.

D. Jurisdiction is Properly in Superior Court

In this case, the superior court held that, collectively, the statutes provide concurrent jurisdiction, that there was no related pending matter in either court, that the genesis of the co-ownership from a will did not make the partition related to probate, that the superior court had jurisdiction, ORDER (Aug. 9, 2017) at 3-4, *Richard's Appx*. at 19, 21-22, and that therefore Evelyn's petition was properly filed. *Id.* at 6.

Richard reviews a smattering of statutes, none of which confer exclusive jurisdiction over this matter in the probate court. If Evelyn had filed her petition in the probate court, jurisdiction may have been rejected, because RSA

[8]After Evelyn filed her petition for partition in the superior court, Richard tried to reopen the inheritance and guardianship cases in the probate court, and thus create a "related pending matter" in the probate court. The effort appears to have been unsuccessful. The effort is further discussed *infra*.

547:9 provides that the probate court has authority over "[a]ll proceedings in relation to the settlement of the estate of a person deceased," but neither Richard nor Evelyn are deceased.

Accordingly, the superior court properly heard and ruled on Evelyn's petition for partition.

III. *Res Judicata* Does Not Bar Partition Now, Because No Dispute Giving Rise to a Partition Action Existed in the Probate Case, and Because Probate Does Not Adjudicate Anticipatory Arguments Among Heirs

Title to the real estate of a deceased person vests in the decedent's heirs immediately upon death. *Wentworth v. Wentworth*, 75 N.H. 547 (1910); *Perkins v. Perkins*, 58 N.H. 405, 406 (1878); *Lucy v. Lucy*, 55 N.H. 9, 10 (1874); *Gregg v. Currier*, 36 N.H. 200, 202 (1858) ("land descends, on the death of the testator or intestate, to the devisees or heirs"). This "common law rule is a very important guidepost" regarding devise of real estate. 10 DeGrandpre & Zorn, *New Hampshire Practice, Probate and Administration of Estates, Trusts & Guardianships* § 35.2, at 35-3 (4th ed. 2008).

Consequently, "[i]n the absence of the necessity of the executor seeking a license to sell the real estate the probate court has no jurisdiction of the real estate of a decedent." *Fleming v. Aiken*, 114 N.H. 687, 690 (1974). Likewise an administrator of an estate "has no duty to perform as to the partition of the remaining real estate between the legatees entitled," *French v. Lawrence*, 75 N.H. 609 (1910), and has "no interest in the care and preservation of the real estate." *Sibley Oil Co. v. Stein*, 100 N.H. 356, 357 (1956); *In re Robbins' Estate*, 116 N.H. 248, 251 (1976) (estate has limited duty to pay taxes); *Ruel v. Hardy*, 90 N.H. 240, 242 (1939) (estate has no duty to pay insurance). Only an "heir or devisee [is] entitled to maintain any action, real or personal, which he might find necessary for the protection of his rights." *Bergin v. McFarland*, 26 N.H. 533, 536 (1853). And courts do not issue advisory opinions or decide matters not before them. *Piper v. Town of Meredith*, 109 N.H. 328, 330 (1969).

When Stella died in 2009, Richard and Evelyn became co-owners of the house. What their co-owning arrangement would be thereafter was not, in the probate proceeding, within the authority of the court to adjudicate, nor within the authority of an executor or administrator to litigate.

Richard nonetheless says that *res judicata* bars Evelyn from ever partitioning the property, because the co-ownership arose from a probated will. *Richard's Brf.* at 14-16. He claims support in *Canty v. Hopkins*, 146 N.H. 151 (2001).

In that case, Canty, the former administrator of his father's probate estate, long after probate was settled, claimed in superior court that Hopkins had wrongfully wrested a property from the deceased's estate. This court held that Canty had opportunities to address that matter during probate, but did not, and he was therefore barred by *res judicata* from later raising it. *Canty v. Hopkins*, 146 N.H. at 155-56 ("In order for res judicata to apply to a finding or ruling, there must be a final judgment by a court of competent jurisdiction that is conclusive upon the parties in a subsequent litigation involving the same cause of action.").

Richard's and Evelyn's co-ownership commenced upon Stella's death. Their dispute regarding payment of rent, taxes, exterminator's fees, and other household expenses, did not and could not arise until after they became co-owners. While it is unclear exactly when Richard stopped paying taxes, it appears that it was in "levy year 2012," MEMO FROM TAX COLLECTOR (Dec. 7, 2017), Exh. 5, *Appx*. at 71, at least a year after the probate proceeding reached finality in January 2011. As long as the siblings' forbearance-and-occupy stalemate held, Evelyn did not have an interest in pursuing legal action. It was only when she discovered the unpaid taxes, and Richard's deceit, that she realized a financial relationship with her brother was no longer viable. *See In re Estate of Bergquist*, 166 N.H. 531, 535 (2014) ("cause of action" for *res judicata* requires already-existing facts, absent when a dispute arises subsequent to a former adjudication).

Even if she wanted to, Evelyn could not have raised the issue of partition in the probate case, because neither the probate court nor the estate, in

that matter, had authority to address matters among devisees. Moreover, it appears that Richard's *res judicata* argument relies on the fact that Richard's and Evelyn's attorneys anticipated the dispute that later erupted in the post-probate future. Whatever they were unable to settle during their negotiations, it is clear – by their not litigating at the time – that they felt the parties had enough of an agreement to be satisfactory to both, that their stalemate was adequate resolution at the time, and that partition was not necessary to the probate proceeding.

Finally, Richard's position is contrary to the law, which provides that partition "is essential to an estate in common," *Spaulding*, 53 N.H. at 574, and that property owners have a right to partition whenever they wish. RSA 547-C:1; RSA 547-C:30; *Valley*, 105 N.H. at 299; *Wallace*, 96 N.H. at 369; *Kelly*, 41 N.H. at 501.

Accordingly, Evelyn's petition to partition was properly heard by the superior court.

IV. Contract Damages Are Inadequate and Unavailable

Richard makes a claim that Evelyn's cause of action should have sounded in contract, not equity, because her remedy is damages, but that because there was no contract, she cannot maintain a contract action. *Richard's Brf*. at 16-17.

The argument presumes that contract damages would be satisfactory to Evelyn's situation, which they are not, for several reasons.

First, as noted, property owners have a right to partition.

Second, damages would not be adequate, because what Evelyn seeks is a termination of any financial relationship with her brother. RSA 498:1 (equity available in "cases in which there is not a plain, adequate and complete remedy at law").

Third, it appears that Richard believes damages would be merely his payment of the back taxes – which he says he can afford. Evelyn would be seeking damages in the nature of the current buy-out price of the house plus many years of lost rent – which Richard says he cannot afford. Thus contract damages could not provide Evelyn a "complete remedy." *Id.*

Finally, the probate court does not have jurisdiction to award general contract damages, *see In re CIGNA Healthcare, Inc*., 146 N.H. 683, 689 (2001), making Richard's contract claim at odds with his jurisdiction claim.

Whatever the exact nature of Richard's contract claim, this is a partition action, and Richard's contract argument is not apposite.

V. Laches Inapplicable Because Richard Benefitted From Evelyn's Forbearance

Richard claims that Evelyn's partition action is barred by laches. *Richard's Brf*. at 17-18. The argument fails for several reasons.

First, as noted, property owners have a right to partition at any time.

Second, Evelyn did not know of the tax arrearage until 2016 when the City called her, and had no reason to inquire before that because she was in regular contact with her brother, and understood he had taken responsibility for the maintenance costs of the property.

Third, Richard's laches claim appears to turn on his alleged reliance on Evelyn's forbearance, in that he made improvements to the house. The court noted, however, that Richard offered no evidence of any significant improvements "such as photographs or receipts," and found that whatever work Richard did was merely "incidental to the day-to-day ownership of real estate [during which he] enjoyed the full use and benefit of residing on the property." ORDER, (Jan. 29, 2018) at 4, *Richard's Appx*. at 61. Even if the house did appreciate in value, Richard is myopic when he claims Evelyn "contributed nothing." *Richard's Brf.* at 12. Evelyn contributed time and forbearance; she did not force a sale in 2008 when the value was low, and has waited until now, when housing prices in New Hampshire have rebounded. *See* New Hampshire Housing Finance Authority, *Housing Market Report* at 7 (June 2018), <www.nhhfa.org/assets/pdf/NHHFA_HMR_06-2018_Final_ Indexed.pdf>.

Fourth, Richard claims Evelyn's partition action was "seven years" too late, *Richard's Brf.* at 18, but he also says it was "premature," *Richard's Brf.* at 12, undermining his own position.

Finally, laches is an equitable doctrine requiring proof of prejudice. *In re Estate of Laura*, 141 N.H. 628, 636 (1997). As the court noted, Evelyn's forbearance "was beneficial to him," because Richard lived free of most housing

costs for many years, essentially subsidized by his sister. ORDER, (Jan. 29, 2018) at 3.

Accordingly, the court was correct in denying Richard's laches claim.

VI. Court Equitably Split the Proceeds of the House, Divided the Tax Owed, and Allocated the Penalties

"Partition is equitable in nature," requiring "a fair division of the proceeds in the light of the attendant circumstances." *Bartlett v. Bartlett*, 116 N.H. 269, 272 (1976). "Equity does not require that the proceeds in partition always be divided strictly according to the relative value of the estates held by the respective parties." *Id.* Rather,

> [i]n exercising its discretion in determining what is fair and equitable …, the court may consider: the direct or indirect actions and contributions of the parties to the acquisition, maintenance, repair, preservation, improvement, and appreciation of the property; the duration of the occupancy and nature of the use made of the property by the parties; disparities in the contributions of the parties to the property; any contractual agreements entered into between the parties in relation to sale or other disposition of the property; waste or other detriment caused to the property by the actions or inactions of the parties; tax consequences to the parties; the status of the legal title to the property; and any other factors the court deems relevant.

RSA 547-C:29.

Because partition is equitable, "the jurisdiction of the court extends to adjustment of conflicting claims in a fair division of the proceeds in the light of the attendant circumstances," and the court has "broad power to determine the rights of those with an interest." *Brooks v. Allen*, 168 N.H. 707, 711 (2016). "An action for partition calls upon the court to exercise its equity powers and consider the special circumstances of the case, in order to achieve complete justice." *Boissonnault v. Savage*, 137 N.H. 229, 232 (1993).

"The party asserting that a trial court order is unsustainable must demonstrate that the ruling was unreasonable or untenable." *Brooks v. Allen*, 168

N.H. at 711. A trial court's findings of fact are "final unless they are so plainly erroneous that such findings could not reasonably be made. Legal determinations and the application of law to fact are reviewed independently for plain error." *Pedersen v. Brook*, 151 N.H. at 66 (quotation and citation omitted).

Richard claims that the remedy of selling the house was not equitable, and that he should have a life estate instead. *Richard's Brf*. at 20-21.

When Evelyn received a call from the City and learned about the tax arrearages, she realized Richard had been deceitful with her for many years, and thus it became clear to her that she had to sever their financial relationship. In addition, several items from their earlier history became relevant.

First, in the probate proceeding, Evelyn learned that Richard had been convicted of financial crimes, his criminal history apparently being made part of the probate record as part of the guardianship proceeding. DEPT. OF HEALTH & HUMAN SERVICES RECORD RELEASE AUTHORIZATION (Dec. 12, 2007), *Appx*. at 145; DEPT. OF SAFETY RECORD AUTHORIZATION FORM (Dec. 12, 2007), *Appx*. at 146; CRIMINAL HISTORY RECORD (Dec. 24, 2007), *Appx*. at 147. It revealed crimes committed when Richard was in his 30s and 40s, including convictions for issuing bad checks in violation of RSA 638:4, resisting arrest or detention in violation of RSA 642:2, disorderly conduct in violation of RSA 644:2, reckless conduct in violation of RSA 631:3, and being a fugitive from justice in violation of RSA 612:2. CRIMINAL HISTORY RECORD (Dec. 24, 2007), *Appx*. at 147; *Trial* at 40-42.[9]

Second, Evelyn recalled that Richard had borrowed $20,000 from her, but had never paid it back. *Trial* at 28-30.

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[9]Additional portions of Richard's criminal history were ruled inadmissible by the superior court in the partition action, *Trial* at 40-41, and are not reported here.

Third, in the partition proceeding, Evelyn learned that Richard had been forging Stella's name on his truck registration every year since Stella died. This came to light because, to bolster Richard's argument that Evelyn's partition action should be heard in the probate court (by creating a "related pending matter," RSA 547-C:2), during the pendency of the partition action, Richard filed a motion to re-open the 2009 probate estate and the 2007 guardianship case. In his motion to reopen, Richard explained that just before Stella died, he had sold Stella's car, and bought a pickup truck in Stella's name. NOTICE OF DECISION (Mar. 18, 2009), *Appx*. at 121; ASSENT (Feb. 2, 2009); *Appx*. at 143; MOTION TO REOPEN (May 25, 2017); *Appx*. at 171; OBJECTION TO MOTION TO REOPEN (Aug. 28, 2017), *Appx*. at 157. Richard admitted that after Stella died, he forged her signature on annual registration documents. Richard conceded he may therefore be guilty of six misdemeanor crimes of unsworn falsification. *Trial* at 42; *see* RSA 641:3. MOTION TO REOPEN (May 25, 2017), *Appx*. at 74, 78; OBJECTION TO MOTION TO REOPEN (Aug. 28, 2017), *Appx*. at 82; LETTER FROM RICHARD TO EVELYN (undated), Exh. 1, *Appx*. at 73. While it is not clear from the record what, if any, ruling was entered on the motion to reopen the probate and guardianship proceedings, it is apparent that Richard's attempt to transport jurisdiction for the partition action was not effective. For Evelyn, it was evidence of Richard's pattern of inveracity and irresponsibility.

When Evelyn learned that Richard had been living in the house but not paying the taxes, she was livid. Not only was she faced with a surprise $35,000 tax liability, it became clear to her that her brother had been deceiving her for years. Despite Richard being in regular contact, despite his knowing from annual tax bills that there was an arrearage, and despite him knowing Evelyn was a co-owner and therefore had an interest, Richard said nothing. *Id.* Evelyn grieved that Richard "did everything behind my back," and felt betrayed and

"devastated … that my brother would do this to me. I'm his sister." *Id.* On the witness stand Evelyn asserted, "You're a hypocrite." *Trial* at 80.

In addition to not paying the taxes and deceiving her about it, during the partition hearing Richard claimed he was seeking abatements from the City, about which the City knew nothing. For Evelyn, this was further evidence of Richard's deceit and financial imprudence.

The 2010 stalemate was in part informed by the low value of the house due to the recession. In the current market, the house is probably worth more, so both parties will likely realize a greater return on the sale, making partition and sale equitable for both.

Richard's situation was of his own making, and probably could have been avoided. Ongoing financial relationships require trust, which Richard eviscerated. Granting Richard a life interest, however, would force Evelyn to continue an unwanted financial link. Partition is not inequitable just because it results in dispossessing a resident of his home. *Boissonnault*, 137 N.H. at 232. Accordingly, the superior court's approval of partition, thus severing the financial relationship, is equitable, and this court should affirm.

Finally, Richard claims that because Evelyn, as joint owner, was responsible for taxes, "she alone should be responsible for the penalties and interest attributable to nonpayment of her share." *Richard's Brf.* at 21. This ignores the fact, cited by the court, that Evelyn did not know of the tax arrearage. She had no reason to inquire about taxes because she believed Richard, as resident, was paying the regular expenses of the house, and Richard's deceit "robbed her of the opportunity to either pay the outstanding taxes herself or take some other action that would mitigate her damages." ORDER (Jan. 29, 2018) at 6. The court's assignment of the penalties and interest to Richard was therefore equitable, and this court should affirm.

CONCLUSION

The superior court appropriately took into consideration the relevant circumstances. It was apparent that the time had arrived for the siblings to sever their financial relationship, the house cannot be physically split, and Richard does not have the resources to buy out Evelyn's share. The superior court lawfully exercised its equity jurisdiction in ordering a sale, and in assigning tax penalties to Richard.

REQUEST FOR ORAL ARGUMENT

Because the issue raised in this appeal is of concern to heirs, devisees, taxpayers, and municipalities in New Hampshire, this court should entertain oral argument.

Respectfully submitted,

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Dated: November 20, 2018

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief. I further certify that this brief contains no more than 8,227 words, exclusive of those portions which are exempted.

I further certify that on November 20, 2018, copies of the foregoing will be forwarded to Leslie Nixon, Esq.

Dated: November 20, 2018

Joshua L. Gordon, Esq.

ADDENDUM