STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2018-0006

Quentin H. White

v.

Brigitte G. Auger f/k/a Brigitte Gaudreau; and
Joanne M. Jackson f/k/a Joanne Labadie

RULE 7 APPEAL FROM FINAL DECISION OF
THE CHESHIRE COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT-APPELLEE BRIGITTE G. AUGER

Robert J. Dietel, NH Bar No. 19540
GALLAGHER, CALLAHAN &
GARTRELL, PC
214 North Main Street
Concord, NH 03301
(603) 228-1181
dietel@gcglaw.com

Charles A. Donahue, NH Bar No. 656
DONAHUE LAW, P.A.
143 West Street
Keene, NH 03431
(603) 357-2363
cad@charliedonahue.com

Oral argument to be presented by:
Robert J. Dietel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TEXT OF RELEVANT AUTHORITY

RSA 477:3-b.
Limitations on Possibilities of Reverter, Rights of Re-entry, and Executory Interests.

I. This section applies only to legal future interests in real property created by deed, will, or power of appointment and not to any beneficial interests created by or through trusts. This section shall not apply to rights of forfeiture or re-entry held by lessors or mortgagees, nor to conveyances of standing trees governed by RSA 477:35-a or RSA 477:35-b, nor to options to purchase real estate, whatever their form.

II.

(a) After December 31, 2008, no legal possibility of reverter, right of re-entry, or executory interest in real property may be retained or created unless either the grantor or the grantee is a public or charitable organization. Any language purporting to retain or create such a future interest shall be void. Language which also creates a covenant may be enforced as such by an action at law or equity but without forfeiture.

(b) For purposes of this section, an organization is public or charitable if it is:

(1) The state of New Hampshire.

(2) A political subdivision or municipal corporation of the state of New Hampshire.

(3) A corporation organized under RSA 292, a religious organization, or a not-for-profit corporation chartered by act of the New Hampshire general court or United States Congress.

(4) A nonprofit organization qualified under section 501(c) of the Internal Revenue Code of the United States, as amended.

(5) A trustee as defined in RSA 7:21, VIII.

III. Renewal declarations shall be required in certain cases.

(a) Unless the original grantor or grantee of the interest was, or the present owner of the interest is, a public or charitable organization, any existing possibility of reverter, right of re-entry, or executory interest in real property shall become void unless renewal declarations are filed in the appropriate registry of deeds as hereinafter provided. Covenants as such are not subject to renewal and remain enforceable by an action at law or equity but without forfeiture.

(b) Times of filing future interests under this section shall be as follows:

(1) A declaration of renewal of an <u>existing</u> possibility of reverter, right of re-entry, or executory interest in real property that was retained by or granted to a natural person <u>need not</u> be recorded while owned by that person. [emphasis supplied] Any subsequent

heir, devisee, grantee, creditor, or other successor to such interest shall record a declaration within 3 years after acquiring it or the interest shall become void.

(2) A declaration of renewal of an existing possibility of reverter, right of re-entry, or executory interest in real property other than those retained by or granted to a natural person shall be filed on or before January 2, 2011, and if such declaration is not filed within such time, the interest shall become void.

(3) A declaration shall be recorded once in every 25 years after the initial declaration is filed, and any interest for which such a declaration is not filed shall become void 25 years after the filing of the last renewal declaration.

(c) A declaration shall be signed and acknowledged by the declarant in the same manner as a deed and contain:

(1) A statement that the declarant owns all or part of a future interest reserved or created by a specified instrument and the declarant's current mailing address.

(2) The date of that instrument and the book and page, probate file, or other specific place where the instrument is recorded.

(3) The names of the owner or owners of the property rights subject to the future interest as of the time the declaration is filed.

(d) Each declaration shall be indexed in the grantor index under the name or names of the persons stated therein to be the owners of the property right subject to the future interest at the time of filing.

(e) The original declaration shall be returned to the declarant after recording in the same manner as a deed.

(f) A declaration which is actually recorded and correctly indexed shall be effective despite failure to name all present owners of the property subject to the future interest so long as at least one owner was correctly identified.

(g) The fee for filing a declaration shall be the same as for a deed.

IV. Unclaimed future interests of defunct public or charitable organizations shall be treated in the following manner: Whenever it shall appear that a public or charitable organization holding a possibility of reverter, right of re-entry, or executory interest has been defunct for more than 3 years with no successor to the future interest provided for or action commenced to determine a successor, the director of charitable trusts shall either commence such an action or, if it appears to be in the public interest, release the future interest to the owners of the underlying estate, with or without conditions.

Source. 2008, 228:2, eff. Jan. 1, 2009.

STATEMENT OF THE CASE

In 2016, plaintiff, Quentin White brought suit to quiet title to a certain parcel of land in Stoddard, New Hampshire, alleging he held title under a 1972 deed of Perley Swett (the "Deed"). See Add., 19.[1]

A bench trial was held on July 19, 2017, during which the trial court heard testimony regarding the relationships between the parties, the facts and circumstances surrounding the Deed's conveyance, and details of the life of its grantor, Perley Swett. See Add., 19-30. The trial court ruled in favor of defendant, Brigitte Auger (formerly Brigitte Gaudreau), granting counterclaims for declaratory judgment and specific performance, and vesting title in Ms. Auger. See Add., 29-30.

The trial court, in a thorough and well reasoned order, found and ruled that Perley Swett had placed conditions on the conveyance described in the Deed, and had intended the property to pass to Mr. White only if he built and lived on the land within ten years. See Add., 28. If Mr. White failed to build and live on the land, or if he acquired other land to build and live on (as had been provided for in Mr. Swett's will), then it was to pass to Ms. Auger. See id., 28. Since it was undisputed that Mr. White did not live or build on the land, and instead chose to live elsewhere, the conditions to his taking title were not satisfied, and title vested in Ms. Auger. See Add., 25-29. The trial court further found the conditions in the Deed were consistent with circumstances at the time of its drafting; specifically, that Mr. Swett had wanted Mr. White to become his neighbor while Mr. Swett was alive, and if that did not happen, for the property to pass to Ms. Auger. See Add., 28.

[1] Citations to "Add., ___" refer to the portion of Plaintiff's brief containing the order on appeal.

STATEMENT OF THE FACTS

In 1972, Perley Swett – a reclusive, elderly gentleman known as the "Taylor Pond Hermit" – drafted a deed to a parcel of land in Stoddard, NH, and imposed a series of conditions on the conveyance described therein. See Add., 20; Appx., 32.[2] Those conditions, and in particular, Mr. Swett's intent in drafting them, are the subject of this appeal.[3] Mr. Swett's deed speaks for itself and states:

> Know all Men by these Presents:
>
> THAT I, Perley E. Swett, of Stoddard, New Hampshire for consideration paid, grant to Quentin H. White of Munsonville, New Hamsphire with warranty covenants to the said Grantee, about ten acres of land, be the same more or less, and this area being that part of the so called "Graves Land" on the south side of road, conveyed on condition that he (Quentin H. White) may desire to and erect some building on said land and live there either part time or year around. There is, however, no requirement that he live or build on the south side of the road if he were to acquire one or more acres on the north side of the road, which would be a far better building location. The main condition being that this be done within ten years, and that he, Quentin H. White, has not in some way acquired title to any other area of Perley Swett's home farm. In case Quentin H. White does acquire a more attractive land area to live on or to build a house on, this land area should be transferred to Brigitte Gaudreau if she is available. If Brigitte Gaudreau's address or location is not known, this land should be deeded to Joanne Labadie at some time before she becomes twenty-one.
>
> A description follows: Beginning at the center of the road on the Range line, thence southerly on said Range line (and part way along a wall) to the north line of Lot five (5), thence westerly on this Lot line to the Sullivan line (at or near a town boundary marker), thence northerly on the Stoddard and Sullivan town line to the center of the road, thence easterly to the starting point.

See Appx., 32.

---

[2] Citations to "Appx., ___" refer to the Appendix to Plaintiff's brief.

[3] Mr. Swett's will was previously examined in the appeal of Arwe v. White, 117 N.H. 1025 (1977). That decision provides a window into Mr. Swett's life, but has no direct bearing on this appeal.

The circumstances surrounding the Deed are well stated in the trial court's order, and therefore do not warrant a complete recitation herein. Nevertheless, there are several notable findings in the order that should inform this Court's analysis of Mr. Swett's intent.[4]

In particular, with respect to Mr. White, the trial court found:

- Mr. White never had any intention to build on the land and never built on it. See Add., 24 (finding "White never intended to live or build a house upon the land. . .").

- Mr. White purchased a house in Keene, and returned to Utah a few years after Mr. Swett's death. See id.

- When Mr. Swett drafted the Deed, he had already provided for a portion of his other property to pass to Mr. White after his death. See Add., 28 ("Swett knew that White was to receive an interest ('in some way acquired title') in the 'home farm' property at some point in the future when he executed and delivered the Deed in 1972.").

- Mr. Swett, who was elderly and living alone in 1972, relied on Mr. White in many ways, including assistance with obtaining food, and also making gifts to others. Add., 21.

In light of these findings, the trial court correctly found and ruled that (a) Mr. White did not satisfy the necessary conditions to obtaining title, and (b) Perley Swett's intent when drafting the Deed was to have the White family become his neighbors while he was alive. See Add., 28 (finding Mr.

[4] Plaintiff has not challenged the trial court's factual findings on appeal, but rather disputes the trial court's interpretation of the plain language of the Deed. Therefore, the factual findings in the trial court's order are undisturbed. Accordingly, to the extent that this Court looks to extrinsic evidence to interpret the deed, the trial court's factual findings must inform that analysis.

Swett "wanted the Whites to be his neighbors while he was alive")(emphasis supplied).

Additionally, with respect to Mr. Swett's relationship with Ms. Auger, the trial court found:

- "Swett displayed a predilection for making gifts to girls." Add., 28.
- Mr. Swett had previously "gifted land to other girls in the neighborhood." Add., 28.
- "Ms. Auger was one of the local 'girls' who benefited from Swett's generosity." Add., 21.
- Mr. Swett "travelled to Auger's house on one of her birthdays and presented her with one-hundred dollars and a poem he had written for her." Add., 22.
- Mr. Swett told Ms. Auger "it was a 'big deal' for him to come to her house because he did not travel to away from his farm very often." Add., 22.
- Mr. Swett gave Ms. Auger an antique brush set. Add., 22.
- Mr. Swett had spent time with Ms. Auger showing her around his land and telling her stories about it. Add., 21-22.
- Mr. Swett told Ms. Auger "he would give her a horse and land upon which to keep it." Add., 22.

Based on these findings, the trial court correctly found and ruled that Perley Swett intended the property to pass to Ms. Auger if Mr. White did not use it for himself while Mr. Swett was alive. See Add., 28. The trial court further found that Ms. Auger, who had been a child in 1972, had no knowledge of her interest in the property until February 2016. Add., 29.

SUMMARY OF THE ARGUMENT

The trial court's order is well reasoned and should be affirmed. The trial court correctly interpreted the Deed based on a holistic reading of its terms, and reached the only reasonable conclusion: the conveyance to Mr. White was conditioned on him building and living on the land within ten years, and if that did not happen, or if Mr. White acquired other property to live on, then the land was to pass to Ms. Auger. That ruling is further supported by the circumstances at the time the Deed was drafted. The trial court's ruling honor's Mr. Swett's clear intent.

Plaintiff's contrary interpretation – that the title was to pass to Ms. Auger only if Mr. White acquired an interest in other land of Mr. Swett – would render the majority of the Deed's text illogical and superfluous. Plaintiff's further arguments that he is entitled to the land as compensation for services to Mr. Swett, or because he waived rights under Mr. Swett's will, are similarly misplaced and also insufficiently developed in the record. Whether the Deed was intended as payment is not material, given that Mr. White could only take title subject to the conditions in the Deed. Additionally, Mr. White could not unilaterally bargain away Ms. Auger's interest when settling his own dispute with Mr. Swett's heirs in 1973.

Likewise, the trial court correctly ruled that RSA 477:3-b is inapplicable. RSA 477:3-b prohibits the creation of certain new future interests in property after 2008, but does not invalidate those in existence as of 2008, nor require any action by individuals, like Ms. Auger, who are the original holders of such interests. Additionally, Ms. Auger's interest vested in 1982, before RSA 477:3-b was enacted.

ARGUMENT

I. PERLEY SWETT'S INTENT IS CLEAR IN THE PLAIN LANGUAGE OF THE DEED AND FURTHER BOLSTERED BY EXTRINSIC EVIDENCE OF THE CIRCUMSTANCES SURROUNDING THE CONVEYANCE.

The trial court's interpretation of the Deed is well grounded in its plain language and the factual circumstances at the time it was drafted.

The Deed can be readily understood when read in full, as explained by the trial court. See Add., 26. In contrast, its individual provisions cannot be reconciled with each other when read in isolation.

Perley Swett was not an experienced legal draftsman, but he still conveyed a clear intent; the "main condition" to Mr. White taking title was that he "erect some building on said land and live there either part time or year around" and that he not have acquired title to any other part of Mr. Swett's home farm. See Appx., 32. Failure of the first condition (i.e., building and living), or a transfer of title under the second condition (i.e., acquiring some part of the "home farm"), would automatically divest Mr. White of title, and cause Ms. Auger's executory interest to vest in fee.

Plaintiff, nevertheless, advances a theory that Ms. Auger was only to take title if Mr. White acquired some other portion of Mr. Swett's land at some undefined time. If this were accurate, the Deed's prior conditions would not be reconcilable with the Deed as a whole. In particular, it would render the "main condition" of building or living within ten years a superfluous portion of the Deed. That would result in an absurd twisting of the Deed's otherwise clear meaning. The trial court

was correct to reject plaintiff's piecemeal interpretation. As the trial court explained, the individual stipulations in the Deed inform rather than contradict each other. See Add., 26.

Additionally, plaintiff's interpretation would create ambiguity in the Deed where there presently is none, since it would leave the meaning and purpose of the other stipulations (such as the ten year limitation) unclear. That result, however, would not favor plaintiff's interpretation of Mr. Swett's intent. Instead, if there is any ambiguity in the language of the Deed, it would be resolved by looking to the trial court's findings of fact, which conclusively establish Mr. Swett's intent in favor of Ms. Auger. See Austin v. Silver, 162 N.H. 352, 354 (2011)(" Our determination of disputed deeds is based upon the parties' intentions gleaned from construing the language of the deed from, as nearly as possible, the position of the parties at the time of the conveyance and in light of surrounding circumstances. We base our judgment on this question of law upon the trial court's findings of fact.") (internal citations omitted) (emphasis supplied).

The trial court found that Mr. Swett's intent could be "easily resolved" by looking at the surrounding facts. Add., 28. Specifically, the trial court found Mr. Swett imposed conditions to encourage Mr. White to move near him. See id. Mr. Swett wanted Mr. White to be his neighbor during Mr. Swett's lifetime (as was understandable given the care and support Mr. White provided), but if that did not happen, then Ms. Auger would receive title. Id. These findings have ample support in the record and are unchallenged on appeal. Accordingly, whether the Deed is

interpreted on its plain language, or with review of the surrounding circumstances, the result is the same. The trial court's order should be affirmed.

II. PLAINTIFF CANNOT ESTABLISH AN EQUITABLE CLAIM TO THE PROPERTY FOR SERVICES TO MR. SWETT, NOR COULD HE UNILATERALLY EXTINQUISH MS. AUGER'S INTERESTS.

Plaintiff appears to assert an equitable claim to title in question three of his brief. Mr. White argues that the trial court's order has the effect of depriving him of the "benefit of his bargain" with Mr. Swett for services he provided. He also appears to allege that he would not have resigned as executor of Mr. Swett's estate in 1973, and relinquished a claim to the Swett home farm, but for his belief that he had good and marketable title in the parcel at issue in this appeal. Those arguments, while not clearly developed, appear to state an equitable claim to title, similar to a claim for unjust enrichment. However, assuming *arguendo* that Mr. White intends to state a claim for unjust enrichment or other equitable relief, the claim must fail for several reasons.

First, plaintiff has failed to develop a sufficient record to support such relief. The trial court's order did not directly address that claim, and plaintiff has not alleged any error in his appeal in that regard. Additionally, plaintiff has not provided a transcript of the bench trial that would be necessary to establish that the Deed was intended to pay him for services to Mr. Swett or otherwise entitle him to some equitable relief.

Further, even if Mr. White's decision to assist Mr. Swett and to resign as executor were based on his belief that he would receive title to the property in this case, that belief has no legal effect on Ms. Auger.

There is no dispute that Ms. Auger was not a party to the estate proceedings, nor involved in anyway with Mr. White's decision to resign as executor, nor was she a party to any agreement with Mr. Swett's heirs. Accordingly, Mr. White could not unilaterally extinguish Ms. Auger's executory interest in the property that existed at the time he made those decisions in the early 1970s. Similarly, if the Deed was intended as compensation for services, there is no dispute that it was granted with conditions including an executory interest in favor of Ms. Auger.

There is no basis for equitable relief in this case, nor any basis to award such relief at the expense of Ms. Auger. See e.g., Turner v. Shared Towers VA, LLC, 167 N.H. 196, 202 (2014)(explaining claim of unjust enrichment requires showing that an individual receives "a benefit which would be unconscionable for him to retain.").

III. RSA 477:3-b IS INAPPLICABLE TO THE DEED AND MS. AUGER'S INTEREST IN THE PROPERTY.

At trial and on appeal, Plaintiff alleges that RSA 477:3-b extinguished Ms. Auger's interest in the property. That claim, however, fails because (a) Ms. Auger's interest arose prior to December 31, 2008, (b) Ms. Auger is the original holder of that interest and as such, did not need to file a renewal declaration, and (c) Ms. Auger's interest vested in 1982 when Mr. White failed to satisfy the conditions set forth in the deed within ten years.

A. The trial court was correct in ruling that RSA 477:3-b is inapplicable.

RSA 477:3-b has two substantive parts. First, it prohibits the creation of certain new future interests. See 477:3-b(II)(a). Second, it provides that certain future interest that existed prior to December 31, 2008 are subject to a "renewal declaration" filing requirement, except if the interests are held by a public or charitable organization, or by the original holder of the interest. See RSA 477:3-b(III)(a) and (III)(b)(1).

Given these provisions, the trial court was correct in ruling that the statute is inapplicable to Ms. Auger's interest.

There is no question that Ms. Auger's interest arose in 1972 when the Deed was drafted. Accordingly, it is not a new future interest created after December 31, 2008, which would otherwise be prohibited by statute.

Likewise, there is no dispute that Ms. Auger is the original holder of that interest. Therefore, she had no obligation to file a "renewal declaration." See 477:3-b(III)(b)(1)(stating "[a] declaration of renewal of an existing possibility of reverter, right of re-entry, or executory interest in real property that was retained by or granted to a natural person need not be recorded while owned by that person. Any subsequent heir, devisee, grantee, creditor, or other successor to such interest shall record a declaration within 3 years after acquiring it or the interest shall become void.")(emphasis supplied).

Plaintiff, nevertheless, alleges that the statute also prohibits individuals from "retaining" existing future interests after December 31, 2008, relying solely on the language in part (II)(a) and ignoring the provisions in part (III) pertaining to "renewal declaration." That argument is simply incorrect. If Plaintiff's interpretation were accurate, then the provisions in RSA 477:3-b(III)(b)(1) pertaining to renewal declarations would be meaningless. Plaintiff's interpretation of RSA 477:3-b(II)(a) cannot be reconciled with the statute as a whole nor with the legislative history.[5] See Bovaird v. N.H. Dep't of Admin. Servs., 166 N.H. 755, 759 (2014)("We seek to effectuate the overall legislative purpose and to avoid an absurd or unjust result.").

B. Ms. Auger's interest vested in 1982 when Mr. White failed to satisfy the conditions in the Deed within ten years.

At the time the Deed was drafted and delivered, it granted Mr. White a fee simple subject to an executory limitation. In other words, Mr. Swett received fee title to the property, but if he did not satisfy certain conditions, then Ms. Auger's executory interest would divest him of title. See Restatement of Property (First) § 46(1)(b) (explaining executory interest will divest prior estate upon occurrence of stated event). That in fact is precisely what happened. By failing to satisfy any of

[5] Plaintiff contends that the legislative history supports his interpretation. However, there is a clear record to the contrary. In written testimony before the NH Senate, Prof. Marcus Hurn, Esq., explained that "[t]he partial abolition of defeasible estates in this legislation is prospective only. No matter how old, obscure, forgotten, or apparently obsolete an existing future interest may be, it is a property right and is preserved under this legislation.") (emphasis supplied). See HB1270 (2008) ("Committee Minutes," Letter of Prof. Hurn, Esq. at 5-6) (available at: http://gencourt.state.nh.us/SofS_Archives/2008/senate/HB1270S.pdf). Prof. Hurn further explained that the requirement to file renewal declarations was intended to apply only to "the successors of original owners" of the interests. See id. While there is no need for this Court to examine the legislative history given the plain language of the statute, the legislative history is in fact aligned with the trial court's ruling.

the conditions in the Deed within ten (10) years, Mr. White was divested of his title in favor of Ms. Auger. The fact that Ms. Auger did not learn of this until February 2016, does not change the result. Because Mr. White failed to satisfy the conditions, he lost his interest in the property. Accordingly, Ms. Auger's interest ceased being executory in 1982. As of that time, she held fee title under the terms of the Deed even though it took several decades for that fact to come to her attention (through no fault of her own). It follows that RSA 477:3-b does not apply to the Deed even if the Court were to credit Plaintiff's interpretation of the statute.

IV. MS. AUGER IS ENTITLED TO A RULING ON HER CONSTRUCTIVE TRUST CLAIM IF THIS COURT REVERSES THE TRIAL COURT'S DECISION.

The trial court ruled that Ms. Auger's counterclaim for constructive trust was moot because it vested title to the property with her based on the wording of the Deed and also the extrinsic evidence. That ruling was appropriate and should be affirmed for the reasons stated above. However, in the event that this court were to reverse the trial court's order, the proper remedy would be to remand to the trial court for further ruling on whether Ms. Auger established a claim to title to the property through a constructive trust.

CONCLUSION

The trial court's decision should be affirmed for the reasons set forth above.

REQUEST FOR ORAL ARGUMENT

Defendant requests oral argument to be presented by Robert J. Dietel.

Respectfully submitted,

BRIGITTE G. AUGER

By Her Attorneys,

GALLAGHER, CALLAHAN & GARTRELL, P.C.

June 19, 2018

Robert J. Dietel, NH Bar No. 19540
214 N. Main Street
Concord, NH 03301
(603) 228-1181
dietel@gcglaw.com

DONAHUE LAW, P.A.

June 19, 2018

Charles A. Donahue, NH Bar No. 656
143 West Street
Keene, NH 03431
(603) 357-2363
cad@charliedonahue.com

CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded two copies of the foregoing by First Class U.S. Mail, postage prepaid, to Michael P. Bentley, Esq., counsel for plaintiff, Quentin H. White, and to defendant, Joanne M. Jackson, pro se.

June 19, 2018

Robert J. Dietel, NH Bar No. 19540