THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0006

QUENTIN H. WHITE

V.

BRIGITTE G. AUGER F/K/A BRIGITTE GAUDREAU

AND

JOANNE M. JACKSON F/K/A JOANNE LABADIE

BRIEF OF THE PLAINTIFF, QUENTIN H. WHITE

APPEAL PURSUANT TO NEW HAMPSHIRE
SUPREME COURT RULE 7 FROM DECISION
OF THE CHESHIRE COUNTY SUPERIOR COURT

Michael P. Bentley, Esq.
NH Bar ID No. 531
Lane & Bentley, P.C.
106 Washington Street
PO Box 472
Keene, NH 03431

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court err by ruling that Brigitte G. Auger was the owner of the land described in a deed from Perley E. Swett to Quentin H. White dated July 18, 1972 as recorded in Vol. 872, Pg. 172 of the Cheshire County Registry of Deeds when Quentin H. White did not acquire from Perley E. Swett or from his estate "a more attractive area to live on or to build a house on? The issue raised was specifically addressed in the decision appealed from at Pages 25-28. See also Plaintiff's Motion for Reconsideration at Pages 51-56 and Paragraph 7 of said motion. See Defendant's Objection to Motion for Reconsideration at Pages 57-58.

2. Did the Court err by ruling that Perley E. Swett did not merely intend for ownership of the land to transfer to Auger only if White acquired other land from Swett's estate but that Swett also intended for the land to become Auger's if White failed to build and reside upon the land within ten years? The issue raised was specifically addressed in the decision appealed from at Pages 25-28. See also Plaintiff's Motion for Reconsideration at Pages 51-56 and Paragraph 13 of said motion. See Defendant's Objection to Motion for Reconsideration at Pages 57-58.

3. Did the Court err by depriving Quentin H. White of the benefit of his bargain by depriving him of all compensation for his "services" rendered to Perley E. Swett. See Plaintiff's Motion for Reconsideration at Pages 51-56 and Paragraphs 10-12 of said motion. See Defendant's Objection to Motion for Reconsideration at Pages 57-58.

4. Did the Court err by ruling that RSA 477:3(b)(II)(a) was only applicable to deeds created after December 31, 2008 and by failing to rule that Brigitte Auger's executory interest became void after December 31, 2008? The issue raised was specifically addressed in the decision appealed from at Pages 28-29. See also Plaintiff's Motion for Reconsideration at Pages

51-56 and Paragraph 7 of said motion. See Defendant's Objection to Motion for Reconsideration at Pages 57-58.

STATUTE

RSA 477:3-b(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.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

On December 30, 1977, this Court issued a decision in the case of Kenneth J. Arwe, Administrator W.W.A Estate of Perley E. Swett v. Quentin H. White & a., 117 N.H. 1025 (1977). Now, better than forty (40) years later, the same Quentin H. White, who was a named Defendant in the earlier case but who did not participate in the appeal, is before this Court seeking the reversal of an Order by Judge David W. Ruoff dated October 11, 2017 which divested Quentin H. White of title to certain real estate in Stoddard, NH that had been deeded to him by Perley E. Swett in 1972.

This Court's earlier decision dealt with a deed to other property in Stoddard, NH that Perley E. Swett signed on June 3, 1969 naming four (4) grantees of which Quentin H. White was one. The issue before the Court in the earlier case was whether the June 3, 1969 deed had been delivered by the grantor and accepted by the four grantees. The Court held that Perley E. Swett had "delivered" the deed and that three of the four grantees, excluding Quentin H. White, had "accepted" the deed. As this Court found, "Quentin White rejected his share; the title to that one-quarter undivided interest reinvested in the grantor." Id. at 1032.

This Court's earlier decision and Judge Ruoff's Order now under appeal, in combination, fully and accurately describe the relationship between Quentin H. White and Perley E. Swett such that nothing further need be stated in that regard. However, it is important for the Court to have at its disposal the documentary evidence from 1972 and 1973 so that the issues now before the Court on this appeal can be considered in context with the underlying events that took place during that period of time.

First and foremost is the deed from Perley E. Swett to Quentin H. White dated July 18, 1972 as recorded on December 5, 1973 in Vol. 876, Pg. 172 of the Cheshire County Registry of Deeds. The construction to be given to this deed is what this appeal is all about. The deed appears at Pages 32 and 33. The deed was marked as Defendant's Exhibit A.

Second is Perley E. Swett's Last Will and Testament dated October 18, 1970 which appears at Pages 37-40 and was part of Defendant's Exhibit C. Quentin H. White makes reference to Perley E. Swett's Last Will and Testament as it clearly sets forth Perley E. Swett's wishes as to what Quentin H. White was to receive under that will. Further, it makes clear the high regard that Perley E. Swett held Quentin H. White in by "...believing him [Quentin H. White] entirely honest and as a good friend, I designate him executor of this will and to administer any estate I leave (Without any bond required from him.)" See Page 39.

This Court's earlier decision noted that Perley E. Swett's "...will was proven on October 2, 1973. White resigned as executor a few months thereafter because of trouble with Swett's heirs." Id. at 1028. The "trouble" referenced in the Court's decision is found in Plaintiff's Exhibit 4 found at Pages 34-35. Bernice E. Clark, a daughter of Perley E. Swett, filed a Petition with the Cheshire County Probate Court seeking that her father's Last Will and Testament be declared null and void alleging in Paragraph 1 that "Quentin H. White is not a relative to my father by

marriage or otherwise but a newcomer to the Keene New Hampshire area" and, in Paragraph 2, that "I have a firm belief that Mr. White is attempting to swindle the estate of my late father from me and other members of my family and that he has hidden certain papers and legal documents thereof to conceal certain assets of my father from the view of this Court, and therefor pray that a hearing on this matter be heard December 5, 1973." It is important to note that a hearing on Bernice E. Clark's motion was scheduled for December 5, 1973 at 11:00 a.m. Fifteen (15) minutes prior to the start of the scheduled hearing Quentin H. White, by his then counsel, caused the deed now in question to be recorded at the Cheshire County Registry of Deeds. (See Page 33).

There is nothing in the record to reflect that the December 5, 1973 hearing was held. There is no Order in the record regarding the disposition of Bernice E. Clark's petition. What is, however, in the record, is a Stipulation between Quentin H. White and all of the heirs of Perley E. Swett dated December 13, 1973 as approved by the Probate Court on December 17, 1973 which addressed all issues between the parties. That Stipulation is found at Pages 41-44 and is part of Defendant's Exhibit C. While preparing this Brief, it was discovered that the certified copy of the Stipulation contained in Defendant's Exhibit C is not complete in that on Page 1 in Paragraph 4 the last line on the page was omitted. On the second page, in Paragraph 6, the last two lines on the page were omitted. On the third page there were seven signatories on the page yet that page in Defendant's Exhibit C contains only three signatures. A complete copy of the Stipulation is attached at Pages 47-50. In Paragraph 2 Quentin H. White resigns as Executor. Paragraph 4 awards to Quentin H. White title to all of Perley E. Swett's personal papers "...excepting only deeds to real estate owned by Perley E. Swett at the time of his decease and such original unrecorded deeds as are among said personal papers...." In Paragraph 5 Quentin

H. White releases the heirs of Perley E. Swett from any and all claims and in Paragraph 6 does likewise as to the estate of Perley E. Swett "...including but not limited to such claims, if any, which shall result from unrecorded deeds from Perley E. Swett...." In Paragraphs 7 and 8 Quentin H. White receives from the heirs of Perley E. Swett and from Perley E. Swett's estate, respectively, a release from any and all claims whatsoever. As noted above, the deed now in issue was recorded on December 5, 1973 such that it was not an "unrecorded deed" when the December 13, 1973 Stipulation was entered into. In addition, as the deed had been delivered by the grantor and accepted by the grantee in 1972, the property described therein was not owned by Perley E. Swett at the time of his death.

As Judge Ruoff's Order correctly reflects, Quentin H. White never built anything on the land in question. He paid taxes on it since 1973. When he ultimately decided that it was time to sell the property, the wording in the deed gave rise to an issue as to whether or not Quentin H. White had good and marketable title particularly in light of the wording involving Brigitte Gaudreau (now Auger) and Joanne Labadie (now Jackson). When Quentin H. White was unable to obtain Quitclaim Deeds from Brigitte Auger and Joanne Jackson, he brought a Petition to Quiet Title to resolve all issues regarding title to the property. Despite it being clear that Quentin H. White never, either by deed from Perley E. Swett or under the Last Will and Testament of Perley E. Swett "acquire[d] a more attractive land area to live on or to build a house on" Judge Ruoff ruled nonetheless that the land described in Defendant's Exhibit A was the property of Brigitte G. Auger.

SUMMARY OF ARGUMENT

The deed from Perley E. Swett to Quentin H. White contained one and only one condition which, if met, could have caused Quentin H. White to be divested of title with title to

then be transferred to Brigitte Auger, formerly Gaudreau. That condition was not met. It was error for the Court to have awarded the land to Brigitte Auger notwithstanding. To the extent that Brigitte Auger had an executory interest in the land, that interest became void on December 31, 2008 per RSA 477:3-b(II)(a). It was error for the Court to rule that this statute was inapplicable to a deed dated July 18, 1972 ruling that the statute was only applicable to deeds executed after December 31, 2008.

THE COURT ERRED BY RULING THAT BRIGITTE G. AUGER WAS THE OWNER OF THE LAND DESCRIBED IN A DEED FROM PERLEY E. SWETT TO QUENTIN H. WHITE DATED JULY 18, 1972 AS RECORDED ON DECEMBER 5, 1973 IN VOL. 872, PG. 172 OF THE CHESHIRE COUNTY REGISTRY OF DEEDS WHEN QUENTIN H. WHITE DID NOT ACQUIRE FROM PERLEY E. SWETT OR FROM HIS ESTATE "A MORE ATTRACTIVE AREA TO LIVE ON OR TO BUILD A HOUSE ON."

Quentin H. White agrees that the case law cited by Judge Ruoff as to the manner by which deeds are to be construed in New Hampshire is correct. However, Quentin H. White affirmatively states that Judge Ruoff erred by his application of the law to the words contained in Perley E. Swett's deed to him.

"The interpretation of a deed is a question of law. Motion Motors v. Berwick, 150 N.H. 771, 775 (2004). When the language of the deed is clear and unambiguous a court must interpret the intended meaning from the deed itself without resort to extrinsic evidence. Id. We review the trial court's interpretation of the deed *de novo.*" Tanguay v. Biathrow, 156 N.H. 313, 314 (2007). The interpretation of a deed "...is ultimately a question of law for this Court to decide by determining the intent of the parties at the time of the deed in light of surrounding circumstances. " Soukup v. Brooks, 159 N.H. 9, 16 (2009).

Perley E. Swett's deed to Quentin H. White conveyed "about ten acres of land... on the south side of the 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 of Perley E. Swett's home farm.
- In case Quentin H. White does acquire a more attractive land to live on or to build a house on, this land area should be transferred to Brigitte Gaudreau if she is available."

When the Court found that the deed was "...neither patently nor latently ambiguous" the Court appears to have concluded, conversely, that the deed was clear and unambiguous thus requiring the Court to interpret the deed from the deed itself without resort to extrinsic evidence. While Judge Ruoff found that "[t]o interpret the deed by looking at the various stipulations in isolation would only serve to obfuscate Swett's clear intent..." Quentin H. White respectfully suggests that the Court's judicial linking of the last stipulation listed above to the first three stipulations contradicts the meaning and intent which Perley E. Swett intended be given to the deed. The last stipulation in the deed makes clear that Perley E. Swett intended Quentin H. White to wind up with some land from Perley E. Swett and not to wind up with nothing which is the effect of Judge Ruoff's Order. The Court's finding that "...Swett did not merely intend for ownership of the land to transfer to White only if White acquired no other part of Swett's estate" is contrary to the express terms of the deed. While the Court in footnote 5 of its Order (See Page 27) raises the possibility of reverter "...to Swett's estate if White did not live or build on the land in ten years" such finding is erroneous as a matter of law as it directly contradicts Paragraphs 7 and 8 of the December 13, 1973 Stipulation as approved by the Probate Court on December 17, 1973 which settled Quentin H. White's involvement in the Estate of Perley E. Swett. These paragraphs provided to Quentin H. White a full release from not only the heirs of the estate of

Perley E. Swett but also from the estate itself. Quentin H. White's deal was that he got title to the land described in the deed-nothing more and nothing less. Yet Judge Ruoff's Order now takes the land away from Quentin H. White even though Perley E. Swett never intended such a result.

Quentin H. White agrees that had he "acquire[d] a more attractive land area to live on or to build a house on, this land should be transferred to Brigitte Gaudreau [now Auger] if she is available." However, in view of the fact that Quentin H. White did not, in fact, "acquire" any "more attractive land" as described in the deed, the condition of the contemplated transfer to Brigitte Gaudreau [now Auger] never occurred such that any transfer to Brigitte Gaudreau [now Auger] failed by the express terms of the deed.

THE COURT ERRED BY RULING THAT PERLEY E. SWETT DID NOT MERELY INTEND FOR OWNERSHIP OF THE LAND TO TRANSFER TO AUGER ONLY IF WHITE ACQUIRED OTHER LAND FROM SWETT'S ESTATE BUT THAT SWETT ALSO INTENDED FOR THE LAND TO BECOME AUGER'S IF WHITE FAILED TO BUILD AND RESIDE UPON THE LAND WITHIN TEN YEARS

Judge Ruoff's ruled that "Swett did not merely intend for ownership of the land to transfer to White only if White acquired no other party of Swett's Estate. Swett also intended the land to become Auger's if White failed to build and reside upon the land within ten years." Quentin H. White contends that Judge Ruoff, forty-five years after the fact, imposed a further condition into Perley E. Swett's deed that the Grantor did not impose himself. The deed does not say that if Quentin H. White fails to build on the property within ten (10) years that the property should be transferred to Brigitte Gaudreau [now Auger]. Perley E. Swett clearly knew how to impose a condition since he clearly and unambiguously said that if "Quentin H. White does acquire a more attractive land area to live on or to build a house on" that his land should be transferred to Brigitte Gaudreau [now Auger]...." In fact, that was the one and only condition by which Brigitte Gaudreau [now Auger] had a possible claim to title of the subject premises. Quentin H.

White believes that the Court's imposition of an additional condition into Perley E. Swett's deed to Quentin H. White, which the Court then went on to find had not been met such that the land should be awarded to Brigitte Auger, was plain error.

THE COURT ERRED BY DEPRIVING QUENTIN H. WHITE OF THE BENEFIT OF HIS BARGAIN THEREBY DEPRIVING HIM OF ALL COMPENSATION FOR HIS "SERVICES" RENDERED TO PERLEY E. SWETT

As both this Court's earlier decision in Arwe v. White & a. and Judge Ruoff's Order reflect, Perley E. Swett was most appreciative of the assistance rendered to him by Quentin H. White over many years. In his own way, Perley E. Swett attempted to pay Quentin H. White for those services. While an earlier deed tendered by Perley E. Swett to Quentin H. White had been ripped up by Quentin H. White in Perley E. Swett's presence, Quentin H. White accepted delivery of the 1972 deed now before this Court. When Perley E. Swett's daughter, Bernice E. Clark, alleged that Quentin H. White was "...attempting to swindle the estate...," Quentin H. White quickly determined that there was no benefit to him to attempt to complete the administration of Perley E. Swett's under his administration since the accusations being made against him were in sharp contrast to the close relationship he had with Perley E. Swett and to the actions which had taken on behalf of Perley E. Swett over that period of time.

Quentin H. White caused the deed to be recorded fifteen (15) minutes prior to the start of the hearing on Bernice E. Clark's motion. Eight days later he and the heirs of Perley E. Swett's estate signed the Stipulation resolving all matters which the Probate Court approved four days after that. Quentin H. White entered into the Stipulation based upon the representations made to him by Kenneth J. Arwe who was to become Administrator W.W.A. of Perley E. Swett's estate and by Lewis A. McMahon, Esq., then counsel for Quentin H. White, that the land in question was his free of the conditions since, under the terms of the Stipulation, Quentin H. White waived

any claim to any bequests made to him by Perley E. Swett under his will or under any unrecorded deed just in case Perley E. Swett had any such deeds floating around amongst his extensive personal papers. As noted by this Court in Arwe v. White & a. the undelivered deed that was the subject matter of this Court's earlier decision was discovered by Quentin H. White on November 21, 1974 or eleven (11) months after the Stipulation was signed. Thus Quentin H. White had waived any interest in that deed eleven (11) months prior to it being found.

Simply stated, Quentin H. White knew at the time that the Stipulation was entered into that he would not be acquiring a "more attractive" piece of land from Perley E. Swett's estate since he was specifically waiving any and all claims to any such real estate. Quentin H. White made a deal with the heirs and with the estate of Perley E. Swett. Judge Ruoff's Order deprives him of the benefit of that bargain and leaves him with nothing to show for the "services" which he rendered to Perley E. Swett. Such a result is clearly inequitable nor could it ever have been within the contemplation of Perley E. Swett.

Quentin H. White agrees with Judge Ruoff's statement that "...the Court finds the timing of the delivery of the Deed is an important factor. By 1972 - when the deed was delivered - Swett had already provided for White in his will and the now-famous undelivered deed." Then Judge Ruoff goes on to say that "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." Quentin H. White suggests that these latter comments made by Judge Ruoff constitute an overstatement. While it seems apparent that in 1972 that Perley E. Swett had an expectation that Quentin H. White would be benefitted by either his will or by the "now-famous undelivered deed," subsequent events made it abundantly clear that regardless of

Perley E. Swett's expectations, Quentin H. White was not the recipient of what Perley E. Swett expected him to receive under either his will or under the "now-famous undelivered deed."

It is precisely for this reason that the sole condition imposed by Perley E. Swett in his 1972 deed to Quentin H. White pursuant to which the land should be transferred to Brigitte Gaudreau [now Auger] must be found to not have been met. Perley E. Swett clearly wanted Quentin H. White to receive something one way or the other yet to allow Judge Ruoff's Order to stand results in the loss to Quentin H. White of the benefit of his bargain.

THE COURT ERRED BY RULING THAT RSA 477:3(b)(II)(a) WAS ONLY APPLICABLE TO DEEDS CREATED AFTER DECEMBER 31, 2008 AND BY FAILING TO RULE THAT BRIGITTE AUGER'S EXECUTORY INTEREST BECAME VOID AFTER DECEMBER 31, 2008

The condition imposed by Perley E. Swett in his 1972 Deed to Quentin H. White created an executory interest in Brigitte Gaudreau [now Auger]. "[A]n executory interest can take effect only by divesting a preceding estate in another grantee...." C. Moynihan, Introduction to the Law of Real Property, 197-198 (1962).

In the 2008 Session of the New Hampshire Legislature, House Bill 1270 was introduced which upon passage became Chapter 228 of the 2008 Session laws. Chapter 228:1 states:

> Statement of Purpose. In conveyances of real property the use of possibilities of reverter, rights or re-entry, or executory interests unduly burdens the free alienability of property when there is no public or charitable purpose or use involved. Future creation of such interests should be limited, and preservation and enforcement of those which continue to exist should be regulated.

The bill then amended RSA Chapter 477 by adding RSA 477:3-b and RSA Chapter 508 by adding RSA 508:2(II). These statutes became effective on January 1, 2009. The legislative history makes clear that possibilities of reverter, rights of re-entry or executory interests in real

property were problems affecting titles to real property. This case is a shining example of the problems that the new legislation was intended to resolve.

RSA 477:3-b(II)(a) provides in part that "[a]fter December 31, 2008, no legal possibility of reverter, right of entry or executory interest in real property may be retained or created unless 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." Judge Ruoff's Order states that "[h]ere the language of the statute plainly demonstrates that the legislature intended RSA 477:3-b(II)(a) to apply to deeds created after December 31, 2008. RSA 477:3-b(II)(a) is therefore inapplicable to the Deed and Auger's executory interest therein." Quentin H. White respectfully submits that this ruling by Judge Ruoff is plainly erroneous and contrary to the wording of the statute. While the statute does provide that "[a]fter December 31, 2008 no legal possibility of reverter, right of entry or executory interest in real property may be ...created," Judge Ruoff's Order jumps over, overlooks and pays no attention to the word "retained" which appears in the statute immediately before the words "or created." The legislative history is clear that the statute was intended to deal with executory interests that were outstanding as of the date that the statute became effective. For Judge Ruoff's ruling regarding the applicability of the statute to be correct, it would be equivalent to the word "retained" not being part of the statute since, under his ruling, the statute only applies to deeds created after December 31, 2008. Such a ruling would be contrary to the principles of statutory construction. Quentin H. White agrees with Judge Ruoff that the language of the statute should be construed according to its plain and ordinary meaning which, by definition, means construing all of the words of the statute and not bypassing an operative word which conflicts with the conclusion that the Court arrived at.

Even if Brigitte Auger held an executory interest in the subject premises on December 31, 2008 (which Quentin H. White denies per his arguments set forth in the earlier sections of this Brief), RSA 477:3-b(II)(a) made that interest void effective as of that date. To then find, as Judge Ruoff did, that her executory interest was not only valid but fully enforceable nine (9) years after the effective date of RSA 477:3-b(II)(a) is contrary to the provisions of New Hampshire law.

CONCLUSION

For the reasons set forth above, Quentin H. White respectfully requests that this Court reverse Judge Ruoff's Order dated October 11, 2017 and rule that Quentin H. White is the owner of the land deeded to him by Perley E. Swett dated July 18, 1972 as recorded in Vol. 876, Pg. 172 of the Cheshire County Registry of Deeds. This is clearly the result which Perley E. Swett intended which remains the guiding principle by which deeds are construed in New Hampshire.

REQUEST FOR ORAL ARGUMENT

The Plaintiff, Quentin H. White, requests to be heard on oral argument before the full New Hampshire Supreme Court and requests fifteen (15) minutes for same. The Plaintiff believes that this case presents a unique circumstance where the same person whose name appears in the caption of a case decided by this Court forty (40) years ago is before this Court seeking the reversal of a Superior Court decision divesting him of title to real estate deeded to him forty-five years ago. Also, it is believed that this Court's determination as to how RSA 477:3-b(II)(a) may affect the outcome this case appears to be a case of first impression regarding this statute. This Court's decision regarding same will provide guidance to real estate practitioners in this state as to the meaning, intent and applicability of this statute to real estate title claims.

I certify that the appealed decision is in writing and is appended to this Brief.

Respectfully submitted,

QUENTIN H. WHITE

By His Attorneys,

LANE AND BENTLEY, P.C.

May 1, 2018

By: _____

Michael P. Bentley, Esq.
NH Bar #531
106 Washington Street, PO Box 472
Keene, NH 03431
(603-352-5720

CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded two copies of the within Brief to Robert J. Dietel, Esq., co-counsel for Brigitte G. Auger, one copy of the Brief to Charles A. Donahue, Esq., co-counsel for Brigitte G. Auger and two copies of the within Brief to Joanne M. Jackson, pro se.

May 1, 2018

_____

Michael P. Bentley, Esq.
NH Bar #531

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Cheshire Superior Court
33 Winter Street, Suite 2
Keene NH 03431

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **Quentin H White v Brigitte Auger, f/k/a Gaurdeau, et al**
Case Number: **213-2016-CV-00160**

Enclosed please find a copy of the court's order of October 11, 2017 relative to:

Order on the merits following bench trial

November 06, 2017

James I. Peale
Clerk of Court

(555)

C: Michael P. Bentley, ESQ; Charles A. Donahue, ESQ

The State of New Hampshire
Superior Court

Cheshire, SS.

Quentin H. White

v.

Brigitte G. Auger, formerly Brigitte Gaudreau and Joanne M. Jackson, formerly Joanne Labadie

No. 213-2016-CV-00160

ORDER ON MERITS FOLLOWING BENCH TRIAL

Plaintiff Quentin White brought this petition to quiet title against Defendants Brigitte Auger (formerly Brigitte Gaudreau) and Joanne Jackson (formerly Joanne Labadie). Ms. Auger contests this petition and has also filed counterclaims against Mr. White for declaratory judgment, specific performance, constructive trust, breach of fiduciary duty, and attorney's fees. Jackson has defaulted for failing to file an appearance and answer. The Court held a bench trial on July 19, 2017. The Court makes the following findings of fact and rulings of law.

Findings of Fact

In the autumn of 1967, Quentin White, his wife, and their four children moved to Stoddard, New Hampshire in order for White to take a position at Keene State College as a professor of economic geography. For their first few years in the Keene area, the White family rented a summer home on Granite Lake during the academic year and

returned to their Utah home in the summer. One weekend in the spring of 1968, as soon as the rural back roads were dry enough to drive on, White took his children on a drive to explore their neighborhood. During their excursion, they came upon an old and vacant-looking house at the top of a hill. To their surprise, an elderly man emerged from the house. The man, Perley Swett, introduced himself as the "Taylor Pond Hermit" and asked them if they could pick him up some Campbell's soup and soda crackers because he was out of food. The family headed to Keene and shortly returned with more than the requested soup and crackers. White refused payment from Swett for the provisions, but the family did stay and chat with Swett for some time.

This encounter spurred the development an admirable friendship between Swett and the White family. During the academic year, White visited Swett every two to three weeks, and even more frequently once Swett's health started declining shortly before his death. In the winter, White had to walk three miles in the snow to make these visits. Swett called the White household multiple times a week, oftentimes just to chat. White frequently helped Swett by picking up groceries, going to the bank, and taking Swett to visit his sister.

Swett often attempted to pay White for, in Swett's words, his "services." White always refused payment because he felt that it was his neighborly duty to help Swett. On one occasion, Swett handed White a deed for one hundred or more acres of land. White attempted to hand the deed back. A somewhat heated discussion ensued, culminating in White tearing the deed in half and placing it on Swett's table. From White's perspective, this act of violence disturbed Swett. White therefore acted more cautiously when Swett handed him another deed in 1972 (the "Deed"), again for White's

services. Unknown to Mr. White, by that time Swett had already bequeathed – by virtue of an executed but undelivered deed – a portion of his estate to White in his Last Will and Testament. At the time White received the Deed, he folded up the Deed and put in his shirt pocket. He later stored it with some old records, intending to not record it and thus, in his words, "let it die." To him, he had thrown it away for all practical purposes. White did not even read the Deed until more than a year later, when he began having problems with Swett's heirs following Swett's death.

White also obliged Swett by helping him deliver gifts to people by picking up cashier's checks at the bank and sometimes even delivering the gifts. Sometimes Mr. Swett would accompany White on these gift giving trips to town, but he preferred to give the gifts anonymously. Most of these gifts were to local children, almost exclusively young girls. Once, Swett granted a 25-acre plot of land to the triplet daughters of a family with whom he was friendly. Other times, Swett made gifts to strangers whose unfortunate circumstances Swett learned of by reading the newspaper. The majority of Swett's gifts were to young girls. According to Mr. White, Swett's generosity stemmed from his belief that girls were better suited for his gifts than boys because he believed boys were being raised to be sent off to war.[1] His charitable preference in this respect was undeniable. It even extended to Swett's will, where he stipulated for more generous bequeaths to girls than boys.

Ms. Auger was one of the local "girls" who benefited from Swett's generosity. She knew Swett because her family went to his land during hunting season and used a cabin located on his land. Swett would show her family around the land and tell them

[1] The Court interprets this evidence to be in reference to the Vietnam War, which was at is zenith during this timeframe.

stories about his land. Auger would embarrass her mother by asking Swett childishly blunt questions about his unusual, disheveled appearance. These questions must not have been too offensive to Swett because he 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. Swett told her that it was a "big deal" for him to come to her house because he did not travel to away from his rural farm very often. On another occasion, Swett brought Auger an antique brush set. Swett also once told her that he would give her a horse and land upon which to keep it.

During the 1972–73 academic year, Swett's physical health showed signs of failing. White's wife, Riitta, began calling Swett once a day and sending someone out to check on him if he did not pick up after a few calls. One Saturday in June 1973, Riitta could not reach Swett by phone. White was out of town and Riitta could not find anyone to go check on Swett. As soon as White returned on Sunday night, he headed for Swett's home with his young son. They found Swett on his bed and unable to get up or speak because of a stroke that paralyzed the right side of his body. Although he knew Swett wanted to pass away in the peace of his own home and farm,[2] White decided to call the paramedics, largely because he had his son with him. Swett was hospitalized for approximately a month, and lived in a nursing home for a similar amount of time before passing away on September 1, 1973. Mr. White returned to Swett's farm to retrieve his will, but by the time he went looking for it someone had already been to the farm and the will was missing.[3]

---

[2] Swett had told White in previous conversations that he did not want his life to be prolonged by medical intervention if he should become ill.

[3] The authenticity of the will is not contested. It is unclear from the record how the will was eventually filed in the probate court.

In 1972, Swett had asked White to be the executor of his will,[4] and Swett's will called for the same. White was appointed as executor on September 23, 1973. The will made several bequeaths to White, including one-fourth of the Swett's "home farm." The other portions of the home farm were bequeathed to another friend of Swett's and two girls. The probate proceedings became almost immediately contentious, as exemplified by one of Swett's children asserting in a court pleading her "firm belief that White [was] attempting to swindle the estate of [her] late father." (Pl.'s Ex. 4.) White quickly decided to resign as executor, and did so on December 13, 1973. As part of his resignation as executor, he relinquished any of his claims under Swett's will and any claims to previously unrecorded deeds from Swett. During the proceedings and prior to resigning his executorship, White read the Deed for the first time. It stated, in relevant part, the following:

> That I, Perley E. Swett, of Stoddard, New Hampshire for consideration paid, grant to Quentin H. White of Munsonville, New Hampshire 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 the 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 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.

[4] Approximately two years prior to his death, Swett showed White a copy of his will and showed him where it was kept.

(Def.'s Ex. A.) Both White's attorney, Lewis A. McMahon, and an attorney appointed by the probate court who succeeded White as executor of Swett's estate, Kenneth Arwe, looked at the above language in the Deed and told White that the conditions were inapplicable because he would not receive any other property from Swett or his estate. Unbeknownst to White and as discussed in the Findings of Law, this was an erroneous interpretation of the Deed. White recorded the Deed at the advice of his attorney.

A few years later, the White family moved back to Utah. Even before deciding to move back, White never intended to live or build a house upon the land granted to him in the Deed because it was too far away from Keene State College. Furthermore, the White family had purchased a home in Keene shortly before Swett's death and before White read the Deed for the first time. Prior to trial in this matter, White had only returned to the Keene area once or twice. He has always paid his taxes on the property.

In January 1988, White received a letter from an attorney representing Jackson, which stated, in part, the following:

> You will note that the language in the [D]eed required that you build on the property within ten years, or convey the property to [Auger] if she is available, and if her address or location is not known, then to [ ] Jackson. My clients tell me that the whereabouts of [Auger] is not known. They are requesting, therefore, that you transfer the property to [Jackson] as contemplated in the original deed.

(Def.'s Ex. H.) White sent a reply letter, which stated in part:

> I am aware of the language in the [ ] [D]eed that conveys the described piece of land to me. A reading by my attorneys, however, both at the time the deed was recorded and later here, concludes that the clear intent was that I have the property. There are other circumstances surrounding the time the deed in question was written and subsequent happenings surrounding Mr. Swett's death that substantiate that intent.
>
> While I have not lived there permanently, I and members of my family have camped there on several occasions and I have faithfully paid all taxes and assessments.

> I, therefore, consider the basic intent of transfer as having been met and the property mine. My intention is not to transfer it to anyone.

(Def.'s Ex. I.)

Last year, White attempted to sell the land. The sale of the land fell through because the prospective buyer's attorney thought that White may not hold the title free and clear of others' interests, namely those of Auger and Jackson. White subsequently attempted to contact Auger and Jackson through his attorney and asked them to sign quitclaim covenants rejecting their interests in the land. Auger was not aware of the Deed until White's attorney contacted her. Auger refused to relinquish her interest without compensation. Jackson did not reply to the request. This action followed.

Rulings of Law

White avers that Swett's intent was to have him retain the land so long as he obtained no other part of Swett's estate. He further avers that RSA 477:3–b(II)(a) voided Auger's interest in the land. Auger contends that Swett intended for title in the land to transfer to her if White did not build and reside upon the land within the first ten years. "In an action to quiet title, the burden is on each party to prove good title as against all other parties whose rights may be affected by the court's decree." Gallo v. Traina, 166 N.H. 737, 740 (2014). In Ettinger v. Pomeroy Ltd. Partnership, 166 N.H. 447 (2014), the New Hampshire Supreme Court reiterated the principles for interpretation of deeds. The Court noted:

> The proper interpretation of a deed is a question of law for this court . . . . In interpreting a deed, [the Court will] give it the meaning intended by the parties at the time they wrote it, taking into account the surrounding circumstances at that time . . . . If the language of the deed is clear and unambiguous, [the Court] will interpret the intended meaning from the

> deed itself without resort to extrinsic evidence. If, however, the language of the deed is ambiguous, extrinsic evidence of the parties' intentions and the circumstances surrounding the conveyance may be used to clarify its terms. A deed may have either a patent or a latent ambiguity. A deed is patently ambiguous when the language in the deed does not provide sufficient information to adequately describe the conveyance without reference to extrinsic evidence. A latent ambiguity exists when the language in the deed is clear, but the conveyance described can be applied to two different subjects or is rendered unclear by reference to another document.

Id. 450 (citations and quotations omitted). The fundamental principle in interpreting deeds "is to determine the intent of the parties at the time of the conveyance in light of the surrounding circumstances." Chao v. The Richey Co., 122 N.H. 1115, 1117 (1982).

The Court finds that the deed is neither patently nor latently ambiguous. While the deed is wordy and redundant, its abstruseness and peculiarities do not equate to ambiguity. Taking the deed holistically and avoiding overly technical interpretations, Swett's intent is clear. See Anna H. Cardone Revocable Trust v. Cardone, 160 N.H. 521, 531–32 (2010) (examining the deed as a whole and avoiding an overly technical or narrow interpretation of contested language in a deed). The deed begins by stipulating conveyance to White on the condition that he build a house and live upon the land, with the caveat that if White acquires land immediately to the north of the property he may build upon that land instead. It further stipulates that this must be accomplished within ten years and that White must not acquire any portion of Swett's "home farm." These stipulations inform rather than contradict the subsequent stipulation that if White "does acquire a more attractive land area to live on or to build a house on, this land area should be transferred to [Auger] if she is available." Although the language in this stipulation does not convey the entire meaning of the preceding stipulations, it is close

enough that it serves as a reference to them. The preceding stipulations make clear that White should only maintain control of the land if he utilized the land as his family's residence within ten years. To interpret the deed by looking at the various stipulations in isolation would only serve to obfuscate Swett's clear intent.[5] Thus, Swett did not merely intend for ownership of the land to transfer to White only if White acquired no other part of Swett's estate. Swett also intended the land to become Auger's if White failed to build and reside upon the land within ten years.

Furthermore, even if the Court did find the deed ambiguous, extrinsic evidence supports the Court's finding.[6]

"If the language of the deed is ambiguous, extrinsic evidence of the parties' intentions and the circumstances surrounding the conveyance may be used to clarify its terms." Austin v. Silver, 162 N.H. 352, 354 (2011). A deed is patently ambiguous when "its language fails to provide sufficient information to describe the conveyance adequately without reference to extrinsic evidence." Id. A latent ambiguity "exists when the deed's language is clear, but the conveyance described can be applied to two different subjects or is rendered unclear by reference to another document." Id. In this case, any latent ambiguity concerning conditions under which Mr. White could retain the

[5] Indeed, if the Court were to read the stipulations in isolation, the proper interpretation would not be the one furthered by White, but instead that Swett intended the property to revert back to Swett's estate if White did not live or build upon the land in ten years.

[6] The Court is uncertain that extrinsic evidence would be permissible if the language of the deed was in fact ambiguous. The New Hampshire Supreme Court has previously held that conditions subsequent must be construed strictly. See Cardone, 160 N.H. at 527–29. While this case involves an executory limitation rather than a condition subsequent, the New Hampshire Supreme Court appears to disfavor conditions that may result in forfeiture. See id. at 528 ("A forfeiture by nature is a drastic remedy because in most cases it is widely disproportionate to the breach"); Hoyt v. Kimball, 49 N.H. 322, 322 (1870) ("But conditions, especially conditions subsequent, are not favored in law, and must be strictly construed, because they tend to destroy estates").

property can be easily resolved by looking at other facts that provide insight into Swett's intent at the time he executed the Deed.

Swett displayed a predilection for making gifts to girls. On more than one occasion, Swett gave gifts to Auger, and even once told her that he intended to give her some land. He had gifted land to other girls in the neighborhood. The evidence supports a finding that Swett intended for the land to go to Auger if White did not intend to use it for himself. Moreover, the Court finds the timing of the delivery of the Deed is an important factor. By 1972 – when the deed was delivered – Swett had already provided for White in his will and the now-famous undelivered deed. Therefore, 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. Thus, the Court concludes, alternatively, that Swett intended for White to use the deeded property to build a home within 10 years while Swett was alive, otherwise the testamentary gift would require conveyance to Ms. Auger (should Swett pass away beforehand). In other words, Perley Swett wanted the Whites to be his neighbors while he was alive. This is quite an understandable result in light of Quentin White's very admirable moral character and altruistic loyalty to his friend.

White also avers that RSA 477:3–b(II)(a) (2013) voids Auger's executory interest. RSA 477:3–b(II)(a) provides:

> 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.

RSA 477:3–b(II)(a). For questions of statutory interpretation, the Court "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." Mountain View Park, LLC v. Robson, 168 N.H. 117, 120 (2015). "When the language of a statute is plain and unambiguous," the Court "need not look beyond the statute itself for further indications of legislative intent." Id. Here, the language of the statute plainly demonstrates that the legislature intended RSA 477:3–b(II)(a) to apply to deeds created after December 31, 2008. RSA 477:3–b(II)(a) is therefore inapplicable to the Deed and Auger's executory interest therein.

Finally, in accordance with the above determination, the Court grants Auger's counterclaims for declaratory judgment and specific performance. The Court finds her action was timely because she was not aware of her potential interest in the property until after February 16, 2016.[7] It denies, however, Auger's counterclaims for constructive trust, breach of fiduciary duty, and attorney's fees. The constructive trust counterclaim is denied as moot because the Court via this order grants Auger title to the land in dispute. The breach of fiduciary duty is denied because the granting of a deed does not create a fiduciary relationship between the grantee and grantor, or between the grantee and individual holding an executory interest. Auger is not entitled to attorney's fees because there is no evidence that White acted in bad faith in bringing the petition to quiet title. White honestly believed that it was Swett's intent for him to retain the land. He received legal advice from two attorneys in 1973 who agreed with his interpretation of the Deed. White had no ill intent in bringing this action and only to wishes to receive some compensation for land that he has long paid taxes on. Nor was

[7] Ms. Auger was 10 years old in 1973, when her interest was created.

the action frivolous, as the peculiar wording of the Deed appeared to create some reasonable confusion as to Swett's intent.

Conclusions

For the foregoing reasons, the Court finds in favor of Auger on the petition to quiet title and Counterclaims I and II, and finds in favor of White on Counterclaims III through V.

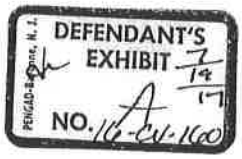
Accordingly, it is hereby ordered that the real property described in the deed recorded in the Cheshire County Registry of Deeds at Volume 876, Page 172, on December 5, 1973 is now the property of Brigitte G. Auger (formerly Brigitte Gaudreau as referenced in the Deed) free and clear of any other claims of interest.

SO ORDERED.

10-11-17
DATE

David W. Ruoff
Presiding Justice

APPENDIX



CONSIDERATION LESS THAN $100.00

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 Hampshire

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.

(wife (husband of said grantor, release to said grantee all rights of (dower (curtsey and homestead and other interests therein.

Witness hand and seal this 18 day of July, 1972

WITNESS:

Carol I. Weeks

Perley E. Swett

STATE OF NEW HAMPSHIRE COUNTY OF Cheshire

On this the 18th day of July, 19 72 before me, Clara A. Giovannangeli the undersigned officer, personally appeared Perley E. Swett known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purpose therein contained.

In witness whereof I hereunto set my hand and official seal.

Clara A. Giovannangeli

Notary Public ~~Justice of the Peace~~

07451

Stoddard (SHORT FORM)

WARRANTY DEED

Sweett

TO

White

Cheshire Records

Received DEC - 5 1973 19

10 Hour 45 Minute a M.

Recorded in Vol. 876 Page 172

Examined

Renos M. Houle Register

FROM THE OFFICE OF

E-99—E. C. Eastman, Concord, N. H.

Mortgage (1)

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS. COURT OF PROBATE

Re: Estate of Perley E. Swett - Petition

The above petition having been filed in this Court on November 20, 1973, notice is hereby given to all parties, or their attorneys of record, that the petition will be heard before the Court on Wednesday, December 5, 1973, at 11:00 a.m.

By Order of the Court,

Phyllis J. Parker,
Register

HCL:p

I hereby certify that on November 21, 1973, I mailed copy of this notice and petition to the following:

Phyllis J. Parker,
Register

Harvey W. Swett	Sullivan, N. H. 03431
Eleanor M. Newell	659 DeWitt Rd., West Webster, N. Y.1458
Norma Bourassa	Sullivan, N. H.
Barbara S. Labadie	Sullivan, N. H.
David W. Swett	Sullivan, N. H.
Maurice F. Swett	Sullivan, N. H.
Shirley Swett	Sullivan, N. H.
Daniel Frazier	377 Elm. St., Keene
Richard L. Swett	663 Euclid Ave., Miami, Fla. 33139
Bernice E. Clark	Sullivan, N. H.
Kathleen E. Davis	Troy, N. H. 03465
Warren E. Clark	Sullivan, N. H.
Priscilla A. Clark Burkett	15 Union Street, Keene, N. H.
Walter D. Clark	Bristol, England **
Patricia A. Clark	Sullivan, N. H.
William S. Clark	Sullivan, N. H.
Deborah M. Clark	Sullivan, N. H.
Charlotte R. Clark	Sullivan, N. H.
Wesley E. Clark	Sullivan, N. H.
Matthew R. Davis	Troy, N. H. 03465
Lillian Nims	Sullivan, N. H.
Alice Nims	Sullivan, N. H.
Jane Nims	Sullivan, N. H.
Frank Nims, Jr.	Sullivan, N. H.
Charles F. Wilder	Peg Shop Road, Keene
Charles G. Wilder	Peg Shop Road, Keene, N.H.
Christopher M. Wilder	Peg Shop Road, Keene, N. H.
Nataasha White	Allan Court, Keene, N. H.
Quentin White	Allan Court, Keene, N. H.
Kenneth J. Arwe, Esq.	Roxbury St., Keene, N. H.
Lewis A. McMahon, Esq.	39 Vernon St., Keene, N. H.
Homer S. Bradley, Jr., Esq.	- Guardian ad litem - Keene, N. H.
Charles J. Contas, Esq.	- Guardian ad litem - Keene, N. H.
Eileen E. Stone -	Box 891, Provo, Utah 84601

** Walter Clark,
Church of Latter Day Saints - England S.W. Mission
St.Hawrence House, Quay St., Bristol, England BSI 2JL

THE STATE OF NEW HAMPSHIRE

TO THE HONORABLE JUDGE OF PROBATE FOR THE COUNTY OF CHESHIRE:

Your petitioner, Bernice E. Clark, of the Town of Sullivan in the county of Cheshire and the State of New Hampshire respectfully represents that the last will and testament of the late Perley E. Swett of Stoddard, Cheshire County and the State of New Hampshire, was offered to this Court, wherein Quentin H. White of the City of Keene, New Hampshire was named by this Court to be the executor of the last will and testament of the late Perley E. Swett.

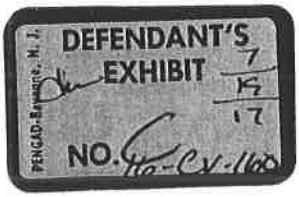
As the late Perley E. Swett was my father I have an interest in the manner and disposition in my fathers estate. At this time I pray that the Court declare that his last will and testament be declared null and void on the following grounds:

1. Quentin H. White is not a relative to my father by marriage or otherwise but a newcomer to the Keene New Hampshire area.

2. I have a firm belief that Mr. White is attempting to swindle the estate of my late father from me and other members of my family and that he has hidden certain papers and legal documents thereof to conceal certain assets of my father from the view of this Court, and therefor pray that a hearing on this matter be heard December 5, 1973.

Respectfully submitted
November 20, 1973

Bernice E. Clark
Bernice E. Clark



THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

8th Circuit - Probate Division - Keene
33 Winter Street, Suite 1
Keene NH 03431

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

CERTIFICATE OF COPY

Case Name: **Estate of Perley E. Swett**

Case Number: **313-1973-ET-1203**

I certify that the attached documents are true copies of the documents on file and of record at the Cheshire County Probate Division. The following documents are attached to this certificate of copy:

Will of Perley E. Swett
Stipulation as to Allowance of the Will and Order thereon
Declination of Quentin H. White

This document, when signed under seal, certifies that this certificate is true and accurate.

February 10, 2017

Larry S. Kane, Clerk of Court

NOT VALID WITHOUT
COURT SEAL

WILL OF

Perley E. Swett

RECEIVED
CHESHIRE COUNTY
REGISTER OF PROBATE
SEP 28 3 23 PM '73

Filed September 28, 1973

Recorded vol 265 Page 224

Filed By: Olson, Reynolds & McMahon

Edson C. Eastman Co., Concord, N. H., E-38

Be it known hereby, That I, Perley E. Swett

of Stoddard in the County of Cheshire and

State of New Hampshire, do make and publish this my LAST WILL AND TESTAMENT.

After the payment of my just debts, funeral charges and expenses of administration, I dispose of my estate as follows:

To three of my heirs, Harvey Swett, and Richard Swett and Maurice Swett, is given each a Cheshire County Savings Bank book, with a present balance of two thousand dollars in each book (as of September 1, 1970)(a joint account with each).

To Bernice Eva Clark, another joint account, with her, in this same Bank, with a present balance (as of September 1, 1970) of over twenty-five hundred dollars. Also any moneys presently in this Bank, in my name (alone) if any be left over after necessary expenses are all paid.

Feeling Charles Wilder is fairly well situated (financially) I am making no bequest to him, but his two (small) boys are to be given five hundred dollars each unless this may be done during my lifetime from money got from sale of "spare" land. Charles being Dora's only living child, and Dora one of my twin girls.

The other twin, Dorothy, (both deceased) having been Frank Nim's wife, and because of his cheating me, in a very raw, and underhanded, method (of a rather "paltry" amount) but that seemed a clear case of premeditated stealing, and also because he now seems extra well situated financially, I am not leaving Dorothy's three girls and a boy, Lillian, Alice, Jane and Frank, any part of my property or estate. (This would not need to apply to great grandchildren as I may wish to give five hundred dollars, from sale of land, to all these, not otherwise provided for, and born during my lifetime (or soon after). Maybe not from first money got (from sale of land) but I wish to give all ten of Berniece's children one thousand dollars each. Also five hundred dollars to Kathleen's small boy. Also I wish to give five hundred to Shirley Swett, to share with her boy. Also I wish to give Hazel Swetts four children each one thousand dollars. (from sale of land)

Hazel's grandchildren seem all fairly well provided for from "trust funds" now held by Sheila and Joanne and Patty. Also Maurice's children seem provided for later, from "trust fund" given to Sheila.

If Mrs. Quentin White's "expected" child is a girl it is to be given one thousand dollars, twin girls each this amount, but if one (or twin boys) only half as much.

Added information to Mr. White: In case of extra funds being available (from sale of "spare" land) after herein gifts, or bequests are given, not less than forty percent, or more than sixty percent of such funds, is to be given my heirs or relatives or descendants, and none of these to receive more of this extra money than five hundred dollars, except Bernice, in case she seemed to be in need more than any others.

The other part of such extra funds is to be disposed of, by Mr. White, by giving the interest, and perhaps an equal amount of the principal, (maybe yearly) to worthy

Mrs White had a girl (Oct. 6) So when enough spare land can be sold, the amount stated should be given her

or needy girls, in amounts of from ten to a hundred dollars, according to what he believes they might be worthy of, or need.

And Mr. White's own relatives at least as much of such funds as others might get who are not related to either of us. Meaning by this any of Mr. White's nieces (if seemingly in need) should come first before others that are not related. This is not intended, and does not bar any of Mr. White's children from being helped to any extent (with part of any extra funds) up to a total of one thousand dollars each from such extra funds (from sale of "spare" land)

Unless changed, by me, disposition seems made of what is called the "home farm", and that seems to be around 369 acres. (all connected)

Besides getting reimbursement for paying my 1969 Stoddard tax bill, with eight percent interest, Quentin White is to have not less than $4,500.00 or more than nine thousand dollars as "commission" (promised him) for his aid earlier (and perhaps later) in disposing of six hundred acres (or more) of my spare land.

Also believing him entirely honest and a good friend, I designate him executor of this will and to administer any estate I leave. (Without any bond required from him.)

Regarding my "last resting place", it is well known to most of my relatives (and many others) that about ten (or more) years ago, I dug and partially prepared the place for my grave. And I not only request, but command, that I be buried in this location, on this farm where I was born, and in later life lived here alone for over twenty-five years. I also request that my body may not be moved off this farm in case I may die here, but any needed or legally required services may be done here. I also request that no more expense be incurred (for my burial) than is legally required or seems actually needed. A waterproof casket, or box, either metal or plastic if not expensive would suit me best

my approval. But this would not seem at all needed unless the grave is dug down so the casket, or box, would be lower down than the tilepipe drain installed when grave was dug. I also wish the grave mound to be "graded" in appearance, so that in the not too distant future, ~~Do~~ nothing would indicate there were a grave here, to any stranger passing by this location, a decade, or more after I were buried there. The same as a brother's grave, located elsewhere on this farm, has no markings to show the place. Outside of now living relatives, or close friends I hope the location of my resting place, will not be remembered, or known the grave location by strangers, or future generations & descendants.

In Testimony Whereof, I hereunto set my hand, this 18th day of October in the year one thousand nine hundred seventy

Barley E. Swett

Signed and declared by the above-named Barley E. Swett to be his last will and testament, in our presence, who in his presence and at his request, subscribe our names hereto as witnesses, this 18th day of October A. D. 1970 at Stoddard, New Hampshire.

10/21/73 HCP

Madeleine S. Hopkins

Linda H. Mackey

Clyde H. Hopkins

MEMORANDA

No person under the age of twenty-one years or of unsound mind can make a will. A will does not require any seal. No person who is to receive anything under a will, and no husband or wife of any such person, should be a witness to such will. But a person is not rendered incompetent as witness to a will by the fact that he is named therein as executor. If the testator is unable to sign the will, his signature may be written for him by some other person "at his request and in his presence." A will may be dated and executed on Sunday.

STATE OF NEW HAMPSHIRE

County of Cheshire, ss: In the Probate Court

In re: Perley E. Swett Estate

STIPULATION

Now come QUENTIN H. WHITE, individually and as executor of the Estate of Perley E. Swett, and HARVEY SWETT, RICHARD SWETT, MAURICE SWETT, BERNICE E. SWETT CLARK, CHARLES F. WILDER (only child of Dora Swett Wilder, deceased daughter of Perley E. Swett), and LILLIAN NIMS, ALICE NIMS CRAFT, JANE NIMS and FRANK NIMS, JR. (only children of Dorothy Swett Nims, deceased daughter of Perley E. Swett), being all of the heirs of Perley E. Swett and, subject to the approval of the Honorable Court, hereby agree and stipulate as follows:

1. All objections to the allowance as the last will and testament of Perley E. Swett of that document approved as such in common form on October 2, 1973 are hereby withdrawn.

2. Quentin H. White shall and by this document hereby does resign as executor of the Estate of Perley E. Swett.

3. The undersigned heirs of the estate of Perley E. Swett do hereby petition for the appointment of Kenneth J. Arwe as administrator w.w.a. of the estate of Perley E. Swett.

4. The undersigned heirs of the estate of Perley E. Swett, though still believing that their claim to the personal papers of Perley E. Swett is morally correct, agree that Quentin H. White has title to all poems, diaries and other

real estate owned by Perley E. Swett at the time of his decease and such original unrecorded deeds as are among said personal papers, such title, however, being subject to the following conditions:

A. One of the heirs of Perley E. Swett designated by the heirs, namely: Bernice E. Swett Clark, shall have the right to examine all of said original poems, diaries and other personal papers of Perley E. Swett in the presence of Quentin H. White or a representative designated by him.

B. Each of the heirs of Perley E. Swett shall have the right at his expense to make such copies of all of said poems, diaries and other personal papers in the possession of Quentin H. White.

5. Quentin H. White shall and by this stipulation hereby does release each and every one of the undersigned heirs of Perley E. Swett of and from any and all claims which he ever had, now has or which his executors, heirs or administrators hereafter can, shall or may have arising out of any cause whatsoever, now or heretofore existing, including but not limited to such claims, if any, which shall result from unrecorded deeds from Perley E. Swett.

6. Quentin H. White shall and by this stipulation does hereby release the estate of Perley E. Swett from any and all claims which he ever had, now has or which his executors, heirs or administrators hereafter can, shall or may have arising out of any cause whatsoever now or heretofore existing, including but not limited to such claims, if any, which shall

as executor and for such compensation which the Cheshire County Probate Court shall allow him for services as executor.

7. Each and every one of the undersigned heirs of the estate of Perley E. Swett shall and by this stipulation does hereby release Quentin H. White from any and all claims which he ever had, now has or which his executors, heirs or administrators hereafter can, shall or may have arising out of any cause whatsoever, now or heretofore existing.

8. The estate of Perley E. Swett shall and by this stipulation does hereby release Quentin H. White from any and all claims which it ever had, now has or which it hereafter can, shall or may have arising out of any cause whatsoever, now or heretofore existing, including, but not limited to, such claims as it may have, if any, to the poems, diaries and other personal papers of Perley E. Swett to which it is hereinbefore agreed Quentin H. White has title.

9. Quentin H. White shall and by this stipulation does hereby deliver actual and/or constructive possession of all personal property, both tangible and intangible, of the estate of Perley E. Swett to Kenneth J. Arwe, Administrator w.w.a. of the estate of Perley E. Swett, excepting only those poems, diaries and other personal papers to which he has title as hereinbefore stipulated.

Dated at Keene, New Hampshire this 13th day of December 1973.

Quentin H. White
Quentin H. White, ind. and as executor, Perley E. Swett Est.

Harvey W. Swett
Harvey Swett

Richard Swett
Richard Swett

Alice Nims Craft
Alice Nims Craft

Jane Nims
Jane Nims

Frank Nims Jr.
Frank Nims, Jr.

Charles Contas
Charles J. Contas,
Guardian ad litem.

Homer S. Bradley, Jr.
Homer S. Bradley, Jr.,
Guardian ad litem.

APPROVED:

Harry C. Lichman
Harry C. Lichman,
Presiding Justice

December 17 1973

(Form 42)

THE STATE OF NEW HAMPSHIRE

TO THE HONORABLE JUDGE OF PROBATE FOR THE COUNTY OF CHESHIRE :

The undersigned Quentin H. White

of American Fork, Utah in said County of

respectfully represents that he was named in the

last will and testament of Perley E. Swett

late of Stoddard in said County, deceased, as trustee

and that he hereby declines said trust.

Dated the October 30, 1979 day of September A. D. 19 79

Quentin H. White

RECEIVED
CHESHIRE COUNTY
REGISTER OF PROBATE
DEC 5 3 15 PM '79

No. .....

DECLINATION

ESTATE OF

PERLEY E. SWETT TRUST EST.

STATE OF NEW HAMPSHIRE

County of Cheshire, ss: In the Probate Court

In re: Perley E. Swett Estate

STIPULATION

Now come QUENTIN H. WHITE, individually and as executor of the Estate of Perley E. Swett, and HARVEY SWETT, RICHARD SWETT, MAURICE SWETT, BERNICE E. SWETT CLARK, CHARLES F. WILDER (only child of Dora Swett Wilder, deceased daughter of Perley E. Swett), and LILLIAN NIMS, ALICE NIMS CRAFT, JANE NIMS and FRANK NIMS, JR. (only children of Dorothy Swett Nims, deceased daughter of Perley E. Swett), being all of the heirs of Perley E. Swett and, subject to the approval of the Honorable Court, hereby agree and stipulate as follows:

1. All objections to the allowance as the last will and testament of Perley E. Swett of that document approved as such in common form on October 2, 1973 are hereby withdrawn.

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3. The undersigned heirs of the estate of Perley E. Swett do hereby petition for the appointment of Kenneth J. Arwe as administrator w.w.a. of the estate of Perley E. Swett.

4. The undersigned heirs of the estate of Perley E. Swett, though still believing that their claim to the personal papers of Perley E. Swett is morally correct, agree that Quentin H. White has title to all poems, diaries and other personal papers of Perley E. Swett, excepting only deeds to

real estate owned by Perley E. Swett at the time of his decease and such original unrecorded deeds as are among said personal papers, such title, however, being subject to the following conditions:

A. One of the heirs of Perley E. Swett designated by the heirs, namely: Bernice E. Swett Clark, shall have the right to examine all of said original poems, diaries and other personal papers of Perley E. Swett in the presence of Quentin H. White or a representative designated by him.

B. Each of the heirs of Perley E. Swett shall have the right at his expense to make such copies of all of said poems, diaries and other personal papers in the possession of Quentin H. White.

5. Quentin H. White shall and by this stipulation hereby does release each and every one of the undersigned heirs of Perley E. Swett of and from any and all claims which he ever had, now has or which his executors, heirs or administrators hereafter can, shall or may have arising out of any cause whatsoever, now or heretofore existing, including but not limited to such claims, if any, which shall result from unrecorded deeds from Perley E. Swett.

6. Quentin H. White shall and by this stipulation does hereby release the estate of Perley E. Swett from any and all claims which he ever had, now has or which his executors, heirs or administrators hereafter can, shall or may have arising out of any cause whatsoever now or heretofore existing, including but not limited to such claims, if any, which shall result from unrecorded deeds from Perley E. Swett, excepting only such claims as he may have for expenses incurred by him

as executor and for such compensation which the Cheshire County Probate Court shall allow him for services as executor.

7. Each and every one of the undersigned heirs of the estate of Perley E. Swett shall and by this stipulation does hereby release Quentin H. White from any and all claims which he ever had, now has or which his executors, heirs or administrators hereafter can, shall or may have arising out of any cause whatsoever, now or heretofore existing.

8. The estate of Perley E. Swett shall and by this stipulation does hereby release Quentin H. White from any and all claims which it ever had, now has or which it hereafter can, shall or may have arising out of any cause whatsoever, now or heretofore existing, including, but not limited to, such claims as it may have, if any, to the poems, diaries and other personal papers of Perley E. Swett to which it is hereinbefore agreed Quentin H. White has title.

9. Quentin H. White shall and by this stipulation does hereby deliver actual and/or constructive possession of all personal property, both tangible and intangible, of the estate of Perley E. Swett to Kenneth J. Arwe, Administrator w.w.a. of the estate of Perley E. Swett, excepting only those poems, diaries and other personal papers to which he has title as hereinbefore stipulated.

Dated at Keene, New Hampshire this 13th day of December 1973.

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Quentin H. White, ind. and as executor, Perley E. Swett Est.

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Harvey Swett

Richard Swett
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Maurice Swett
Maurice Swett

Bernice E. Swett Clark
Bernice E. Swett Clark

Charles F. Wilder
Charles F. Wilder

Lillian Nims
Lillian Nims

Alice Nims Craft
Alice Nims Craft

Jane Nims
Jane Nims

Frank Nims Jr.
Frank Nims, Jr.

Charles Contas
Charles J. Contas,
Guardian ad litem.

Homer S. Bradley, Jr.
Homer S. Bradley, Jr.,
Guardian ad litem.

APPROVED:

Harry C. Lichman
Harry C. Lichman,
Presiding Justice

December 17 1973

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS. SUPERIOR COURT
NO. 213-2016-CV-00160

Quentin H. White

v.

Brigitte G. Auger, formerly Brigitte Gaudreau

and

Joanne M. Jackson, formerly Joanne Labadie

MOTION FOR RECONSIDERATION

NOW COMES the Petitioner, Quentin H. White, by his attorney, Michael P. Bentley, Esq. and says as follows:

1. That by Notice of Decision issued on November 6, 2017 the Clerk of Court issued the Court's Order on the merits dated October 11, 2017.

2. There is no doubt that the deed in question, Respondent's Exhibit A, conveyed real estate in Stoddard, NH that was gifted to Quentin H. White by Perley E. Swett in appreciation for the services which Quentin H. White rendered to Perley E. Swett.

3. The Court, by awarding the real estate in question to Brigitte Auger 45 years after Perley E. Swett bestowed this gift on Quentin H. White and only after Quentin H. White had paid taxes on the land for a like period of time suggests that the Court found that it was the intent of Perley E. Swett that under the set of circumstances found by the Court that Quentin H. White should not retain the benefit of the gift which he received from Perley E. Swett.

4. Quentin H. White respectfully suggests that there is nothing in the record that would support such a result.

5. Respondent's Exhibit A conveyed to Quentin H. White "about ten acres of land... on the south side of the 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 of Perley E. Swett's home farm.
- In case Quentin H. White does acquire a more attractive land to live on or to build a house on, this land area should be transferred to Brigitte Gaudreau if she is available."

6. That while the Court found that "[t]o interpret the deed by looking at the various stipulations in isolation would only serve to obfuscate Swett's clear intent..." the Petitioner respectfully suggests that the Court's judicial linking of the last stipulation listed above to the first three stipulations contradicts the meaning and intent which Perley E. Swett intended to be given to the deed.

7. Contrary to the Court's finding that "...by looking at the various stipulations in isolation would only serve to obfuscate Swett's clear intent" the last stipulation makes clear that Perley E. Swett intended Quentin H. White to wind up with some land from Perley E. Swett and not to wind up with nothing.

8. The Court's finding that "...Swett did not merely intend for ownership of the land to transfer to White only if White acquired no other part of Swett's estate" is contrary to the express terms of the deed.

9. That while the Court in footnote 5 on Page 9 of its Order raises the possibility of reverter "...to Swett's estate if White did not live or build on the land in ten years" such finding is erroneous as a matter of law as it directly contradicts Paragraphs 7 and 8 of the Stipulation dated

December 13, 1973 as approved by the Probate Court on December 17, 1973 which settled Quentin H. White's involvement in the Estate of Perley E. Swett (see Respondent's Exhibit C) and which paragraphs provided to Quentin H. White a full release from not only the heirs of the Estate of Perley E. Swett but also from the estate itself.

10. The deed in question was recorded on December 5, 1973, eight (8) days prior to the date of the Stipulation such that all parties knew full well prior to entering into the Stipulation of White's ownership of the land in question.

11. That by entering into the Stipulation, White bargained away his rights under the Last Will and Testament of Perley E. Swett and his rights under the then unknown and unrecorded deed that was the subject matter of White v. Arwe, 117 N.H. 1025 (1977) in exchange for the land in question.

12. That the Court's decree in this matter deprived Quentin H. White of the benefit of his bargain.

13. The Court's finding that "Swett also intended the land to become Auger's if White failed to build and reside upon the land within ten years" judicially inserts words into the deed not intended by the Grantor and which insertion alters the intent of the Grantor which is beyond the province of the Court.

14. As he testified to at time of trial, Quentin H. White received no other land from Perley E. Swett other than the land described in the deed in question in this case.

15. Quentin H. White specifically requested the Court to find that he "...never acquired a more attractive land to live on or to build a house on" but the Court declined to rule on this request. See Petitioner's Request for Finding of Fact #13.

16. Quentin H. White further requested the Court to issue a Ruling of Law that "[t]he Petitioner never acquired any interest in the home place of Perley E. Swett as described in Respondent's Exhibit B" but the Court declined to issue such a ruling. See Petitioner's Request for Rulings of Law, Letter N.

17. Contrary to the position of Quentin H. White, the Court found that RSA 477:3-B(II)(a)(2013) was intended "...to apply to deeds created after December 31, 2008. RSA 477:3-B(II)(a) is therefore inapplicable to the Deed and Auger's executory interest therein."

18. The Court's finding in this regard is not only contrary to the clear language of the statute but is also contrary to the legislative history which the Court declined to review finding that "...the language of the statute is plain and unambiguous."

19. While the statute clearly indicates that "[a]fter December 31, 2008, no legal possibility of reverter, right of entry or executory interest in real property may be ...created" the statute also contains the words "retained or" immediately prior to the word "created."

20. That while it is obvious that the executory interest in the deed involved in this case was "created" prior to December 31, 2008, the clear wording of the statute mandates a finding that no such interest may be "retained" after December 31, 2008 yet the Court failed to recognize same.

21. RSA 477:3-B(II)(a)(2013) has its origin in the 2008 Session of the New Hampshire Legislature and was introduced as HB 1270 which, upon enactment, became Chapter 228 of the 2008 Session Laws.

22. Chapter 228:1 of the 2008 Session Laws provides as follows:

> Statement of Purpose. In conveyances of real property the use of possibilities of reverter, rights or re-entry, or executory interests unduly burdens the free alienability of property when there is no

public or charitable purpose or use involved. Future creation of such interests should be limited, and preservation and enforcement of those which continue to exist should be regulated.

23. The testimony offered by Professor Marcus Hurn from the Franklin Pierce Law Center is informative as to what HB 1270 was intended to do. As stated by Professor Hurn:

> HB 1270 does four main things:
>
> 1. It prohibits the creation of new defeasible estates between private parties except as part of a trust.
> 2. For existing future interests, it required private owners or their successors to record in the Registry of Deeds a renewal declaration at no less than 25 year intervals.
> 3. It empowers the Director of Charitable Trusts to deal with future interests once held by defunct charitable or public organizations.
> 4. It establishes a 5 year statute of limitations for making claims under forfeiture clauses.

24. It is clear not only from the wording of the statute but also as supported by the legislative history, that RSA 477:3-B(II)(a) was and is applicable to executory interests in existence as of December 31, 2008 and not only as to those interests created afterwards.

25. RSA 477:3-B(II)(a) provides in part that "[a]ny language purporting to retain or create such a future interest shall be void."

26. As stated by Professor Hurn in his bullet point #4 as set forth in Paragraph 23, above, Chapter 228:3 of 2008 Session Laws created a 5 year statute of limitations now incorporated as RSA 508:2(II) which provides that "[n]o action for the recovery of real estate pursuant to rights based on a possibility of reverter, right of re-entry or executory interest shall be brought after 5 years from the time the right to recover possession or the right of re-entry first accrued to the party claiming it or to some other persons under whom the party claims."

27. More than five (5) years have elapsed since the enactment of RSA 508:2(II) such that the Statute of Limitations has run barring Brigitte Auger from maintaining any action to recover real estate based upon an executory interest..

WHEREFORE Quentin H. White respectfully prays as follows:

A. That the Court reconsider its decision of October 11, 2017 for the reasons set forth above.

B. That upon reconsideration the Court vacate its Order of October 11, 2017 and rule that Quentin H. White is the owner of the real property described in the deed from Perley E. Swett to Quentin H. White dated July 18, 1972 as recorded on December 5, 1973 in Volume 876, Page 172 of the Cheshire County Registry of Deeds free and clear of any other claims of interest.

QUENTIN H. WHITE

November 16, 2017

By: Michael P. Bentley

Michael P. Bentley, Esq., His attorney
NH Bar #531

I certify that a copy of the within Motion for Reconsideration was forwarded to Charles A. Donahue, Esq., counsel for Brigitte Auger, this 16th day of November, 2017.

Michael P. Bentley

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS. SUPERIOR COURT
NO. 213-2016-CV-00160

Quentin H. White
v.

Brigitte G. Auger, formerly Brigitte Gaudreau
and
Joanne M. Jackson, formerly Joanne Labadie

OBJECTION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

NOW COMES the Defendant, Brigitte Auger, through her counsel, and states as follows:

1. The Court, in its thorough, well-reasoned order, has not overlooked or misapprehended points of law or facts, under N.H.R.C.P. 12(e).

2. The Plaintiff for the first time now, raises a 5 year statute of limitations under RSA 508:2(II).

    a. Plaintiff did not plead RSA 508:2(II) as an Affirmative Defense, in his Complaint or Answer of Quentin H. White to Defendant, Brigitte Auger's counterclaims.

    b. Pursuant to N.H.R.C.P. 9(d)(17), Plaintiff's failure to plead RSA 508: 2 (II) statute of limitations, as an Affirmative Defense, constitutes a waiver of such defense.

    c. It is undisputed, and the Court found, that Ms. Auger was 10 years old in 1973, when her interest was created; and that she was not aware of her interest in the property until after February 16, 2016.

3. The Court's analysis of RSA 477:3-B(II)(a) is correct. Regardless, Plaintiff's failure to plead this affirmative defense constitutes a waiver.

4. The spirit and intent of the grantor, Mr. Swett, the "Taylor Pond Hermit", is honored by the Court's order vesting title in Ms. Auger.

WHEREFORE the Defendant respectfully requests that this Honorable Court:

a. Deny Plaintiff Motion for Reconsideration.

Respectfully Submitted,
Defendant
Brigitte G. Auger

Date: 11/17/17

By: Charles A. Donahue, Esquire
NH Bar No. 656

I certify that a copy of this document has been emailed this date to opposing counsel.

Date: 11/17/17

Charles A. Donahue, Esquire