

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

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SUPREME COURT
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EDWARD F. HAYES, JR., TRUSTEE OF THE SURVIVOR'S TRUST A
C/U THE HAYES FAMILY TRUST DATED JANUARY 20, 2000

V.

JAMES J. CONNOLLY, TRUSTEE OF THE ANN D. CONNOLLY LIVING
TRUST DATED DECEMBER 22, 2003

APPEAL FROM FINAL ORDER OF
THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF ON BEHALF OF JAMES J. CONNOLLY TRUSTEE OF THE ANN
D. CONNOLLY LIVING TRUST DATED DECEMBER 22, 2003

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the Ann D. Connolly Living Trust Dated
December 22, 2003 Corporation

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(Oral Argument by Samantha D. Elliott)

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STATUTES AND EVIDENTIARY RULES INVOLVED

547-C:1 Parties. – Any person owning a present undivided legal or equitable interest or estate in real or personal property (hereinafter called "property"), not subject to redemption, or the holder of an equity of redemption shall be entitled to have partition or division in the manner hereinafter provided. If such interest or estate is in fee, he or she shall be entitled to partition or division in fee; if a life estate or a term for years, he or she shall be entitled to partition or division thereof to continue so long as his or her estate or interest endures. A life tenant, remainderman, or a tenant for years of whose term at least 20 years remains unexpired may, in the exercise of the court's equitable powers, have partition of the fee. The existence of a lease of the whole or a part of the property to be divided shall not prevent partition or division, but such partition or division shall not disturb possession of a lessee under a lease covering the interests of all the co-tenants.

547-C:2 Petition. – A petition may be filed by such person in the superior or probate court in the county in which the property or any part of the property lies or is then located, particularly describing the property, the names of all owners or persons interested, if known, and the share or interest of the petitioner in the property and praying for partition or division of the property; provided, however, where there is a related pending matter in either court, jurisdiction for the related partition action shall lie with the court having jurisdiction over the underlying matter; and provided further that in any such case where the right to a trial by jury is guaranteed by the constitution and is claimed by any party, jurisdiction shall lie exclusively in the superior court. Upon petition or upon its own motion, the court may cause any property to be partitioned or divided and awarded or assigned in accordance with procedures described in this chapter. Nothing in this chapter is intended to abrogate common law or statutory authority of the superior and district courts to adjudicate issues of personal property between parties engaged in litigation before those courts.

547-C:22 Unequal Division and Sale. – Whenever property is so situated or is of such a nature that it cannot be divided so as to give each owner his or her share or interest without great prejudice or inconvenience, the whole or a part of the property may be assigned

to one of them, the assignee paying to the others who have less than their share such sums as the court shall award or order.

547-C:25 Sale. – When the proceedings are pending, if it is alleged in the petition that the property is so situated or is of such a nature that it cannot be divided so as to give each owner his or her share or interest without great prejudice or inconvenience and the court so finds, the court may order it to be sold and the proceeds from the sale to be divided among the owners according to their respective rights, titles, or interests, and may make all other orders that may be necessary to cause such sale and the distribution of the proceeds, as a court of equity may do in like cases.

547-C:29 Award. – In entering its decree the court may, in its discretion, award or assign the property or its proceeds on sale as a whole or in such portions as may be fair and equitable. In exercising its discretion in determining what is fair and equitable in a case before it, the court may consider: the direct or indirect actions and contributions of the parties to the acquisition, maintenance, repair, preservation, improvement, and appreciation of the property; the duration of the occupancy and nature of the use made of the property by the parties; disparities in the contributions of the parties to the property; any contractual agreements entered into between the parties in relation to sale or other disposition of the property; waste or other detriment caused to the property by the actions or inactions of the parties; tax consequences to the parties; the status of the legal title to the property; and any other factors the court deems relevant.

547-C:30 Construction. – Proceedings under this chapter shall be remedial in nature. The provisions of this chapter are to be liberally construed in favor of the exercise of broad equitable jurisdiction by the court in any proceeding pending before it.

N.H. R. Ev. 401

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

N.H. R. Ev. 402

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States or New Hampshire Constitution;
- a statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

N.H. R. Ev. 403

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

STATEMENT OF THE FACTS AND OF THE CASE

In 1953, James Joseph Dowd and Claire Sheehan Dowd purchased property on the eastern shore of Lake Sunapee. December 8, 2017 Order (“Final Order”), included herein, at p. 2. Ann Dowd Connolly was present when her parents first viewed the house and, that first summer, made the curtains that still adorn the windows. Transcript of September 20, 2017 Bench Trial (“Trial Tr.”), at p. 130. Her parents subsequently gifted the parcel to Ann and some of her siblings. Trial Tr. 130; Trial Ex. BB, attached hereto (August 5, 1960 Deed noting, “The consideration of this conveyance being love and affection, no revenue stamps are affixed.”). The children ultimately divided it among themselves, with the portion at issue in this case (“the Property”) going to two of the daughters, Ann Dowd Connolly and Clare Dowd Hayes, with their respective spouses, in 1968. Final Order 2.

As described by the trial court, the Property “primarily consists of approximately 150 feet of lakefront, a boathouse, a garage, and a rustic single-family seasonal residence perched on a slope overlooking the lake.” *Id.* For the next 47 years, the sisters and their immediate families shared the Property, with the Connolly family using the Property between June 15th and July 30th each year and the Hayes family using it between August 1st and September 15th of each year. *Id.* The sisters and their families usually shared the expenses associated with maintaining the Property, though Ann Connolly paid more than her fair share in the final years of her sister Clare’s life. *Id.* at 2-3.

Ann Connolly and her husband had three children: James, AnnMaura, and Mary. See Trial Tr. 119. The Property became the

hub of their family experience, from annual birthday celebrations to AnnMaura's wedding. Final Order 4. Jim Connolly has visited every summer of his life except for three years. Trial Tr. 132. His children have visited "basically every year of their lives." Trial Tr. 133. As AnnMaura explained, those visits provide an opportunity that they may not otherwise have for her, her siblings, and their children to be together. Trial Tr. 166. AnnMaura testified that the Property is the reason that she is close with her extended family and that she would be "devastated" to lose it. Trial Tr. 168-9.

After Ann Connolly's husband passed away, she entered into two agreements with her sister Clare and Clare's husband Edward. Final Order 2. The first was a letter to their children memorializing the time-sharing arrangement that they had followed for the previous decades. *Id.* The second, signed on November 27, 1992, was billed as a partnership agreement and primarily addressed two incidents of ownership: (1) it defined how the shared financial rights and responsibilities were to be treated (such as profits, losses, tax deductions, liabilities, and expenses); and (2) it provided each partner a right to purchase the other's interest in the Property if a partner sought to dissolve the agreement or if a partner passed away and his or her heirs no longer wanted to continue ownership. See appendix to Brief of Petitioner-Appellant, Edward F. Hayes, Jr., Trustee of the Survivor's Trust A c/u the Hayes Family Trust Dated January 20, 2000 ("Hayes Trust App."), at 195-198 (Ex. F, 1992 Property Partnership Agreement "1992 Agreement."). The 1992 Agreement further provided a method for determining a purchase price, using up to three appraisers, in the event that the partners could not agree on a price. See *id.* The 1992 Agreement was also expressly binding on the partners' heirs, contemplating that the

terms would be honored though each partner's interests and rights might pass through estate planning. *See id.*

The above-described provisions are recited below:

Upon the dissolution, or the death of either of the Partners, the other or the surviving Partner, shall have the right to purchase the interest of the deceased Partner at a price agreed upon by the Partners or the deceased Partner's legal representative, provided the decedent's lawful heirs under the decedent's Last Will and Testament do not desire to continue the decedent's ownership of the subject property. This Agreement shall be binding on the decedent's heirs under the aforementioned provisions. If the Partners cannot agree on the purchase price, then the Partners shall each select one appraiser or the legal representative of the deceased Partner shall select one appraiser, and these two shall agree, if possible, in good conscience, on the value of the interest of the dissolving and/or deceased Partner, and such agreed value shall be binding and conclusive on all parties hereto or claiming hereunder. But if these two are unable to agree, they shall select a third appraiser and then the decision of any two of the appraisers shall be binding and conclusive on all Parties hereto or claiming hereunder.

Id.

In 2001, Edward and Clare Hayes conveyed their one-half interest in the Property into the Hayes Family Trust. Final Order 2. In 2004, Ann Connolly conveyed her one-half interest in the Property into the Ann D. Connolly Living Trust ("Connolly Trust"). *Id.* Edward Hayes passed away in 2009 and Clare Hayes followed in 2014. *Id.* As of that date, therefore, Clare and Edward's one-half interest in the Property was held by the Survivor's Trust A c/u the Hayes Family Trust dated January 20, 2000 ("Hayes Trust"). *See* Hayes Trust App. 5. Edward Hayes, Jr. ("Ted Hayes"), the oldest child of Clare

and Edward, is the trustee of that trust. *Id.* He and his two siblings, Stephen and Maureen, are the beneficiaries. Hayes Trust App. 7.

In 2014, Ted Hayes decided, as trustee, to sell the Hayes Trust's interest in the Property. Final Order 4; Trial Tr. 28. He sent an email to his Aunt Ann Connolly explaining his desire. *Id.* at 5. In correspondence with his Aunt Ann, he explained that his son, Mike, was willing to purchase the Hayes Trust's interest, but was not willing to continue ownership of the Hayes Trust's one-half interest in the Property—Mike was only willing to purchase the Hayes Trust's share if he was also able to purchase the Connolly Trust's share, which Ann Connolly and her heirs had no interest in selling. *Id.* at 5-6; Hayes Trust App. 185-86. Through Mike, the Hayes Trust explained that it would not sell its interest to the Connolly Trust unless the Connolly Trust would participate in a winner-takes-all, closed-bid process for the entire Property, in which Mike would be allowed to bid even though he had no ownership interest in the Property. *Id.* The Connolly Trust objected to this process as it had no interest in selling its share, and the proposed closed-bid auction would create an unacceptable risk of it being dispossessed of ownership. *Id.*; Hayes Trust App. 181. Because the Connolly trust was not willing to be in such a precarious position with respect to its beloved property, the parties reached an impasse. *Id.*

In November 2015, Mike Hayes filed a petition to partition the Property. Hayes Trust App. 1. His requests for relief included a request for an order directing the sale of the Property directly to him,

for market value to be determined by an appraiser.¹ Hayes Trust App. 9. The Connolly Trust objected to the petition at the outset on the grounds that Mike Hayes possessed no legal interest in the Property. Hayes Trust App. 2. Ted Hayes subsequently stepped in as the Petitioner, in his role as trustee of the Hayes Trust, the owner of the interest in the Property, and this litigation followed. Hayes Trust App. 2.

The initial substitution of parties from Mike Hayes to the Hayes Trust is revealing. Throughout the proceedings, the Hayes Trust has ignored a fundamental fact—Mike Hayes holds no legal interest in the Property. He is neither the trustee nor the beneficiary of the Hayes Trust. Hayes Trust App. 7. In pleading after pleading, including its brief before this Court, the Hayes Trust ignores the different legal standing between the Connolly Trust, which owns one half of the Property, and Mike Hayes, who holds no legal interest at all. See *e.g.* Hayes Trust App. 8 (Petition speaks of the desire of “both sides” to purchase the Property); Hayes Trust App. 28 *and* 99 (Hayes Trust’s Motion for Summary Judgment and Reply to Objection to Motion for Summary Judgment refer to Mike Hayes’s ambition to “retain ownership”); Hayes Trust Brief 17 (describes a “private auction between co-owners”).

¹ The Hayes Trust contends in its appeal that it is inequitable to determine the purchase price of the Property through an appraisal process given the parties’ emotional attachment to the Property. It argues that the only equitable approach is one that exploits the Connolly Trust’s emotional attachment. However, the Hayes Trust’s petition, which requests valuation through an appraisal process, contradicts their present argument. The only explanation for this discrepancy is that the Hayes Trust apparently finds the appraisal process acceptable as long as it results in a sale of the Property to Mike Hayes, the son of the Hayes Trust’s trustee.

The Connolly Trust answered the Petition and filed a counterclaim asking the court to award the Hayes Trust's ownership interest to the Connolly Trust in exchange for appropriate payment as permitted by RSA 547-C:22.

In August 2016, the Hayes Trust moved for summary judgment, arguing that it was entitled as a matter of law to a private auction between the Connolly Trust and the Hayes Trust's preferred purchaser, the Trustee's son Mike Hayes. Hayes Trust App. 22-31. The Connolly Trust objected on the basis that the equitable issues attendant to partition could not be decided as a matter of law, and that there were genuine disputes of material fact with respect to the issues the court may consider in exercising its discretion as delineated in RSA 547-C:29. Hayes Trust App. 68-86. The Connolly Trust also raised the 1992 Agreement in response to the Hayes Trust's motion for summary judgment, Hayes Trust App. 74, and moved to amend its counterclaim, Hayes Trust App. 87-97, at this time because the 1992 Agreement had just been located during Ann Connolly's move to an assisted-living facility, Trial Tr. 138. The trial court allowed the amendment. It denied the Hayes Trust's motion for summary judgment because the equitable question presented by the case could not be decided as a matter of law. November 18, 2016 Order ("Summary Judgment Order"), included herein.

Prior to trial, the Connolly Trust filed a motion in limine to exclude testimony by Mike Hayes. Hayes Trust App. 118-121. The primary basis of the motion was that Mike Hayes is not an owner of the Property or a party to the action and, given the Hayes Trust's single desire to sell its interest in the Property, any testimony regarding his aspiration to purchase the property would be irrelevant

testimony from a potential third-party purchaser. *Id.* Further, any testimony he could offer regarding the Hayes family's use of the Property would be likewise irrelevant. Hayes Trust App. 129. Those considerations would only be relevant if the Hayes Trust were attempting to establish a superior entitlement to retaining the Property, or to compensation for more than half of its value. *Id.* It argues neither. After a hearing, the trial court granted the motion in limine with respect to Mike Hayes's "ability, motives for, or genuine willingness to acquire the property" because the Hayes Trust had "failed to satisfactorily explain the relevance of this evidence" and whatever value the evidence may have was substantially outweighed by its tendency to confuse, mislead, and waste time. Transcript of September 12, 2017 Motion Hearing ("Motion Tr."); September 13, 2017 Order ("Motion in Limine Order"), included herein. The trial court denied the motion in limine with respect to Mike Hayes's personal knowledge regarding all other relevant issues. *Id.*

The parties took a view of the Property and tried the case in front of Judge John C. Kissinger, Jr. on September 20, 2017. Final Order 1. During trial, Ted Hayes acknowledged that the Hayes Trust was in fact seeking to sell its interest and that his son, Mike, does not have any legal interest in the Property. Trial Tr. 38, 16-17. Ted Hayes further conceded that the process outlined in the 1992 Agreement for disposing of a co-tenant's share—whereby, when one co-tenant wishes to sell, the other co-tenant can purchase for fair market value to be determined by appraisers—is a fair process. Trial Tr. 78. The trial court received additional testimony, from Jim Connolly as trustee of the Connolly Trust, that the Connolly Trust is

prepared to pay fair market value for the Hayes Trust's share. Trial Tr. 146.

By Order dated December 8, 2017, the trial court ruled that the Connolly Trust could purchase the Hayes Trust's interest for fair market value pursuant to RSA 547-C. Final Order 9-10. In reaching this result, the trial court acknowledged the Hayes Trust's need to liquidate its assets and the Connolly Trust's desire to maintain ownership. Final Order 9. It acknowledged that the Property represents "far more than a simple economic asset" and that the Connolly family's emotional attachment to the Property would prevent the family from acquiring a comparable property even if they were handsomely compensated for their interest. *Id.* at 9-10. It found that it would be grossly inequitable to require the Connolly Trust to pay a premium over fair market value to retain its interest. *Id.*

The trial court further ruled that the value of the Hayes Trust's share is to be determined by an appraisal process. Final Order 10. Unless they can agree on a value, the parties are each ordered to identify a separate appraiser. *Id.* If the two designated appraisers cannot agree on a value, they will designate a third appraiser, and an agreement among any two of them shall constitute the Property's fair market value. The Connolly Trust will then have 90 days within which to close the sale. *Id.* Failing that, the Property will be listed for sale in accordance with the process proposed by the Hayes Trust. *Id.* While this result is similar to the approach originally outlined by the parties in the 1992 Agreement, the trial court did not base its decision on that prior agreement, having found it has been abandoned.

This appeal followed.

SUMMARY OF THE ARGUMENT

Ted Hayes, as trustee of the Hayes Trust, appears, asking this Court to find the trial court's order an unsustainable exercise of discretion. To satisfy that burden, he must show that the ruling was "unreasonable or untenable to the prejudice of his case." *Brooks v. Allen*, 168 N.H. 707, 711 (2016) (citations omitted). The trial court's order, however, affords both parties their requested relief, and thus, is inherently reasonable and equitable. Specifically, the Hayes Trust petitioned the Court asking to sell its 50% share of the Property, and the Connolly Trust, in response, asked to purchase that share. The trial court's order, directing the Connolly Trust to purchase the Hayes Trust's interest for fair market value, achieves both goals and respects each party's interests as co-tenants.

The Hayes Trust, nevertheless, brings this appeal because it claims that something more equitable might exist. That is not this Court's standard on review. Yet, the Hayes Trust posits that placing the property on the open market or ordering a private auction between the Connolly Trust and Mike Hayes, a third party, non-owner and the son of the Hayes Trust's trustee, would command a higher price than fair market value. It would do so by requiring the Connolly Trust to pay some artificial premium lest it run the risk of losing its beloved Property to a third party. The Hayes Trust argues that, in the alternative, such a process would allow both parties to recoup more for the Property in the event that a third party were to outbid the Connolly Trust. These arguments reveal the Hayes Trust's true intent, which is to leverage the Connolly Trust's emotional attachment to the Property to command a premium above fair market value. The trial court, not surprisingly, rejected that approach. There is no abuse of discretion in that decision, and it is

within the sound judgment of the trial court. This conclusion is further supported by Ted Hayes's own testimony, in which he admitted—in reference to a prior agreement between the parties that specified a similar method of disposing of each sides shares—that such relief is “one fair method of dealing” with the situation. Trial Tr. 78. That testimony alone should be dispositive of this appeal.

The Hayes Trust's additional arguments are similarly unpersuasive. The Hayes Trust's contention that the trial court enforced an abandoned contract is plainly against the record. The trial court did grant a remedy similar to that which is specified in the prior 1992 agreement, but it is also a common-sense, equitable remedy, and one which even the petitioner acknowledged was a fair approach. To conclude it was not within the trial court's discretion to grant such relief, and adopt the petitioner's argument, would require this Court to hold that the trial court is precluded from granting certain equitable relief in a partition action because the parties once agreed to similar terms. There is no such law that strips an equity court of the ability to resort to that which it finds most equitable. Such an outcome would be illogical, inequitable, and contrary to the partition statute, which specifically allows a trial court to consider prior agreements between the parties. RSA 547-C:29.

The Hayes Trust's further evidentiary argument, that it was error to exclude certain testimony of Mike Hayes, is also misplaced. The Hayes Trust throughout the proceedings below, and now on appeal, has attempted to obscure Mike Hayes's role with respect to the Property, when it is in fact clear. He is a third party with no legal interest in this case. See Hayes Trust App. 3; RSA 547-C:1. The Hayes Trust's arguments seek to assign error for limiting his testimony at trial and excluding him from the pool of prospective

purchasers. However, he simply has no rights with respect to the Property. There is nothing in the partition statute or the related case law that affords him, or any other third party, the rights that the Hayes Trust seeks on his behalf. His desire to purchase the Property is either an irrelevant effort by a third-party to insert himself into a partition action, or it is a way to leverage the Connolly Trust's emotional attachment to its family property to extract a premium above fair market value. There is ample support in the record for the trial court's determination that neither is equitable.

ARGUMENT

I. Standard of Review

The Hayes Trust's brief misstates the controlling standard of review. While the Connolly Trust did bring claims for declaratory relief and breach of contract, those claims were denied by the trial court and are not on appeal. The only claims on appeal are the cross-claims for partition. It follows that the pertinent and controlling standard of review in this appeal is that pertaining to the trial court's exercise of its equitable powers. The Supreme Court reviews such decisions to grant equitable relief for an unsustainable exercise of discretion and determines "whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." *Brooks v. Allen*, 168 N.H. 707, 711 (2016) (quoting *State v. Lambert*, 147 N.H. 295, 296 (2001)). "The party asserting that a trial court order is unsustainable must demonstrate that the ruling was unreasonable or untenable to the prejudice of his case" and must show that its factual findings "lack evidentiary support or are legally erroneous." *Id.* (quoting *Foley v. Wheelock*, 157 N.H. 329, 332 (2008) and *In the Matter of Henry & Henry*, 163 N.H. 175, 178, (2012)). Like decisions to grant equitable relief, decisions to admit or exclude evidence are reviewed for an unsustainable exercise of discretion. *State v. Roy*, 167 N.H. 276, 284 (2015). Consequently, all of the issues raised by the Hayes Trust on appeal are governed by the same standard of review.

II. The Relief Ordered by the Trial Court is Equitable, and Not Unreasonable or Untenable.

The statute governing partition actions affords the trial court substantial discretion to determine the rights and disposition of real property. RSA 547-C:30. It calls upon the court to “exercise its equity powers and consider the special circumstances of the case, in order to achieve complete justice.” *DeLucca v. DeLucca*, 152 N.H. 100, 102 (2005). “Complete justice” is “that which in fairness and good conscience ought to be or should have been done.” *Langevin v. Hillsborough County*, 114 N.H. 317, 320 (1974).

Complete justice was not as elusive in this case as it might typically be. This is not the case of two co-tenants each seeking to maintain ownership of a jointly-owned property. In this case, the Hayes Trust sought Partition in order to liquidate its interest in the Property, and the Connolly Trust sought Partition in order to preserve its interest in the Property by purchasing the Hayes Trust’s share. The trial court had the rare opportunity to grant the primary relief requested by both opposing parties. This is why, in fashioning its relief, the trial court acknowledged the “Hayes Family Trust’s need to liquidate its assets.” Final Order 9.² Under the trial court’s order, the Hayes Trust will receive fair market value as determined by two (or three) independent appraisers, and the Connolly Trust will

² Contrary to the Hayes Trust’s assertions, the trial court did not “penalize the petitioner for bringing suit to change the status quo.” Hayes Brief 13-15. Though the trial court did say that the Hayes Trust “alone desires to change the family sharing arrangement that has been in place for decades,” that language does not indicate an unfair burden. Rather, like the language about the Hayes Trust’s need to liquidate, it is an acknowledgment that the Hayes Trust came to court seeking to sell its interest while the Connolly Trust came to court seeking to retain its interest. The trial court was able to satisfy both requests without extracting a premium from the Connolly Trust.

not risk being forced to sell the Property it holds so dear. This is complete justice.

As delineated throughout the proceedings and its brief, the Hayes Trust's preferred resolution would play its current co-tenant's emotional attachment to the Property against the ownership desires of a third party (Mike Hayes), ostensibly to realize some potential increase in the price. See Hayes Trust Brief, *throughout*; Trial Tr. 63 (Testimony of Ted Hayes admitting that he would like to use the Connolly's emotional attachment to the Property "to get a greater than fair market value price for the Property."). Because of the Connolly Trust's extensive affection for the Property and the third party's emotionally-charged desire to acquire the Property, the Hayes Trust argues that the premium could be significant. This approach amounts to emotional blackmail. The trial court's rejection of the approach and its refusal to weigh the potential financial premium more heavily than the Connolly Trust's existing equal rights to use and occupy the Property is not unreasonable or untenable.

Contrary to the Hayes Trust's claims, forcing the Connolly Trust to bid against Mike Hayes or other third parties would not necessarily lead to fair compensation to the Connolly Trust for the emotional value of the Property in the event that the Connolly Trust were dispossessed of its ownership interest. Hayes Trust Brief 7. Instead, it would either force the Connolly Trust to pay an inequitable premium for the Property, or force the Connolly Trust to accept an offer that is more than it is able to pay to retain the Property. Further, as the trial court acknowledged, this property is unique to the Connolly Trust, and there is no comparable property that could replace it given the family's long and important history with this particular parcel. Final Order 9; see also *Moore v. Sterling Warner*

Indus. Inv. Corp., 114 N.H. 520, 522 (1974) (recognizing the unique character of real estate and the special protection provided to interests in property).

Forcing an open sale or a private auction to extort a premium from one of the co-owners based on the considerable emotional value of the Property is inconsistent with the nature of the parties' use of the Property. In 1960, Ann Connolly and Clare Hayes's parents gifted the Property to their children and noted in the deed, "The consideration of this conveyance being love and affection, no revenue stamps are affixed." Trial Ex. BB, attached hereto (August 5, 1960 Deed). Ann Connolly and Clare Hayes redistributed the shared expenses associated with the Property when Clare was widowed so that the Hayes family could continue to enjoy the Property notwithstanding Clare's financial limitations upon losing her husband. Trial Tr. 133:24-134:5. The trial court recognized this history, writing that "it is clear the Property represents to the parties far more than an economic asset." Final Order 10. It is not inequitable to place a value on that emotional attachment that weighs in favor of affording continued ownership rather than a forced sale exploiting that value. The trial court was correct in determining that complete justice did not require the emotional extortion proposed by the Hayes Trust.

Notwithstanding this appeal, all parties and many jurisdictions agree with the trial court that granting the current co-owner an opportunity to purchase the other's interest before forcing a sale of the entire Property is an equitable solution when one owner wants to sell and the other does not. The modern trend in jurisdictions that have explicitly considered the issue is to give the current co-owner an opportunity to purchase the interest of the person seeking

partition by sale before forcing a sale of the entire property on the open market. See Uniform Partition of Heirs Property Act (enacted in eleven states and introduced in five more). Moreover, Ted Hayes testified that giving Ann Connolly an opportunity to purchase the Hayes Trust's share, as delineated in the 1992 Partnership Agreement (and consistent with the Uniform Act and the Final Order on appeal), is a "fair method" of dealing with this situation. Trial Tr. 78.

This Court need not find that it would have crafted the same relief. To prevail upon appeal, the Hayes Trust must show, not that there may have been some other relief that would also have been equitable, but that it was unreasonable or untenable to award the Property to the Connolly Trust in exchange for payment of fair market value to the Hayes Trust. This, it cannot show. Equity does not require that the Court leverage the emotional attachment held by one co-owner for the financial benefit of the other.

The Hayes Trust brief argues, "The side of the family who did not get the property had the right to be compensated as much as possible." Hayes Trust Brief 27. However, the Hayes Trust was seeking to liquidate its ownership interest in the Property. The Hayes "side of the family" that wanted to "get the property" was not a current co-tenant or a party to the proceedings entitled to equitable consideration. See RSA 547-C:1 (restricting parties to those who own a present legal or equitable interest or estate). Whether and how desperately a third party wants to acquire the Property over the Connolly Trust's objection to selling it is inconsequential. The actual transfer of title out of the Hayes Trust is not unreasonable because it was requested by the Hayes Trust. The price that will be realized on

that transfer is not unreasonable as it is axiomatic that fair market value is an equitable price.³

A. The trial court properly denied the Hayes Trust's motion for summary judgment.

The Hayes Trust claims that the trial court erred when it denied summary judgment on the Hayes Trust's request for a private auction of the Property that would have required the Connolly Trust to bid against Mike Hayes. The Hayes Trust's claim of error with respect to summary judgment has two fatal flaws: (1) it overlooks the Connolly Trust's claims under the 1992 Agreement; and (2) it depends upon drawing an equivalence between an entitlement to partition and an entitlement to the specific remedy of the sale of the Property at a private auction involving third parties. The trial court did not err when it held that the equitable determination could not be decided on summary judgment.

First, the Connolly Trust's assertion of rights under the 1992 Agreement prevented summary judgment in favor of the Hayes Trust. The Connolly Trust raised the existence and operation of the 1992 Agreement in response to the Hayes Trust's motion for summary judgment, and at the same time, amended its counterclaims. Hayes Trust App. 74, 95-96. If the 1992 Agreement were enforceable, it would govern the disposition of the Property and neither party would be entitled to partition. It follows that the trial court could not order partition until it ruled that the 1992 Agreement was unenforceable. The Hayes Trust did not file a motion for

³ To the extent that the Hayes Trust now argues that appraisers will be unable to appropriately value the Property, see e.g. Hayes Trust Brief 22, it did not present any evidence or argument regarding this issue to the trial court.

summary judgment with respect to the 1992 Agreement. Therefore, the trial court could not grant partition until the case had been tried. It was not error to deny summary judgment.

Second, even if it were true that there were no material disputes regarding the need for some sort of relief under RSA 547-C other than physical partition, such relief is not limited to sale, and is certainly not limited to private auction. The statute permits the trial court to “cause any property to be partitioned or divided and awarded or assigned in accordance with procedures described in this chapter.” RSA 547-C:2. The chapter describes sale and the division of proceeds among the owners. RSA 547-C:25. It also describes assignment of the whole property to one owner with payment to the other of such sums as the court shall order, as the Connolly Trust requested. RSA 547-C:22. Notably, it does not contain any provision describing a private auction between a current owner and a third party, as sought in the Hayes Trust’s motion for summary judgment. In order to decide among the available equitable relief, the trial court considers the attendant circumstances, including those factors enumerated in RSA 547-C:29. The equitable question presented by the Hayes Trust’s motion could not have been decided as a matter of law and certainly not on an incomplete record.

- B. The trial court did not err when it excluded Mike Hayes’s testimony regarding his ability, motives for, or genuine willingness to acquire the Property.

It was not “clearly untenable or unreasonable” to exclude testimony from Mike Hayes regarding his ability, motives for, or genuine willingness to acquire the Property. See *McLaughlin v. Fisher Eng’g*, 150 N.H. 195, 197 (2003). The Hayes Trust’s brief

states that the additional evidence it would have offered from Mike Hayes was limited to testimony about his “interest in purchasing the Property and his financial wherewithal to do it.” Hayes Trust Brief 22. The purpose of the testimony was “to support the proposition that there was a good supply of ready, willing, and able buyers willing and able to pay a premium for the Property” such that an appraiser’s determination of value would be insufficient compensation for the Hayes Trust’s interest in the Property. Hayes trust Brief 21. The trial court’s exercise of discretion in excluding the testimony was plainly sustainable.

The trial court is offered broad discretion to consider any factors it deems relevant in exercising its discretion. RSA 547-C:29. Notwithstanding that broad scope, the trial court found the proffered evidence irrelevant and excluded it. Motion in Limine Order 2; N.H. R. Ev. 401, 402. It further noted that, to the extent it is relevant, its value is substantially outweighed by its tendency to confuse, mislead, and waste time. *Id.*; N.H. R. Ev. 403. It was not clearly untenable or unreasonable to exclude the testimony. Mike Hayes is not an owner or a party to the proceedings. His willingness to purchase the Property is no more relevant than any other third-party’s willingness to do so. At the hearing on the motion in limine, counsel for the Hayes Trust agreed that Mike Hayes has no present interest and argued that the willingness of any third party to purchase the Property, even a stranger off the street, would be relevant in a partition action. See Motion Tr. 21-22. It cannot be untenable or unreasonable to exclude such testimony, especially given the latitude afforded to the trial court in determining what factors to consider while exercising its discretion in partition cases.

Further, the trial court's final order did presume that there were people who would be willing to pay more than fair market value as determined by the appraisers. It presumed that an open-market sale might require the Connolly Trust to "pay a premium over fair market value to retain its interest in the Property." Final Order 10. It was irrelevant and confusing that the willing purchaser was Mike Hayes because he had no legal status in the case, notwithstanding the Hayes Trust's attempts to confer such status upon him. The trial court did not err in excluding the testimony.

C. The trial court's rationale is not self-contradictory.

In almost any judicial opinion, there are isolated sentences which can be seized out of context to create the illusion of reversible error or some unmeant declaration of an unintended principle. The Hayes Trust has clasped upon not a sentence, but rather a single word, "marginal." The trial court did not award the Property to the Connolly Trust because it did not know how much more than fair market value Mike Hayes or some other purchaser might be willing to pay. It awarded the Property to the Connolly Trust because it is inequitable to ransom the Connolly Trust's emotional attachment to the Property, especially given the fact that the Hayes Trust is asking to sell its share and the Connolly Trust is willing and able to buy that share for fair market value.

The Hayes Trust, nevertheless, ignores the context of the trial court's language and chooses to read its words in isolation. In particular, it ignores that the trial court engaged in an appropriate balancing, whereby it considered arguments regarding a potential premium against the Connolly Trust's extreme attachment to the Property and their inability to conceive of a replacement, no matter the amount of money they may receive for their share. Final Order

9-10. The Hayes Trust ignores the trial court's finding that the Property represents "far more than a simple economic asset." Final Order 10. The Hayes Trust ignores these findings, and consequently misses the point that the trial court found it "grossly inequitable to require the Connolly Trust to pay a premium over fair market value to retain its interest in the Property" not based on the amount that they may have needed to pay, but based on the fact that it would be inequitable to require them to pay any amount above fair market value under the circumstances. Presumably, if it would be grossly inequitable to require it to pay a "marginal" amount, it would have been even more inequitable to require the Connolly Trust to pay more than a "marginal" amount.

The Hayes Trust also ignores the fact that it failed to persuade the trial court that its beneficiaries are in such great financial need that they should be able to extinguish the Connolly Trust's equal ownership interest in the Property, or extract a premium from the Connolly Trust, no matter how large. The Hayes Trust cannot point to any trial court error that prevented such proof.

As to the evidence regarding Stephen Hayes's financial needs that is reiterated in the Hayes Trust's brief, the trial court considered it and acknowledged in its order that the beneficiaries would benefit from liquidating the trust's assets. Final Order 10. The trial court reasonably found that such evidence did not carry the weight necessary to justify the relief sought by the Hayes Trust. See *RSA 547-C:29; DeLucca v. DeLucca*, 152 N.H. 100, 102 (2005) (The Supreme Court reviews the record to determine whether the findings could reasonably be made and defers to the trial court's resolution of conflicts in the testimony, the credibility of witnesses, and the weight to be given evidence.) As a practical matter, if the financial need of

the Hayes Trust's beneficiaries did not justify entitlement to a marginal increase in price, it is difficult to see how it would have justified an entitlement to a larger than marginal increase in price.

III. The Trial Court Did Not Specifically Enforce the 1992 Agreement.

The Hayes Trust argues on appeal that the trial court erred by specifically enforcing the agreement that it had found unenforceable. Hayes Trust Brief 9-15. It is apparent on the record that the trial court did no such thing. There is no dispute that the trial court denied the Connolly Trust's claims for declaratory judgment and breach of contract because it found that the parties had abandoned the 1992 Agreement. Final Order 8. By conflating the rulings made on the different claims before the court, the Hayes Trust seeks to assign legal error to the trial court's valid exercise of its discretion. The trial court had broad equitable discretion to craft a remedy on partition. N.H. RSA 547-C:30. Its ruling that the 1992 Agreement was unenforceable did not affect or constrain that discretion, especially since the statute governing partition specifically permits consideration of "any contractual agreements entered into between the parties in relation to sale or other disposition of the property." RSA 547-C:29.

The Hayes Trust instituted this case with a petition for partition seeking assignment of the Property to third-party Mike Hayes, or sale on the open market pursuant to RSA 547-C:25.⁴ Hayes Trust

⁴ In its motion for summary judgment, the Hayes Trust altered its request to a winner-take-all private auction between Mike Hayes and the Connolly Trust. Hayes Trust App. 30. Its trial memo sought a public sale with a reserve. Hayes Trust App. 171-175. Its brief on appeal seeks either a public sale with a reserve or a winner-take-all private auction between Mike Hayes and the Connolly Trust. Hayes Trust Brief 28.

App. 1-9. The Connolly Trust cross-claimed for Partition seeking assignment of the Property to it in exchange for payment of such sums as the court should order pursuant to RSA 547-C:22. Hayes Trust App. 87. After discovery of the 1992 Agreement, which purportedly governed the disposition of the Property if no Hayes heir desired to continue ownership of the Hayes Trust's one-half interest, the Connolly Trust added claims for declaratory judgment and breach of contract. Hayes Trust App. 87-97.

Having found the 1992 Agreement unenforceable, the trial court was left to decide the parties' cross-petitions for partition which are governed by RSA 547-C. The statute vests the trial court with broad equitable powers to "consider the special circumstances of the case in order to achieve complete justice." *DeLucca v. DeLucca*, 152 N.H. 100, 102 (2005). As previously discussed, the trial court reasonably determined that assignment of the entire Property to the Connolly Trust under RSA 547-C:22 was the more equitable solution. The court then sought an equitable means of determining the amount that the Connolly Trust should be required to pay for the Hayes Trust's interest. Final Order 10. The trial court noted that the appraisal process it devised for determining the value was "similar" to the process set out in the unenforceable 1992 Agreement. *Id.* Even if it were identical, that identity or similarity could not eliminate the appraisal process from the universe of possibilities the trial court could order in the exercise of its discretion. There is no principal in law or equity that would tie the two rulings together in the manner advanced by the Hayes Trust.

Moreover, the partition statute explicitly permits consideration of "any contractual agreements entered into between the parties in relation to sale or other disposition of the property." RSA 547-C:29.

The provision cannot only refer to “valid and enforceable ‘contractual agreements’” as the Hayes Trust argues. Hayes Trust Brief 11. When construing a statute, this Court “must give effect to all words in a statute and presume that the legislature did not enact superfluous or redundant words.” See *Merrill v. Great Bay Disposal Serv.*, 125 N.H. 540, 543 (1984). If the provision applied only to valid and enforceable contracts, it would be superfluous because the sale or disposition of any interests governed by a valid and enforceable contract would be determined pursuant to the terms of the contract and not by partition. See *Valley v. Valley*, 105 N.H. 297, 299 (1964) (the right to partition can be waived by express or implied agreement).

The trial court properly considered all of the rights and interests of the parties in crafting an equitable method of determining the value of the Hayes Trust’s share. The trial court declared the 1992 Agreement unenforceable because it found that it had been abandoned. It did not find, and the Hayes Trust did not argue, that the agreement was unenforceable because it was unconscionable or in violation of public policy. There is no reason in law or equity that the trial court’s decision regarding the 1992 Agreement would restrict its equitable discretion in crafting a remedy under the partition statute. The similarity between the 1992 Agreement and the trial court’s order does not constitute reversible error.

CONCLUSION

For the reasons set forth above and in the Superior Court’s decision, the Superior Court’s order should be affirmed.

REQUEST FOR ORAL ARGUMENT

If the Court determines that oral argument would assist it in deciding this appeal, counsel for James J. Connolly, Trustee of the Ann D. Connolly Living Trust Dated December 22, 2003, hereby request 15 minutes for oral argument and designate Samantha D. Elliott to present it.

Respectfully submitted,

**James J. Connolly, Trustee of
the Ann D. Connolly Living
Trust dated December 22,
2003**

By His Attorneys,

**GALLAGHER, CALLAHAN &
GARTRELL, P.C.**



Samantha D. Elliott (#17685)
Robert J. Dietel (#19560)

August 7, 2018
Date

CERTIFICATE OF SERVICE

I, Samantha D. Elliott, hereby certify that two copies of the foregoing have been sent via first-class mail to David W. Rayment, Esquire, counsel for Petitioner, Edward F. Hayes, Jr.

August 7, 2018
Date



Samantha D. Elliott (#17685)
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ORDERS APPEALED AND ADDITIONAL EXHIBITS

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THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
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Concord NH 03302-2880

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NOTICE OF DECISION

SAMANTHA D. ELLIOTT, ESQ
GALLAGHER CALLAHAN & GARTRELL PC
214 NORTH MAIN STREET
CONCORD NH 03301

RECEIVED
NOV 21 2016
Gallagher Callahan & Gartrell PC

Case Name: Edward F. Hayes, Jr., Trustee of the Survivor's Trust A c/u The Hayes Family
Trust dated January 20, 2000 vs. Ann D. Connolly, Trustee of the Ann D.
Case Number: 217-2016-CV-00306

Please be advised that on November 02, 2016 Judge Nicolosi made the following order relative to:

Motion for Summary Judgment - "This case presents an equitable question that cannot be resolved by summary judgment. Looking at the facts in light most favorable to the respondent, and drawing all reasonable inferences from those facts in respondent favor as well, the court cannot say as a matter of law, the petitioner should be awarded the relief sought."

November 18, 2016

Tracy A. Uhrin
Clerk of Court

(003)

C: David W. Rayment, ESQ; Maureen G. Helfrich; Stephen G. Hayes; James Connolly

**THE STATE OF NEW HAMPSHIRE
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NOTICE OF DECISION

File Copy

Case Name: **Edward F. Hayes, Jr., Trustee of the Survivor's Trust A c/u The Hayes Family
Trust dated January 20, 2000 vs. Ann D. Connolly, Trustee of the Ann D.**
Case Number: **217-2016-CV-00306**

Enclosed please find a copy of the court's order of September 13, 2017 relative to:

ORDER

September 13, 2017

Tracy A. Uhrin
Clerk of Court

(485)

C: Samantha D. Elliott, ESQ; David W. Rayment, ESQ; Mark S. Derby, ESQ; Maureen G. Helfrich;
Stephen G. Hayes; James Connolly; Michael Hayes; Robert J. Dietel, ESQ

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

MERRIMACK, SS.

No. 217-2016-CV-00306

Edward F. Hayes, Jr.,
Trustee of the Survivor's Trust A
c/u The Hayes Family Trust dated January 20, 2000

v.

Ann D. Connolly,
Trustee of the Ann D. Connolly Living Trust

ORDER

The parties are two trusts that each own a one-half interest in property situated on Lake Sunapee. The Petitioner, Edward F. Hayes, Jr., as trustee of the Survivor's Trust A, certified under the Hayes Family Trust dated January 20, 2000, requests the Court order partition of the property pursuant to RSA 547-C:2. The Respondent, Ann D. Connolly, as trustee of the Ann D. Connolly Living Trust, seeks the enforcement of a certain 1992 partnership agreement or, alternatively, requests the Court order the Petitioner award its interest in the property to the Respondent in exchange for the interest's fair market value.

In advance of a bench trial scheduled to begin on September 20, 2017, the parties filed several motions *in limine* and raised certain concerns during a final management conference on August 28, 2017. The Court held a hearing on these matters on September 12, 2017, during which the parties represented that they were in agreement on all issues except those raised in the Respondent's motion *in limine* to exclude the testimony of Michael Hayes, the Petitioner's corresponding objection, and the Respondent's subsequent response.

In its motion, the Respondent seeks to prevent Michael Hayes from testifying at trial and to otherwise exclude all references to Michael Hayes's desire to purchase the property. The Court agrees with the Respondent that evidence of Mr. Hayes's desire to purchase the property and the amount he is willing to offer is inadmissible. Although RSA 547-C:2 grants the Court broad discretion to consider all "factors the court deems relevant" in "determining what is fair and equitable" in an action for partition such as this, the Petitioner has failed to satisfactorily explain the relevance of this evidence. Moreover, this case is not about Mr. Hayes's ability, motives for, or genuine willingness to acquire the property, therefore, to the extent this evidence is marginally relevant, its value is substantially outweighed by its tendency to confuse, mislead, and waste time. See N.H. R. Ev. 403.

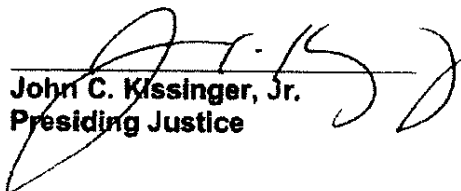
The Court agrees with the Petitioner, however, that it is entitled to elicit testimony from Mr. Hayes relating to his personal knowledge of facts concerning whether the 1992 partnership agreement was abandoned, as well as his personal knowledge of the property and its history relevant to the issues in this case. The Court acknowledges the Respondent's position that much of Mr. Hayes's testimony will address undisputed issues. For example, the Respondent admits "that it did not assert its rights under the 1992 Partnership Agreement until after this lawsuit was filed" and argues, therefore, that "[t]estimony from Michael Hayes regarding the negotiations [to purchase the property] prior to suit has no probative value." (Reply to Obj. ¶ 2.) Nevertheless, the Court is not convinced that Mr. Hayes will fail to provide pertinent information and context regarding this negotiation and other relevant issues even if part of his testimony is somewhat duplicative or addresses undisputed facts.

Conclusion

For the foregoing reasons, the Respondent's motion *In limine* is GRANTED IN PART and DENIED IN PART.

SO ORDERED.

9/13/12
Date



John C. Kissinger, Jr.
Presiding Justice

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Merrimack Superior Court
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NOTICE OF DECISION

File Copy

— Case Name: **Edward F. Hayes, Jr., Trustee of the Survivor's Trust A c/u The Hayes Family
Trust dated January 20, 2000 vs. Ann D. Connolly, Trustee of the Ann D.**
Case Number: **217-2016-CV-00306**

Enclosed please find a copy of the court's order of December 08, 2017 relative to:

ORDER

December 13, 2017

Tracy A. Uhrin
Clerk of Court

(485)

C: Samantha D. Elliott, ESQ; David W. Rayment, ESQ; Mark S. Derby, ESQ; Maureen G. Helfrich;
Stephen G. Hayes; James Connolly; Robert J. Dietel, ESQ

**THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT**

MERRIMACK, SS.

No. 217-2016-CV-00306

Edward F. Hayes, Jr.,
Trustee of the Survivor's Trust A
c/u The Hayes Family Trust dated January 20, 2000

v.

James J Connolly,
Trustee of the Ann D. Connolly Living Trust

ORDER

The parties are two trusts, each owning a one-half interest in property situated on Lake Sunapee (the "Property"). Pursuant to RSA chapter 547-C, the Petitioner, Edward F. Hayes, Jr., as trustee of the Survivor's Trust A, certified under the Hayes Family Trust dated January 20, 2000, requests the Court order the Property be sold in a specified manner designed to maximize its value by exposing it to the greatest number of potential purchasers. The Respondent, James J. Connolly, as co-trustee of the Ann D. Connolly Living Trust, seeks the enforcement of a certain 1992 "Property Partnership Agreement" (the "1992 Agreement"), which allegedly grants the Respondent the right to purchase the Property for its fair market value, or, alternatively, the Respondent asks the Court order the Petitioner to award its interest in the Property to the Respondent in exchange for the interest's fair market value as determined by the Court or in accordance with a process outlined in the Agreement. The Court viewed the Property on September 20, 2017, and held a bench trial on this matter that same day. Based on the evidence, the parties' arguments, and the applicable law, the Court orders that the Petitioner's interest in the Property be awarded to the Respondent in exchange for its

fair market value in the manner set out below.

I. Findings

After vacationing with their family on Lake Sunapee for several years, in 1953, husband and wife James Joseph Dowd and Claire Sheehan Dowd purchased a parcel along the lake's eastern shore. Sometime thereafter, Mr. and Mrs. Dowd conveyed the parcel to four of their six children. The parcel was subsequently subdivided between the children, and, in 1968, the portion of the parcel that now constitutes the Property¹ was deeded to Clare Dowd Hayes and Ann Dowd Connolly, and their respective spouses, Edward F. Hayes and Phillip Connolly. In 2000, Mr. and Mrs. Hayes conveyed their one-half interest in the Property to The Hayes Family Trust. Similarly, in 2004, Mrs. Connolly² conveyed her one-half interest in the Property to the Ann D. Connolly Living Trust.

Prior to conveying their interests in the Property to their respective trusts, Mr. and Mrs. Hayes and Mrs. Connolly entered into two separate agreements in 1992. First, the three memorialized a time-sharing arrangement in a letter disseminated on November 4, 1992, which stipulated, inter alia, that the Connolly family would have the right to use the Property between June 15th and July 30th of each year, and the Hayes family would have the right to use the Property between August 1st and September 15th of each year. (See Resp't's Ex. G.) Second, the three signed the aforementioned 1992 Agreement on November 27, 1992, with the explicit intent "to conduct and share the business, the expenses and profits" of the Property's "operations" in accordance with

¹ The Property, as it is currently configured, primarily consists of approximately 150 feet of laketront, a boathouse, a garage, and a rustic single-family seasonal residence perched on a slope overlooking the lake.

² It is the Court's understanding that Mrs. Connolly's husband died sometime prior to 1992.

the 1992 Agreement's terms. (Resp't's Ex. F.) Among other things, the 1992 Agreement provides that the three "partners" will bear "[a]ll liabilities and expenses" and share "[a]ll profits and loses" in proportion to their respective interests in the Property, and further that:

Upon the dissolution, or the death of either of the Partners, the other or the surviving Partner shall have the right to purchase the interest of the deceased Partner at a price agreed upon by the Partners or the deceased Partner's legal representative, provided the decedent's lawful heirs under the decedent's Last Will and Testament do not desire to continue the decedent's ownership of the subject property. This Agreement shall be binding on the decedent's heirs under the aforementioned provisions. If the Partners cannot agree on the purchase price, then the Partners shall each select one appraiser or the legal representative of the deceased Partner shall select one appraiser, and these two shall agree, if possible, in good conscience, on the value of the interest of the dissolving and/or the deceased Partner, and such agreed value shall be binding and conclusive on all parties hereto or claiming hereunder. But if these two are unable to agree, they shall select a third appraiser and then the decision of any two of the appraisers shall be binding and conclusive on all Parties hereto or claiming hereunder.

(Id.)

During the September 20th trial, the Court heard testimony from Edward "Ted" Hayes Jr., Michael Hayes, James "Jim" Connolly, and Ann M. Connolly, all of who have spent significant amounts of time at the Property and are familiar with the its historical use and management. Ted Hayes is the son of Clare Dowd Hayes and Edward F. Hayes and he became successor trustee of The Hayes Family Trust in 2014 following Mrs. Hayes's death that year and Mr. Hayes's death in 2009. Ted Hayes testified that his father historically undertook most routine repairs and improvements of the Property, while contractors preformed major work. These costs were ordinarily split between the Hayes and Connolly families. Ted Hayes estimated that since his grandparents initially purchased the Property in 1953, there were only ten years he failed to spend at least a

portion of the summer at the Property.

Jim Connolly, the son of Ann Dowd Connolly and the co-trustee of the Ann D. Connolly Trust, similarly testified that he has visited the Property nearly every summer. He also explained that the Property has been the setting of numerous important Connolly family events, such as the wedding of his sister, and that the family generally celebrates summer birthdays at the Property. Jim Connolly also echoed Ted Hayes's testimony that the Property's expenses were usually shared equally between the two families. He added, however, that his mother contributed disproportionately more to the expenses during the last several years before the death of her sister, Clare Dowd Hayes. Ann M. Connolly, the daughter of Ann Dowd Connolly and the sister of Jim Connolly, described the Property as the "epicenter" of her family, and explained that cousins of the Hayes and Connolly families also have homes on Lake Sunapee and routinely visit the Property.

Ted Hayes testified that despite his affinity for the Property, when he was elevated to trustee of The Hayes Family Trust, he assumed a duty to the trust's beneficiaries — which include himself, his brother Stephen Hayes, and his sister Maureen Helfrich — to liquidate the trust's assets.³ Pursuant to this goal, soon after her death in 2014, Ted Hayes undertook to sell his mother's home. Upon finalizing the home's sale in August 2015, he then initiated discussions with his aunt Ann Dowd Connolly about selling The Hayes Family Trust's share of the Property. Following this discussion, Ted Hayes sent an email to Mrs. Connolly and several other members of

³ Ted Hayes further explained that his brother has a disability that hinders his ability to care for himself and would, therefore, greatly benefit from liquidating the trust's assets, and that his sister represented to him after their mother's death that she had neither the financial ability nor the inclination to contribute to the expenses of the Property. Additionally, Ted Hayes explained that without contribution from his siblings, he would be unable to bear the financial cost of maintaining the Property alone.

the Connolly and Hayes families, including his son Michael Hayes and Jim Connolly, wherein he thoroughly explained the need for The Hayes Family Trust to sell its interest and expressed his desire that Michael Hayes represent the Hayes family in negotiations. (See Pet'r's Ex. 16.) The Connolly family subsequently appointed Jim Connolly as their representative.

Jim Connolly and Mike Hayes spoke over the phone at least once, possibly twice, about how to divest The Hayes Family Trust from the Property, but primarily their conversations were conducted over email. Overall, the emails reflect that both men sought to handle the process of divesting The Hayes Family Trust in a respectful and equitable manner, recognizing both families' attachment to the Property. Mike Hayes made clear from the outset that the Hayes family did not believe any solution involving "joint ownership or usage" of the Property would be in their best interest. (Id. at page R22 037.) To that end, Mike Hayes initially proposed the following process:

- 1) Establish fair value
 - a. Get appraisal(s) or just agree on a number (e.g., \$750k +/- \$50k seems to be the range)
- 2) Your family and I each indicate whether we are interested in paying that fair value for the Lake.
 - a. Both no: Sunapee sold on open market
 - b. One yes, one no: Family A buys out Family B at fair value.
 - c. Both yes: Each family then identifies their own valuation for the Lake, seal the inputs, higher bidding family buys out other family.

(Id. at page R22 038.) Jim Connolly ultimately took the position that his family did not "want to make any agreement that could force [them] to sell" and that their preferred outcome was for Mike Hayes to purchase The Hayes Family Trust's interest and for the Property to continue to be shared in accordance with the status quo. (Id. at page R22 033.) Although Mike Hayes had, from the beginning of negotiations, expressed a desire to purchase the Property in its entirety, he remained adamant that he did not wish to

assume the "friction and frustration" he believed inherent to "any co-ownership structure." (Id.) Negotiations having reached an impasse, the Hayes family brought suit in May 2016.

It is undisputed that no member of either the Connolly or Hayes families raised the 1992 Agreement until well after the initiation of this case. Jim Connolly testified that his mother, who was a signatory to the 1992 Agreement, never mentioned its existence and he only learned of the 1992 Agreement when he found a copy of it amongst his mother's possessions in a storage unit during the summer of 2016. Ted Hayes similarly testified that he was unaware of the 1992 Agreement until September 2016, when the Connollys relied upon it during this litigation. Ted Hayes further testified that he would have expected his parents to have informed him of the 1992 Agreement when they transferred their interest in the Property into trust had they considered the agreement significant at the time.

Finally, regarding the parties' valuation of the Property, it is uncontested that the Property is not suited for physical partition, and the parties agree it is unlikely there is a market for only The Hayes Family Trust's interest in the Property. Based on his personal knowledge of the surrounding area, Ted Hayes estimates the Property is worth between \$800,000 and \$900,000. This figure is substantially higher, however, than three appraisals Ted Hayes commissioned,⁴ as well as the Property's tax assessment value of \$610,000. (See Resp't's Ex. T.) Ted Hayes attributes this discrepancy to increased values across the board over the last year and to the fact that the parties' emotional attachment to the Property would, in his opinion, likely result in something of

⁴ The Property was appraised for \$675,000 in 2009, (see Resp't's Ex. S), \$640,000 in 2014, (see Resp't's Ex. R), and \$630,000 in December 2016, (see Resp't's Ex. Q).

a bidding war. Conversely, Jim Connolly believes, based predominately on the Property's 2016 appraisal, that the Property is worth roughly \$630,000. Pursuant to this value, approximately three weeks prior to trial, the Connollys offered to purchase The Hayes Family Trust's interest in the Property for \$315,000. This was the first time either party offered to purchase an interest in the Property for a specific amount.

II. Rulings

The first issue before the Court is the applicability of the 1992 Agreement. The Respondent argues that the 1992 Agreement is an enforceable contract that provides the Connolly Trust "an express right to purchase the Property and an equitable procedure to determine the purchase price." (Resp't's Trial Mem. at 9.) Conversely, the Petitioner maintains that the evidence shows the parties "mutually abandoned" the 1992 Agreement. The Court agrees with the Petitioner.

Generally, contract abandonment occurs when both parties depart from the terms of the contract by mutual consent. Abandonment may be accomplished by express mutual consent or by implied consent through the actions of the parties. Where acts and conduct are relied on to constitute an abandonment, they must be positive, unequivocal and inconsistent with an intent to be further bound by the contract.

Axenics, Inc. v. Turner Const. Co., 164 N.H. 659, 666 (2013) (quotations and citations omitted). Here, the actions of the signatories to the 1992 Agreement demonstrates a mutual lack of commitment to be bound by its terms. Both the Hayeses and Ann Dowd Connolly conveyed their interests in the Property into trust, and neither the terms of those trusts nor the settlors' actions suggest they anticipated the Property's future would be determined by the terms of the 1992 Agreement. To that point, Mr. and Mrs. Hayes choose not to discuss the 1992 Agreement with their son, despite presumably understanding that as successor trustee he would inevitably at least consider divesting

the trust's interest in the Property. Furthermore, when Ted Hayes approached Ann Dowd Connolly about selling The Hayes Family Trust's interest in the Property, Mrs. Connolly failed to assert her rights under the contract. See Restatement (Second) of Contracts § 283 comment a ("Sometimes mere inaction on both sides, such as the failure to take any steps looking toward performance or enforcement, may indicate an intent to abandon the contract."). Accordingly, the 1992 Agreement is not an enforceable contract.⁵

Next, the Court must craft an equitable remedy pursuant to RSA chapter 547-C. See Pedersen v. Brook, 151 N.H. 65, 67 (2004) ("The New Hampshire statutes concerning partition have long been regarded as conferring equitable jurisdiction and powers."); DeLucca v. DeLucca, 152 N.H. 100, 104 (2005) ("[A]n action to partition property calls upon the court's equity powers, so that complete justice may be done by such means as are appropriate to the special circumstances and situation of each particular case."); Brooks v. Allen, 168 N.H. 707, 711 (2016) ("A court of equity will order to be done that which in fairness and good conscience ought to be or should have been done. It is the practice of courts of equity to administer all relief which the nature of the case and facts demand." (quotation and ellipsis omitted)); RSA 547-C:30 ("Proceedings under this chapter shall be remedial in nature. The provisions of this chapter are to be

⁵ The Court notes that during trial, the Petitioner's counsel sought to elicit testimony from Ted Hayes and submit certain documents (see Pet'r's Ex. 11 and 12 (marked for ID only) relating to discussions amongst, and actions taken by, Clare Dowd Hayes, Edward F. Hayes, Ann Dowd Connolly, and an attorney married to Ann M. Connolly regarding what legal steps could be taken to preserve the Property's status quo for future generations. The Petitioner asserts that this evidence tends to show that all involved — and most relevantly Ann Dowd Connolly — viewed the 1992 Agreement as inoperative. The Respondent's counsel objected to this evidence on hearsay and authentication grounds. The Court opted to defer ruling on these objections until after considering the evidence. Given that there is sufficient alternative evidence demonstrating the 1992 Agreement was abandoned, the Court declines to reach a conclusion on the merits of the Respondent's objections.

liberally construed in favor of the exercise of broad equitable jurisdiction by the court in any proceeding pending before it.”).

Pursuant to RSA 547-C:25, the Petitioner asks the Court order the entire Property be sold in a manner designed to expose it to the open market and maximize its sale price. RSA 547-C:25 provides, in relevant part, that “if it is alleged in the petition that the property is so situated or is of such a nature that it cannot be divided so as to give each owner his or her share or interest without great prejudice or inconvenience and the court so finds, the court may order it to be sold and the proceeds from the sale to be divided among the owners.” Thus, as a threshold matter, before ordering a property to be sold, a court must first find that a physical division of the property cannot occur without great prejudice or inconvenience. To that end, it is uncontested in this case that a physical partition of the Property would be unworkable. Indeed, from the view, it is apparent to the Court that physical partition is not a viable option.

Nevertheless, the Respondent maintains that ordering a sale of the Property pursuant to RSA 547-C:25 would be unfair to the Connolly family because it could potentially force them to choose between losing the Property⁶ or paying a premium in order to retain it. As an alternative, the Respondent asks the Court to award it The Hayes Family Trust’s interest in the Property in exchange for half the Property’s fair market value. The Court believes this is the fairest solution, taking into account both families’ strong emotional ties to the Property and The Hayes Family Trust’s need to liquidate its assets. To that latter point, although Ted Hayes explained that the

⁶ The Respondent further contends that “even if the Connolly Trust were handsomely compensated for its interest . . . in the event that the Connolly Trust was outbid on the open market, the Connolly family could not purchase a comparable property because no other property would be vested with the same memories.” (Resp’ts Trial Mem. at 6.)

beneficiaries of The Hayes Family Trust would benefit from liquidating the trust's assets, he failed to persuade the Court that the beneficiaries' financial need is so great that it justifies forcing the Connolly family to possibly choose between selling their well-beloved interest in the Property or paying more than fair market value to acquire The Hayes Family Trust's interest merely in order to maximize the value of the Property to a marginal degree. Moreover, in reaching this decision, the Court accepts the testimony regarding the long standing connection both families have to the Property, and it is clear the Property represents to the parties far more than a simple economic asset. Thus, considering The Hayes Family Trust alone desires to change the family sharing arrangement that has been in place for decades, the Court finds it would be grossly inequitable to require the Connolly Trust to pay a premium over fair market value to retain its interest in the Property.

Given these rulings, the Court must lastly devise an equitable means of determining the Property's fair market value. Although the 1992 Agreement does not constitute an enforceable contract, it still suggests that at one time the Hayes and Connolly families believed its process for ascertaining the value of the Property was fair and equitable. See RSA 547-C:29 ("In exercising its discretion in determining what is fair and equitable in a case before it, the court may consider . . . any contractual agreements entered into between the parties in relation to sale or other disposition of the property . . ."). Accordingly, the Court exercises its equitable jurisdiction and orders the parties follow a process similar with that set out in the 1992 Agreement.

Conclusion

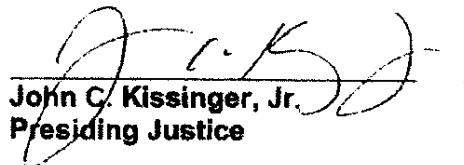
The Petitioner and the Respondent shall — within 30 days of the date of the issuance of this Order — each designate a separate appraiser who will seek to agree — within a reasonable time — on a fair market value for the Property. Should these appraisers be unable to agree, they shall expeditiously select a third appraiser, and an agreement of any two appraisers thereafter shall constitute the Property's fair market value. Once the Property's fair market value has been established pursuant to this process, the Respondent shall have 90 days in which to close. The parties may forego this process should they mutually agree on the Property's worth, and either party may seek permission from the Court to extend deadlines for good cause. Should the Respondent fail to close as outlined above, the Property shall be marketed in conformance with the process described in the Petitioner's Final Order on Partition, (see Index # 58), and the parties shall share the proceeds of the Property's sale equally.

Finally, the Petitioner has submitted requests for findings of fact and rulings of law. (Index ## 56, 58.) The Court's findings and rulings are set forth in narrative form in this Order. Insofar as the Petitioner's requests are consistent with this Order, they are granted; otherwise, they are denied or determined to be unnecessary.

SO ORDERED.

12/8/17

Date



John C. Kissinger, Jr.
Presiding Justice

BB

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Know All Men by These Presents

THAT we, James J. Dowd and Clare S. Dowd, both of Holyoke in the County of Hampden and Commonwealth of Massachusetts,

for consideration paid, grant to Clare Dowd Hayes of Chula Vista in the County of San Diego and State of California and John E. Dowd and James J. Dowd, both of said Holyoke and Ann H. Dowd of Washington in the District of Columbia, with warranty covenants to the said Clare Dowd Hayes, John E. Dowd, James J. Dowd and Ann H. Dowd, as joint tenants with rights of survivorship, the

Three certain tracts of land, together with the buildings thereon, situated on the East shore of Lake Sunapee in Newbury in the County of Merrimack and State of New Hampshire, and described as follows:

Lots 7, 8 and 9, agreeably to a "Plan of House Lots of Henry A. Hancox, said Plan being No. 171 and recorded in Merrimack County Records"

A certain other tract of land situated in said Newbury, bounded and described as follows, to wit: Beginning at the Southeast corner of Lot No. 7 on Plan of Houselots on the East shore of Lake Sunapee; thence Easterly by land of Alexander Murchie to the highway known as the Bowles Road; thence Northerly by said Road twenty-five (25) feet to a stake; thence Westerly by land of Joseph A. Donigan to the Northeast corner of Lot No. 9 on said Plan of Houselots; thence Southerly by said Lots 9, 8 and 7 to the place of beginning.

EXCEPTING AND RESERVING therefrom the avenue in the rear of said lots as shown on said plan.

Including also the right to pass and repass on foot, in automobiles or in animal drawn vehicles over a certain road as presently constructed by Ethel J. Ehleider across the Northeast corner of the second lot of land described in a deed to Alexander Murchie, dated August 14, 1917, recorded in Merrimack County Registry of Deeds, Book 429, Page 519, and located in said Newbury, for the purpose of ingress and egress from the cottage of said Ehleider located on the shore of Sunapee Lake, together with the right to make necessary repairs to the said road from time to time but not including the right to change its present location on the land of said Murchie, as the same was described in a deed from Alexander Murchie dated October 15, 1949 and recorded in Vol. 670, Page 239 of Merrimack County Records.

A strip of land, situated in said Newbury, bounded and described as follows, to wit:

Beginning at the Northeast corner of Lot #9 on plan of lots by H. A. Hancox, C. E., dated October, 1906; thence Southerly along lots numbered 9, 8 and 7 three hundred (300) feet to the Southeast corner of Lot #7; thence Easterly to the west line of Lot #49; thence Northerly along the west line of part of Lot #49, all of Lot #50 and part of Lot #51; thence Westerly to the point of beginning.

Meaning and intending to convey the narrow strip of land shown on said map which lies between the East line of Lots 9, 8 and 7 and the West line of part of Lot 49, all of Lot 50 and part of Lot 51. Said strip has sometimes been referred to as an avenue.

Being the same premises conveyed by John E. Dowd to James J. Dowd and Clare S. Dowd by deed dated June 5, 1953 and recorded in Merrimack County Records, Vol. 732, Page 481.

This conveyance is made subject to a mortgage in the original amount of \$4,000.00 on which is now due \$2110.00 to the Newport Savings Bank, dated March 26, 1952 and recorded in Merrimack County Records, Vol. 713, Page 40 which mortgage indebtedness the grantees herein assume and agree to pay.

The consideration of this conveyance being love and affection, no revenue stamps are affixed.

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We, James J. Dowd and Clara S. Dowd, do hereby grant, sell, convey and confirm unto said grantees, all rights of
 (dower, curtesy) and homestead and other interests therein.
 Witness our hands and seals this 5th day of August 1960

WITNESS:
Marcella F. Bushway
To Both

James J. Dowd
Clara S. Dowd

State of New Hampshire

SULLIVAN SS. August 5, A. D. 1960

Personally appeared James J. Dowd and Clara S. Dowd, known to me, or satisfactorily proven, to be the persons whose names are subscribed to the foregoing instrument and acknowledged that they have executed the same for the purposes therein contained.

Before me,
Marcella F. Bushway
 Notary Public



My Commission Expires March 14, 1963
 Received and recorded Aug. 9, 9-00 A.M. 1960

Notarized in my presence

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 217-2016-CV-00306

Edward F. Hayes, Jr., Trustee of the Survivor's Trust A c/u The Hayes Family Trust Dated
January 20, 2000
Petitioner

v.

Ann D. Connolly, Trustee of the Ann D. Connolly Living Trust
Dated December 22, 2003
Respondent

TRIAL MEMORANDUM

NOW COMES Respondent and Counterclaim Petitioner, Ann D. Connolly, Co-Trustee of the Ann D. Connolly Living Trust ("the Connolly Trust"), by and through its attorneys, Gallagher, Callahan & Gartrell, P.C., and respectfully submits the following trial memorandum:

INTRODUCTION.

Both parties through their claims, counterclaims, and defenses call upon this Court to exercise its equitable powers. The historic purpose of equity is "to secure complete justice." *N.H. Donuts, Inc. v. Skipitaris*, 129 N.H. 774, 783 (1987) (quotation omitted). "Complete justice" is "that which in fairness and good conscience ought to be or should have been done." *Langevin v. Hillsborough County*, 114 N.H. 317, 320 (1974). Here, the Court is taxed with devising a remedy that acknowledges the property interests held by each of the parties and their wishes with respect to those interests. It is also asked to consider the contractual rights of first refusal embodied in a 1992 Property Partnership Agreement ("the 1992 Agreement"), and the efforts undertaken to continue the families' historic sharing arrangement coupled with the undeniable medical and logistic obstructions to asserting those contractual rights immediately upon their vesting.

Petitioner, Edward Hayes, Jr. ("Ted"), Trustee of the Survivor's Trust A c/u The Hayes Family Trust Dated January 20, 2000 ("the Hayes Trust") has asked to sell the Hayes Trust's interest in property located at 140 Bowles Road, Newbury, NH (the "Property"). The Connolly Trust has asked to buy the Hayes Trust's interest. Because the parties have made complementary requests, this Court can do "complete justice" more easily than in the typical case. It can respect Ann Connolly's and, by extension the Connolly Trust's, historic ownership of the Property and her efforts to continue that ownership, while also ensuring that the Hayes Trust is fairly compensated for the interest it wishes to sell. The Court can do so by assigning the Property to the Connolly Trust under RSA 547-C:22 or under the 1992 Agreement. The Court can order payment of fair market value as determined by it or as determined by the process outlined in the 1992 Agreement – a process that Ted Hayes acknowledged is fair. Transcript of September 20, 2017 Bench Trial ("Tr."), attached hereto, at 78:23-25. Justice does not require this Court to ransom Ann Connolly's emotional attachment in an effort to extract more than fair market value as the Hayes Trust has requested. Tr. 63:4-13. It is axiomatic that fair market value is equitable. The Hayes Trust is entitled to nothing more.

ARGUMENT

I. **The Court should exercise its equitable discretion under RSA 547-C to assign the whole Property to the Connolly Trust and order payment of fair market value to the Hayes Trust.**

Because there is much about which the parties agree, this is not a typical partition case. Both parties agree that the Hayes Trust and the Connolly Trust each own a present undivided one-half interest in the Property. Ex. 7 and 9.¹ Both parties have sought relief under RSA 547-C. Both parties agree that the Property cannot be divided by metes and bounds. Hayes Trust's

¹ References to numbered exhibits are to Petitioner's trial exhibits and lettered exhibits are to Respondent's trial exhibits.

Petition; Tr. 129:11-15. Neither is claiming that it is entitled to more than the value of its one-half interest due to the other's waste or its own contributions.

This is also an atypical case because the parties are not each fighting to retain ownership of the Property. The Hayes Trust no longer wishes to own the Property and has asked this Court to allow it to sell its interest. Tr. 58:15-18. The Connolly Trust wishes to retain its ownership interest and has asked to purchase the Hayes Trust's interest. Tr. 143:22-24. The only question before the Court under the partition statute is whether it should proceed under RSA 547-C:22 (assigning the Property to the Connolly Trust and ordering payment to the Hayes Trust) or under RSA 547-C:25 (ordering the Property sold and dividing the proceeds).

A. The enumerated factors in RSA 547-C:29 weigh in favor of assignment of the Property to the Connolly Trust.

When exercising its discretion on partition, the Court may consider any factors it deems relevant, including, among other enumerated considerations:

...the duration of occupancy and nature of the use made of the property by the parties; disparities in the contributions of the parties to the property; any contractual agreements entered into between the parties in relation to sale or other disposition of the property...

RSA 547-C:29. The Connolly Trust submitted evidence pertaining to each of these factors which sustains the Connolly Trust's claim that equity should protect the Connollys' interest in the Property, especially because the Court can do so while affording the Hayes Trust all that it is entitled to receive. The Hayes Trust also submitted evidence pertaining to these factors, but that evidence is not relevant. Because the Hayes Trust has not asked to retain the Property and has not asked for a larger-than-one-half share of any purchase price, the duration of the Hayes family's occupancy, the nature of its use, and its contributions to the Property are wholly irrelevant to the issues before the Court—any emotional attachment members of the Hayes family may have to the Property does not affect whether sale on the open market would be more

equitable than sale to the Connolly Trust for fair market value.² Evidence of any agreements between the families and the nature of the two families' use of the Property that may shed light on the historic intended disposition of the Property is, however, important. All weigh heavily in favor of assigning the Property to the Connolly Trust.

i. Ann Connolly's duration of occupancy and ownership is significant.

Ann Connolly was present in 1952 when her parents bought the Property and, that summer, made the curtains that still adorn the windows. Tr. 130:13-17. She personally took title in 1960 with her siblings. Ex. BB. Later she shared title with her sister and their husbands. Ex. 2. Though she has transferred the Property into a trust, that estate planning effort has no effect on her tenure as owner and occupier of the Property, especially because it may be revoked. Tr. 135:11-13. Since 1952, she has visited the Property as often as possible during the summer. Tr. 157:9-19. Though she did not visit the Property this summer because she suffered a stroke in May 2017, Tr. 128:1, she visited in 2016, Tr. 133:19-21. Her health is improving and her family is hopeful that she will be able to visit again in the future. Tr. 113:20-114:3.

ii. The nature of the parties' use of the Property demonstrates that its emotional value has historically taken precedence over economic factors, and continues to do so.

The nature of Ann Connolly's and her family's use of the Property illustrates their deep connection to it and the loss they would experience if they were deprived of continued ownership. It has been the site of annual birthday celebrations, and importantly, of AnnMaura Connolly's wedding. Tr. 133:5-14. Jim Connolly has visited every summer of his life except for three years. Tr. 132:15-21. His children have visited "basically every year of their lives." Tr.

² To the extent that the Hayes Trust might argue that this evidence is relevant to explain the value that members of the Hayes family who are not current owners might assign to the Property and be willing to pay if given the opportunity, the Court has already excluded this evidence by Order dated September 13, 2017.

133:3-4. AnnMaura Connolly explained that the Property provides an opportunity for her to see her siblings and for their children to be together, an opportunity that they may not otherwise have. Tr. 166:3-10. If the Connolly Trust is able to maintain its ownership, it intends to continue the tradition started by Ann Connolly's parents by making the Property a place for family to come together. Tr. 167:11-17. Ass AnnMaura testified, it would be devastating to lose the Property. Tr. 169:8-9.

The Hayes Trust's stated desire to maximize the Property's financial value upon sale, beyond fair market value, at the expense of the Connolly family's emotional attachment is contrary to the nature of either family's historic use of the Property. In 1960, Ann Connolly and Clare Hayes's parents gifted the Property to their children and noted in the deed, "The consideration of this conveyance being love and affection, no revenue stamps are affixed." Ex. BB. Ann Connolly has structured her financial holdings with the purpose of making the Property available to her children and grandchildren. Tr. 134:9-12. Ann Connolly and Clare Hayes redistributed the shared expenses associated with the Property when Clare was widowed so that the Hayes family could continue to enjoy the Property notwithstanding Clare's financial limitations upon losing her husband. Tr. 133:24-134:5. Though the Connolly Trust does not ask the Court to consider this evidence in support of a claim to more than its one-half interest, it is evidence of a shared belief that the value of the Property was not primarily monetary. Extorting a premium based on the significant emotional value is inconsistent with the nature of the parties' use of the Property. Even Ted Hayes acknowledges that "it would be useful to keep it in the family because of the longstanding history we all have with this beautiful piece of property and the memories." Tr. 38:19-23.

- iii. *The 1992 Agreement provides further support for assigning the Property to the Connolly Trust rather than permitting sale on the open market.*

The 1992 Agreement provides that Ann Connolly should have an opportunity to purchase the Hayes Trust's interest before it is offered for sale to any third party. Ex. 22. Sale of the whole Property on the open market in the face of her desire to purchase the Hayes Trust's interest is plainly contrary to the agreement between the parties. This "contractual agreement entered into between the parties in relation to the sale or disposition of the Property" weighs in favor of the relief requested by the Connolly Trust. Regardless of whether the Court finds the Agreement to be enforceable as a matter of law, it is uncontroverted evidence of the parties' historic intent regarding the disposition of the Property.

- B. The Connolly Trust's right to possess the Property should prevail over the Hayes Trust's inequitable and unsupported quest to maximize financial return at the expense of the Connolly family's emotional attachment when assignment to the Connolly Trust in exchange for fair market value will fully compensate the Hayes Trust.**

A forced sale of the whole Property, though provided for in RSA 547-C:25, would work an injustice in this case even if the Connolly Trust were handsomely compensated for its interest. Jim Connolly testified that, in the event that the Connolly Trust was outbid on the open market, the Connolly family could not purchase a comparable property because no other property would be vested with the same memories. Tr. 146:16-22. New Hampshire courts have long recognized that property is unique and that interests in property are entitled to special protection. *See Moore v. Sterling Warner Indus. Inv. Corp.*, 114 N.H. 520, 522 (1974) ("Ordinarily a binding agreement for the sale of real estate will be specifically enforced in equity because the unique character of real estate makes the damages for breach of contract irreparable as a matter of law.") (quotations and citations omitted).

- i. *All parties, and many jurisdictions, agree that granting a co-owner the right to purchase prior to ordering a partition sale is an equitable solution.*

In this case, one joint owner wishes to sell its interest. That owner is asking this Court to force the other joint owner to risk losing its interest by placing the whole property on the open market. The modern trend in jurisdictions that have explicitly considered the issue is to give the current co-owner an opportunity to purchase the interest of the person seeking partition by sale before forcing a sale of the entire property on the open market. *See* Uniform Partition of Heirs Property Act (enacted in ten states and pending in three more). Those states have recognized and codified the more equitable solution, the solution that the Connolly Trust seeks here. Moreover, Ted Hayes testified that giving Ann Connolly an opportunity to purchase the Hayes Trust's share, as delineated in the 1992 Partnership Agreement (and consistent with the Uniform Act), is a "fair method" of dealing with this situation. Tr. 78:4-25.

- ii. *Fair market value will fully compensate the Hayes Trust.*

There is no evidence that assignment to the Connolly Trust would be inequitable. The Connolly Trust is willing to pay fair market value, whatever that is determined to be. Tr. 146:1-6. The Court can determine fair market value based on the testimony. The assessed value of the entire Property is \$610,000. Ex. T. The Hayes Trust commissioned an appraisal as of December 15, 2016. Ex. Q. Ted Hayes used an appraiser that he had used at least two other times for the same Property. Tr. 67:10. The appraised value of the entire Property as of December 15, 2016 was \$630,000. Ex. T. Though Ted Hayes claims to disagree with that number, he did not commission a new appraisal or ask his appraiser to consider new evidence or to revise her conclusion. Tr. 69:3-9. Jim Connolly, as trustee of the Connolly Trust, agrees with that appraised value. Tr. 115:5-7. The Court could also determine fair market value using the appraisal method

outlined in the 1992 Partnership Agreement. Ex. 22. The trustees of both the Hayes Trust and the Connolly Trust testified that this would be a fair method. Tr. 78:23-25; 146:13-15.

iii. *There is no evidence that an open-market sale will do equity.*

The only justification offered for the Hayes Trust's request for an open-market sale is Ted Hayes's claim that an open-market sale will afford him an opportunity to use the Connolly family's emotional attachment to get a greater-than-fair-market value for the Property. Tr. 62:9-63:13. That aim is inherently inequitable. "He who comes into equity must come with clean hands." *Dandeneau v. Seymour*, 117 N.H. 455, 461 (1977). By its own testimony, the Hayes Trust does not come with clean hands and should not be entitled to the relief he seeks.

The Hayes Trust did not offer any other evidence that an open-market sale would benefit either party. Further, the Hayes Trust admitted that an open-market sale would cause delay and that the Hayes Trust would be required to contribute to carrying costs during that period. Tr. 89:24-90:6. The Connolly Trust is willing to complete its purchase quickly. Tr. 146:7-9. The Hayes Trust admitted that an open-market sale will have associated costs such as a real estate commission. Tr. 90:2-3. Though Ted Hayes testified that he believes that the proceeds from an open-market sale "far exceed the additional costs that I incurred to process this litigation," Tr. 90:8-10, (costs that forced the Trust into debt, Tr. 88:22-89:2), his belief is founded entirely on his unjust plan to leverage the Connolly family's love of the Property to extract a premium from them.

"An action for partition calls upon the court to exercise its equity powers and consider the special circumstances of the case, in order to achieve complete justice." *DeLucca v. DeLucca*, 152 N.H. 100, 102 (2005) (citing *Boissonnault v. Savage*, 137 N.H. 229, 232 (1993)). The special circumstances of this case demand assignment of the entire Property to the Connolly

Trust in exchange for payment of fair market value to the Hayes Trust under RSA 547-C:22. Given the Hayes Trust's desire to sell, the Connolly Trust's willingness to buy, and the evidence presented at trial, any other result would work an injustice.

II. The 1992 Agreement is an enforceable contract which provides the Connolly Trust an express right to purchase the Property and an equitable procedure to determine the purchase price.

The record demonstrates that an enforceable contract was formed in 1992 between Ann Connolly and Clare and Edward Hayes, Sr. which was intended to prevent the precise circumstance at issue in this case; i.e., to prevent an owner from being forced to sell its share against its will. Petitioner acknowledged these points in his testimony, excepting the enforceability of the Agreement:

- He acknowledged that his parent's signed the 1992 Agreement on November 27, 1992. *See* Tr. 75:14-17.
- He acknowledged that the 1992 Agreement reflected their intent. *See* Tr. 75:22-23.
- He acknowledged that if none of his parent's heirs wished to continue owning a half-share of the Property, as is the case, that "[t]he Connollys have a right to buy the property in that circumstance, according to this document [the 1992 Agreement]." *See* Tr. 78:4-8.
- He acknowledged that the 1992 Agreement would prevent the pending partition action. *See* Tr. 79:7.
- He acknowledged that the method set forth in paragraph 6 of the 1992 Agreement, which sets forth the parties' respective rights for valuing and selling the Property (including the right of first refusal), is a fair one. *See* Tr. 77:23-25.

Despite these admissions, Petitioner asks the Court to ignore or invalidate the 1992 Agreement on the grounds of (a) abandonment and/or (b) waiver. Specifically, he contends that the parties' intent must have changed after November 1992 – i.e., that the agreement was abandoned – because each original partner placed their interest into revocable trusts, and they

generally did not speak to their children about the 1992 Agreement. He further contends that the Agreement is unenforceable – i.e., that a contractual right was waived – because the Connolly Trust did not attempt to exercise rights under the 1992 Agreement when Clare Hayes died in 2014 or at the outset of this dispute in 2015, or because the Connolly Trust did not state a specific dollar sum in its initial offers to purchase, instead referencing fair market value. *See* Tr. 59:2-5 and 76:25-77:1-4. Those arguments, however, cannot be sustained under the facts or law, and are insufficient to negate the Connolly Trust’s right to specific performance under the 1992 Agreement.

A. The Parties did not abandon the 1992 Agreement.

“It is a fundamental principle of contract law that one party to a contract cannot alter its terms without the assent of the other party” and “the minds of the parties must meet as to the proposed modification.” *Guaraldi v. Trans-Lease Grp.*, 136 N.H. 457, 460-61 (1992). Accordingly, to establish a defense of abandonment, Petitioner was required to show that “both parties depart[ed] from the terms of the contract by mutual consent.” *Axenics, Inc. v. Turner Const. Co.*, 164 N.H. 659, 666 (2013)(quoting *J.A. Jones Constr. V. Lehrer McGovern Bovis*, 89 P.3d 1009, 1019 (Nev. 2004). And, “[w]here acts and conduct are relied on to constitute an abandonment, they must be positive, unequivocal, and inconsistent with an intent to be further bound by the contract.” *Id.* (quoting *Fru-Con/Fluor Daniel v. Corrigan Brothers*, 154 S.W.3d 330, 335 (Mo. Ct. App. 2004)). Plaintiff failed to meet this burden.

- i. *The creation of the Hayes and Connolly Trusts does not demonstrate a mutual consent to abandon the 1992 Agreement.*

The record is devoid of any evidence that would suggest that the parties mutually consented to extinguish the 1992 Agreement by conveying their respective interests into revocable trusts. Instead, the record demonstrates that those conveyances were merely for estate

planning purposes, as was contemplated and allowed by the 1992 Agreement. More specifically, Ann Connolly and Clare and Edward Hayes did not actually relinquish any ownership rights when they created the revocable trusts to hold their respective interests, and therefore did not act inconsistent with the 1992 Agreement.

It is well established that the creation of a revocable trust does not, on its own, change the underlying ownership of the trust property. Instead, courts look to see whether there was a relinquishment of control. *See e.g., Kesling v. Kesling*, 967 N.E.2d 66, 83 (Ind. Ct. App. 2012) (holding Appellant retained ownership of shares of stock where he formed a revocable trust to hold the shares, and named himself as trustee and beneficiary for life); *Amonette v. IndyMac Bank*, 515 F.Supp.2d 1176, 1184 (D.Haw.2007) (holding that “[b]ecause a settlor of a revocable living trust retains an unlimited right to revoke any conveyance to the revocable living trust, it has an unfettered ownership interest even though title is legally held by the trust” and that the settlor could pursue a Truth in Lending Act claim); *Engelke v. Estate of Engelke*, 921 So.2d 693, 696 (Fla.Dist.Ct.App.2006) (holding that “[b]ecause [grantor] retained a right of revocation, he was free to revoke the trust at any point in time. Accordingly, he maintained an ownership interest in his residence, even though a revocable trust held *title* to the property” and thus the grantor was entitled to homestead protections)).

Because the Hayes Trust reserved full rights of revocation to Clare and Ed Hayes, they remained owners of the Property during their lives. *See* Ex. 10 at 2 (stating “the Trustors [Clare and Ed Hayes] have the right to amend this Trust, in whole or in part and, therefore, while the Trustors are alive, for income tax purposes, the Trust shall be treated as a revocable ‘Grantor Trust’ pursuant to Internal Revenue Code 767.”); *see also* Ex. 10 at 5 (“Property transferred to the Trustee by the Trustors which is jointly owned with rights of survivorship [i.e., the Property

at issue in this case] shall be held and owned by the trust as the commonly owned property of the Trustors.”) (emphasis supplied). The Hayes Trust, therefore, cannot premise its claims of abandonment or dissolution on the creation of the Hayes Trust and the conveyance of title into that trust.

Additionally, the record shows that, even after the creation of the Hayes Trust and Connolly Trust, the parties continued to own, share, and care for the Property in like manner as before. *See e.g.*, Tr. 24:11-17 (Petitioner describing shared use as unchanging from 1992 to date) and Tr. 25:19-22 (Petitioner acknowledging expenses were shared throughout). This is consistent with the terms of the 1992 Agreement, which provides for equal sharing of expenses and for joint consent between the partners to any affirmative action regarding the Property, excepting dissolution. *See* Ex. 22 at ¶¶ 2-4.

Further, even if the creation of the Hayes and Connolly Trust were found to be an attempted assignment of the parties interests, there is nothing in the 1992 Agreement that would prevent assignment to a revocable trust, particularly where the assignment did not change the identities of the original partners. Ann Connolly and Clare and Ed Hayes were the partners prior to the creation of their trusts, and they remained the partners, as trustees, after the creation. The 1992 Agreement plainly contemplates that such estate planning would and could occur, and that interests could pass beyond the original partners. The Agreement specifically vests the right to decide to continue or terminate ownership in each partner’s heirs after their deaths. *See* Ex. 22 at ¶ 6 (“This Agreement shall be binding on the decedent’s heirs under the aforementioned provisions”).

Simply put, the creation of the Hayes and Connolly Trusts does not hold the legal or factual significance that the Hayes Trust seeks to ascribe to it. The parties did not mutually abandon the 1992 Agreement.

- ii. *Petitioner's abandonment defense cannot be premised on an absence of communication regarding the 1992 Agreement, where, as a matter of law, evidence of waiver must be positive, unequivocal, and inconsistent with an intent to be bound.*

Petitioner asserted at trial that his parents did not talk with him about the 1992 Agreement and that he did not know about it until 2016. *See* Tr. 41:1-18. Likewise, Jim Connolly acknowledged that his mother did not discuss the Agreement with him. Tr. 139:12-16. Petitioner appeared to suggest, and will likely argue, that these facts are evidence of a mutual abandonment. That argument, however, is fundamentally flawed.

As set forth above, “[w]here acts and conduct are relied on to constitute an abandonment, they must be positive, unequivocal, and inconsistent with an intent to be further bound by the contract.” *Axemics, Inc.*, 164 N.H. at 666. Thus, it is axiomatic that an absence of communication regarding a contractual agreement, standing alone, cannot form the basis for a finding of mutual assent to an agreement’s abandonment. Similarly, whether the Hayes family members spoke amongst themselves about the 1992 Agreement is not relevant to whether a contractual right existed because, even if true, a party cannot unilaterally extinguish a contractual right. *See Guaraldi*, 136 N.H. at 460-61.

Additionally, Petitioner’s suggestion that there is any significance to any absence of communication regarding the 1992 Agreement between the parties to the Agreement and their children fails to account for the realities of how people often conduct their affairs. For example, Jim testified at trial that it was not his mother’s practice to share such information. Tr. 139:14-16. Ann Connolly had capably managed her affairs on her own and did not involve her children

in that part of her life. *See id.* Thus, any perceived lack of communication between Ann Connolly and her children cannot be stretched to infer an intent to abandon.

Yet, at its core, Petitioner's premise is further deficient. A careful review of the record reveals that Ann Connolly and Clare and Edward Hayes did, in fact, make their intentions known in general terms.

On November 4, 1992, Ann Connolly and Clare and Ed Hayes sent a joint letter to their children in which they explained precisely how they would like the Property to be used. *See Ex. G.* The fact that this letter focused on the day to day sharing and use is significant because they also explained that they were considering the creation of a "legal agreement" that "will be binding on, and fair to, each and every individual who may subsequently have a right to any portion of the inheritance." *See Ex. G.*

Approximately three weeks later, on November 27, 1992, Ann and Clare and Edward followed through on their stated intentions to create a "legal agreement" addressing inheritance rights by signing the 1992 Agreement. That agreement does precisely what they told their children it would do; it binds the parties and addresses their ownership and inheritance rights in the Property. Thus, it was inaccurate for Petitioner to suggest that there was no communication of his parent's intent when the Nov. 4, 1992 letter (Ex. G) reveals and explains their objectives at that time. And, the subsequent execution of the 1992 Agreement demonstrates that they followed through on the intent expressed in that initial communication. Though Ted Hayes may have expected more information from his parents, this is far from the type of positive, unequivocal, and inconsistent evidence necessary to demonstrate abandonment.

B. The Connolly Trust did not waive its rights under the 1992 Agreement.

To establish a waiver defense, Petitioner was required to present evidence of “explicit language indicating the defendant’s intent to forego a known right, or conduct from which it may be inferred that the defendant abandoned [the] right.” *See Gianola v. Cont’l Cas. Co.*, 149 N.H. 213, 214 (2003). The record does not support such a finding.

- i. Clare Hayes’s death did not give rise to any rights under the 1992 Agreement because the Hayes Trust had not expressed a desire to sell at that time.*

Petitioner testified at trial that his mother Clare passed away on April 15, 2014, and suggested that her death had significance to the enforceability of the 1992 Agreement. *See Tr.* 14:17-18 and at 77:1-2. While that argument is not clearly developed, it appears Petitioner may suggest that the Connolly Trust was required to exercise its right to purchase the Property upon her death. Failure to do so, he may intend to argue, constitutes a waiver. To the extent Petitioner was raising or intends to raise such an argument, it is misplaced. Under the terms of the 1992 Agreement, the Connolly Trust did not acquire a right to purchase until every heir to the Hayes Trust interest indicated that he or she did not wish to continue ownership. This conclusion is self-evident from the plain language of the Agreement which provides that a right to purchase does not arise until “the decedent’s lawful heirs...do not desire to continue the decedent’s ownership of the subject property.” *See Ex. 22 at ¶ 6.*

Accordingly, because the Hayes Trust did not clearly express until September 2015 an intent to no longer continue shared ownership, it follows that Clare’s death in 2014 had no significance to the Connolly Trust’s rights under the 1992 Agreement. *See Tr.* 29:14-23 (Petitioner stating he did not turn his attention to sale of Hayes Trust’s interest until September 2015); *Ex. 16* (October 21, 2015 email from Mike Hayes unequivocally rejecting the possibility of continued joint ownership).

- ii. *Ann Connolly did not intentionally forego a known contractual right by expressing a desire to continue sharing, nor did she waive her rights by failing to explicitly invoke her rights under the 1992 Agreement.*

There is no evidence that the Connolly Trust intentionally waived any rights under the 1992 Agreement. Any delay in asserting the right to purchase the Hayes interest in the Property is explained first by Ann Connolly's hesitation to abandon without effort the shared family use of the Property that had served them all so well for so long and then by her significant medical issues at the time. Not only are the facts insufficient to support any claim that the Connolly Trust was willing to forgo a known right, it would be inequitable to predicate a waiver on these facts.

- a. Ann Connolly's initial communications with Petitioner do not demonstrate an intent to waive her contractual rights.

It is apparent from the communications between Ann Connolly and Ted Hayes in September 2015 that her focus was on trying to find a way to keep sharing and refining a "joint use agreement" between the parties. *See Ex. 16 at R22 041.* Her initial email to Ted on this topic, sent on September 22, 2015, expressed a desire "to share, enjoy and maintain the land" and to make sure the families' "traditions of fair sharing are known and honored." *See id.* The entire focus of her communications with Ted were on trying to find a way to avoid having to change what had worked in the past. *See Ex. 16 at R22 038-039 and R22 041.* In this context, it is logical and reasonable that Ann would not assert a right to buy out the Hayes Trust at that time as doing so would have been plainly inconsistent with her clear preference of shared use. It would have been antagonistic to achieving that goal. Similarly, that desire was not inconsistent with her rights under the 1992 Agreement because that agreement sought to preserve ownership between the families. Given Ann's desire to keep sharing – a fact that has been undisputed – it was reasonable for her to avoid invoking a right to purchase until she had fully explored whether sharing could work.

- b. Ann Connolly's health concerns reasonably prevented her from focusing on or raising her contractual rights and should not be interpreted as a knowing waiver.

Shortly after Ann's initial communications with Petitioner, she fell and broke a vertebra in her back. She was hospitalized for that fall on October 5, 2015. *See* Tr. 152:9-153:3. This hospitalization was a continuation of a series of health setbacks that had begun in the prior year. *See* Tr. at 135:20-136:25.

During the period between November 2014 and November 2015, Ann was hospitalized or in rehab for approximately six out of twelve months. *See* Tr. 136:10-11. In that year, she fell and fractured a femur, had surgery on her leg, broke her foot, broke a vertebra, had pneumonia, was diagnosed with congestive heart failure and COPD, and transitioned from living at home to assisted living. *See generally* Tr. 135:20-136:25.

Throughout this time, Ann Connolly was focused on her health and where she was going to live, as were her children. *See* Tr. 137:19-24. And, because of these health issues, she was not able to manage her own affairs and a power of attorney was activated. *See* Tr. 138:5-7. In this process of hospitalizations and moves, Ann's papers were packed up into storage and set aside. *See* Tr. 138:16-19. Jim Connolly later discovered the 1992 Agreement in those records in the spring of 2016. *See* Tr. 138:21-25.

Taken together – Ann's desire to maintain sharing, her substantial health challenges, the loss of her ability to care for herself, and numerous hospitalizations and moves – it is more than reasonable to conclude that she was not in a position to focus on the Hayes Trust's desire to sell, the management of the Property, or her contractual rights under the 1992 Agreement.

Accordingly, she cannot reasonably be found to have had an intent to forego a known right or to

abandon one. To conclude otherwise would not only be unreasonable under the circumstances but also inequitable.

- iii. *The Connolly Trust's offers to purchase for fair market value were sufficient to exercise its rights under the 1992 Agreement and to entitle it to specific performance.*

Petitioner testified at trial that the Connolly Trust did not make an offer to purchase the property, despite numerous communications back and forth on this topic, because the offers that were exchanged did not reference a specific dollar sum. *See* Tr. 60:2-11. However, the evidence shows that Jim Connolly communicated several offers to purchase, both before and after discovering the 1992 Agreement, all of which made clear that the Connolly Trust was willing to purchase the Hayes Trust's interest for fair market value. *See* 59:2-60:17. The Hayes Trust's unwillingness to even respond to those offers (Tr. 63:19-64:10) repudiated the Connolly Trust's option to purchase the Property pursuant to the 1992 Agreement. Where a party holding a right to purchase property, indicates that they are "ready, willing and able to purchase" that is "sufficient for specific performance." *See Glik v. Chocura Forestlands Ltd. Partnership*, 157 N.H. 240, 250 (2008) (citing *Lowell v. First Church of Christ*, 101 N.H. 363, 366 (1958)).

III. Trial Exhibits 11 and 12 should be excluded as inadmissible hearsay and because the content of those documents is irrelevant.

During trial, Petitioner's counsel indicated that he wished to examine Petitioner regarding Exhibits 11 and 12, both of which had been marked prior to trial as being presented for identification only. *See generally* Tr. 42-54 (containing extent of evidentiary argument). Those documents, he represented, were authored by William Bonk and would be introduced for the purpose of the truth of the matters asserted therein under a state-of-mind hearsay exception. *See* 46:16-47:8. Specifically, he suggested that they were intended to address Mr. Bonk's opinions about what documentation or agreements existed to govern the parties' rights to the Property,

and to make inferences with respect to Petitioner's parents' and Ann Connolly's reactions to Mr. Bonk's impressions. *See id.* Petitioner's counsel also represented that he had additional exhibits on this or related topics that he may seek to introduce, but he ultimately did not do so. *See Tr.* 49:18-20.

While this evidentiary issue was the subject of a lengthy objection at trial, it is a straightforward issue with a clear answer. Petitioner may not introduce exhibits 11 and 12 because they are plainly hearsay. The author of those exhibits was not present at trial and no attempts were made to authenticate the documents or the content of the statements therein. Further, those documents cannot be used to speak to the state of mind of Clare or Edward Hayes or Ann Connolly because they were not the authors of those exhibits. *See* N.H. Rule of Evid. 803(3) (describing state of mind exception as relating to "declarant's then-existing state of mind") (emphasis supplied). Mr. Bonk's own state of mind is not relevant to the questions before the Court. Additionally, despite the discussion of these exhibits at trial, Petitioner did not ultimately move to admit either exhibit as full exhibits. Therefore, there is no basis for their consideration.

CONCLUSION

There is no dispute that Ann Connolly and Clare and Edward Hayes, as well as Ann and Clare's parents, historically used and enjoyed the property because it was a place for family gatherings with their children, grandchildren, cousins, and siblings, and not because of its monetary value. There is also no dispute that this sentiment was conveyed to all generations through letters, documents, and even deeds. Accordingly, equity demands that such a clear emotional attachment be preserved and allowed to continue, where, as here, all sides' interests can be fully protected. The Hayes Trust's request for relief can be given effect and it can be made whole through fair-market-value compensation for its interest. In so doing, the Connolly

Trust's long-standing ownership can be ensured to continue and its right to title equally protected. The equities of this solution are self-evident.

WHEREFORE, for the reasons stated, the Connolly Trust respectfully requests that this Honorable Court:

- A. Assign the Property to it and order payment of fair market value to the Hayes Trust under RSA 547-C:22; or
- B. Specifically enforce the 1992 Agreement; and
- B. Grant such further relief as justice requires.

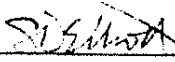
Respectfully submitted,

ANN D. CONNOLLY

By Her Attorneys,

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10/13/17
Date


Samantha D. Elliott (NH Bar #17685)
Robert J. Dietel (NH Bar #19560)

CERTIFICATE OF SERVICE

I, Samantha D. Elliott, hereby certify that a copy of the foregoing was sent to Maureen G. Helfrich, Stephen G. Hayes and David W. Rayment, Esquire, counsel for Petitioner, Edward F. Hayes, Jr.

10/13/17
Date


Samantha D. Elliott (NH Bar #17685)