THE STATE OF NEW HAMPSHIRE

SUPREME COURT

JUNE 2018 TERM

DOCKET NO.: 2018-0025

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

vs.

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

APPEAL FROM FINAL ORDER OF
THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF THE APPELLANT

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STATUTES AND ORDINANCES INVOLVED

RSA 547-C:2

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.

RSA 547-C:22

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

RSA 547-C:25

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.

RSA 547-C:29

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.

N.H. R. Evid. 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. Evid. 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

The petitioner and appellant, Edward F. "Ted" Hayes, Jr., as Trustee of the Survivor's Trust A c/u the Hayes Family Trust dated January 20, 2000, (the "petitioner", "appellant", "Ted Hayes", or, as the context may require, the "Hayes Trust" or the "Hayes Family Trust"), is a tenant in common with the respondent and appellee, James J. Connolly, Co-Trustee of the Ann D. Connolly Living Trust dated December 22, 2003 (the "respondent", "appellee", "Jim Connolly", or, as the context may require, the "Connolly Trust" or the "Connolly Living Trust"), in waterfront property on Lake Sunapee at 140 Bowles Road in Newbury (the "Property"). App. 2-5, 12-15, 18-20, 108-112.

The uncontested facts below, as found by the Trial Court, demonstrate that the parties' joint ownership of the Property dates back to a 1968 deed to two sisters, Clare Dowd Hayes and Ann Dowd Connolly, and their respective spouses, Edward F. Hayes and Philip Connolly. See Order dated December 8, 2017 with Notice of Decision dated December 13, 2017 (the "December 13, 2017 Order") at 2.[1] The Property was originally part of a larger parcel purchased in 1953 by James Joseph Dowd and Clare Sheehan Dowd, Clare Hayes' and Ann Connolly's parents. Id., App. 193 (family tree). The Trial Court observed that the Property 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. at n.1. Over the years, the two sisters and their families shared use of the Property, ultimately developing a practice where the Connolly family would use the Property for the first half of the summer and the Hayes family would use the Property for the

[1] The December 13, 2017 Order is bound within this brief pursuant to Supreme Court Rule 16(3)(i) and sequentially numbered.

second half of the summer. Tr. 24. The two sides of the family shared the expenses of the Property and performed maintenance. See December 13, 2017 Order at 4.

Philip Connolly passed away on January 6, 1991. See December 13, 2017 Order at 2n.2, App. 7, 13, Paragraph 4 (Petition and Answer). In or about 2000, Clare Dowd Hayes and Edward F. Hayes conveyed their half-interest in the Property to the Hayes Trust. Id. Ann Dowd Connolly conveyed her half-interest in the Property to the Connolly Trust in or about 2003. Id. Edward F. Hayes passed away in 2009 and Clare Dowd Hayes passed away in 2014. Id., at 3. Ted Hayes is the son of Clare and Edward F. Hayes, and upon the death of his mother, he became the Trustee of the Hayes Trust. Tr. 27. As Trustee of the Hayes Trust, the three primary beneficiaries were Ted Hayes and his siblings, Stephen Hayes and Maureen Helfrich. Tr. 16-17, App. 7-9, 13-15. Because Stephen Hayes and Maureen Helfrich were not in a position to contribute financially to the upkeep of the Hayes Trust's half-interest in the Property, and because Ted Hayes could not individually sustain his share of the Hayes Trust's obligation, he asked his son, Mike Hayes, to talk with Jim Connolly, Ann Connolly's son, about a potential resolution. See December 13, 2017 Order at 3-4. This included at least one telephone call and a series of e-mails. Id. at 4-5, App. 179-191.

The parties reached an impasse and the Hayes Trust brought suit for partition. App. 1-9. The Connolly Trust answered and counterclaimed for partition as an alternate remedy. App. 11-21. In August of 2016, the Hayes Trust moved for summary judgment, arguing that there was no dispute that the Property was not capable of a physical partition, and the appropriate remedy was a private auction among members of the Hayes and Connolly families. App. 22-67. In September of 2016, the Connolly Trust for the first time identified a so-called "Property Partnership Agreement" executed by Ann Dowd Connolly, Edward F. Hayes and Clare Dowd Hayes on

November 27, 1992 (the "1992 Agreement"). App. 78-81, 194-198. The 1992 Agreement stated as follows, in pertinent part:

> [u]pon 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.

App. 80, 197.

The Connolly Trust amended its counterclaim to seek enforcement of the 1992 Agreement, App. 91-96. The Connolly Trust also interposed the 1992 Agreement as a reason to deny the Hayes Trust's motion for summary judgment. App. 74-81. The Trial Court, Nicolosi, J., denied the Motion for Summary Judgment on or about November 18, 2016. See Notice of Decision dated November 18, 2016, bound within this brief pursuant to Supreme Court Rule 16(3)(i) and sequentially numbered. The parties prepared for trial, and prior to trial the respondent sought to exclude the testimony of Ted Hayes' son, Michael Hayes, on relevance grounds. App. 118-121. Ted Hayes objected. App. 122-126. In essence, and in support of Ted Hayes' proposed remedy of a public sale—as opposed to enforcement of the 1992 Agreement—Michael Hayes, who was a family member with a strong connection to the Property, proposed to testify about his willingness and ability to purchase the Property on the open market, where that purchase may involve bidding against and out-bidding other prospective purchasers, to realize the highest and best price possible for all concerned. App. 125, 9-12-17 Tr. 16-18, 19-23.

The Trial Court held a hearing on September 12, 2017, 9-12-17 Tr. 1-27, and ultimately granted the motion in limine in part and denied the motion in part. See Order dated September 13, 2017, bound within this brief pursuant to Supreme Court Rule 16(3)(i) and sequentially numbered. The Trial Court ruled as follows:

> [i]n 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. [Michael] 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.

See, id., at 2. With that ruling in place, the parties and the judge took a view of the Property and tried the case on September 20, 2017. See December 13, 2017 Order at 1, Tr. 1-174.

By Order dated December 8, 2017 with a Notice of Decision dated December 13, 2017, the Trial Court ruled that the parties to the 1992 Agreement had abandoned it and it therefore could not, as requested by the respondent, be enforced. See December 13, 2017 Order at 7-8. The Trial Court also confirmed what all of the parties knew, i.e., that the Property was not capable of a physical partition. See, id., at 9. However, the Trial Court went on to specifically enforce the precise terms of Section 6 of the abandoned 1992 Agreement as a remedy for partition, and required the petitioner to sell to the respondent at a value determined by appraisers, rather than the true fair market value as determined by exposing the Property to the open market. See, id., at 9-11. This is especially relevant given the low supply and high demand for waterfront property on Lake Sunapee.

This appeal follows.

SUMMARY OF THE ARGUMENT

The Trial Court erred as a matter of law when it found that the parties had abandoned the 1992 Agreement, and then specifically enforced the terms of the abandoned contract under the guise of a remedy upon partition. It is a matter of black letter law that an abandoned contract cannot be specifically enforced. Having made clear and unequivocal findings that the parties abandoned the 1992 Agreement, it was plain error to then specifically enforce it as a partition remedy.

In essence, the 1992 Agreement issue was determinative of the remedy that would be imposed. Once the Trial Court took it off the table, the parties stood as equal tenants-in-common, and should have been treated as such. A tenancy-in-common brings with it common risks and rewards, or burdens and benefits. The most common benefit of co-ownership is that a co-owner shares the financial burden of valuable waterfront property ownership with someone else. The most common burden of co-ownership is that at any time a co-owner or the co-owner's voluntary or involuntary successor-in-title (such as a creditor), can seek partition for any reason.

In the case below, the Trial Court effectively penalized the petitioner for commencing the partition action, even though he was compelled to do so by his fiduciary duty to the beneficiaries of the Hayes Trust, all of whom did not have the resources to contribute half of the costs of ownership of the Property going forward, and even though the petitioner was entitled to the remedy of partition as a matter of right. Because it was the appellant who commenced the litigation, the Trial Court punished him for it by taking away with one hand what it had just given with the other. That is, a finding that the 1992 Agreement had been abandoned by the original parties. This was particularly erroneous and unjust because the Connolly Trust insisted upon

maintaining the status quo of co-ownership and was, prior to commencement of litigation, unwilling to make an offer to buy-out the Hayes Family Trust's one-half interest in the Property.

Therefore, the petitioner was constricted by: (1) his fiduciary duties; (2) his and his siblings' personal financial conditions; and (3) the respondent's insistence on maintenance of the status quo. He was therefore left by the respondent with no alternative but to file for partition. It was erroneous under these circumstances to make the fact that the petitioner brought suit a basis for resurrecting the abandoned 1992 Agreement, particularly where there was at least one member of the Hayes side of the family willing and able to purchase the Property at or above fair market value. If this Court were to affirm the Trial Court's rationale in penalizing the party who initially brought the partition action, it would severely undermine and change the settled expectations of all tenants-in-common of real property. It should be, and is, irrelevant to the selection of a remedy, which owner filed first and why. Under the Trial Court's logic, the first co-tenant who files a partition action will automatically be placed at a disadvantage because he or she was first to file, and if he or she does so for reasons deemed unworthy or less worthy, even where, as here, the respondent counterclaimed for partition, the first co-tenant will be penalized for filing the action. App. 16-20. This is not, and cannot be, the law of partition, particularly where New Hampshire is full of family-owned vacation properties passing down from generation to generation, such that this fact pattern regularly repeats itself.

The Trial Court also erred by ordering a private sale based on appraisals as dictated by the terms of the 1992 Agreement, as opposed to a private auction or a public listing and sale, where other family members for whom the Property has meaning would have a fair opportunity to purchase the Property. The forced private sale under the terms of the abandoned 1992 Agreement was plain error and contrary to the law. Even so, the remedy ordered was not supported by the

evidence, and it was clearly erroneous given the two exceedingly fair alternatives proposed by the petitioners and rejected by the Trial Court.

In the first instance, it was always clear and undisputed that the Property was not capable of physical partition, so the remedy would have to involve some sort of sale. The fairest remedy was a private auction among the Hayes and Connolly family members, which was the first remedy proposed by the petitioner. A private auction allows family members to make unlimited offers and counter-offers to the point at which the selling party has been offered more money to sell than he or she or anybody else is willing to pay to retain or acquire ownership. This is the essence of fairness, equity and complete justice because it guarantees that the Property with sentimental value will not be sold outside the family, and it will fairly compensate the selling party for parting with real property to which he or she may have an emotional attachment.

Alternatively, the Trial Court's remedy of a private sale based solely on appraisals was erroneous because some of the factors that comprise fair market value are not present in a contested partition action. That is, to some degree, the participants are not willing sellers (or buyers), because the respondent insisted on maintaining the status quo and left the petitioner with no alternative but litigation. App. 181, 183, 190-191. Likewise, the parties are not free of compulsion, because the judicial partition process is compulsory, and economic factors and fiduciary duties are weighing on the petitioner.

The Trial Court also erred when it ruled as irrelevant and excluded testimony from a family member, Michael Hayes, regarding his willingness and ability to purchase the property if it is subject to listing for sale. This evidence was highly relevant to the issue of the appropriate remedy and the petitioner's basic right to maximize the value of his interest in the Property. Because the Trial Court took the additional step of making an evaluative judgment about the petitioner's need

to maximize value for the beneficiaries, knowing about at least one potential purchaser and what he was willing able to pay, was highly probative of which remedy to order.

Absent the proffered but excluded testimony, the Trial Court's rationale in support of enforcing the 1992 Agreement was internally inconsistent. On one hand, the Trial Court concluded that the additional funds to be gained from a private sale would be of a "marginal" benefit to the petitioner. At the same time, the Trial Court reasoned that it would be "grossly inequitable" to ask the respondent to potentially pay some unspecified increased amount in order to increase the ownership percentage from 50% to 100% by purchasing the petitioner's one-half interest. As a matter of law, logic and basic common sense, a monetary sum cannot be "marginal" and "grossly inequitable" at the same time. If an amount is "marginal" then it is, by definition, not "grossly inequitable" to expect someone to pay it to double his or her ownership in a special and sentimental family property. If, on the other hand, an amount is so large that it would be "grossly inequitable" to pay it, then perhaps it is significant enough to justify a public sale to test the market and provide the petitioner with a fair and equitable remedy upon partition. This is particularly the case where, as here, (1) the 1992 Agreement was invalidated; and (2) the respondent had every opportunity prior to forcing the petitioner to file the partition case, to make an offer or try to invoke the 1992 Agreement.

The Trial Court therefore erred as a matter of law when it specifically enforced the terms of a contract that it found had been abandoned. Even if it had the discretion to contradict its most significant ruling, the Trial Court's remedy lacked evidentiary support and logical consistency, and was extremely prejudicial to the petitioner. For those reasons, the Trial Court's decision should be vacated, and the case should be overturned and/or remanded to implement the petitioner's proposed order.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT SPECIFICALLY ENFORCED THE TERMS OF A CONTRACT THE PARTIES HAD ABANDONED.

A. Standard of Review

While this Court will not disturb the factual findings of the Trial Court unless they are unsupported by the evidence or erroneous as a matter of law, "legal determinations and the application of law to fact are reviewed independently for plain error." See Pedersen v. Brook, 151 N.H. 65, 66 (2004) (citing Olbres v. Hampton Co-Op Bank, 142 N.H. 227, 230 (1997) and quoting Fleet Bank-NH v. Chain Constr. Corp., 138 N.H. 136, 139 (1993)). See also Sleeper v. Hoban Family Partnership, 157 N.H. 530, 533, 537 (2008). The Supreme Court reviews claimed errors of law de novo. See, e.g., Massachusetts Bay Ins. Co. v. American Healthcare Servs. Assn., 170 N.H. 342, 348 (2017); In re City of Nashua, 155 N.H. 443, 444 (2007).

"Mixed questions of law and fact concern the application of a rule of law to the facts and the consequent determination of whether the rule is satisfied. [The Supreme Court] will not overturn the trial court's ruling on a mixed question unless it is clearly erroneous. [] If however, the court misapplies the law to its factual findings, [the Supreme Court] review[s] the matter independently under a plain error standard." See Poland v. Twomey, 156 N.H. 412, 414 (2007) (citing Cadle Co. v. Bourgeois, 149 N.H. 410, 415 (2003)).

Regardless of how it is construed, it was plainly erroneous for the Trial Court to specifically enforce, as a partition remedy, a contract that it had found to have been abandoned by the parties.

B. Abandoned Contracts Shall Not Be Specifically Enforced

The petitioner commenced this case as a partition action, seeking the equitable remedy of partition. App. 5-9. Once the respondent discovered the 1992 Agreement, she counterclaimed for breach of contract, App. 95-96, sought a declaratory judgment that the 1992 Agreement is "valid and enforceable", id., and requested that the Trial Court "order transfer of the Hayes Trust's interest to the Connolly's consistent with [the 1992 Agreement's] terms. Id. Put differently, the respondent's counterclaim sought specific enforcement of the 1992 Agreement, i.e., an order on her declaratory judgment claim compelling the petitioner to comply with the "terms" of the 1992 Agreement.

Whether the 1992 Agreement was enforceable was, by far, the most significant and determinative issue in the case below. The parties did not learn about it until August and September of 2016, approximately 9-10 months after the petitioner filed suit. App. 1, 9, 68-97. The parties clearly understood that if the 1992 Agreement is enforceable, then its terms would govern any decision by either party to sell its ownership interest in the Property. If it did not apply, then the parties would be left to the Trial Court's powers under RSA 547-C:25 et seq. to effectuate an equal division of the proceeds of the sale. Instead, with one hand, the Trial Court gave the petitioner the ruling it sought by invalidating the 1992 Agreement, and then took it away with the other by specifically enforcing its precise terms as a partition remedy.

It is well-settled that an abandoned contract may not be specifically enforced. "A contract may be abandoned by the parties, and once abandoned, it may not be specifically enforced." See Gustafson v. Jensen, 515 So.2d 1298, 1301 (Fla. 3d Dist. Ct. App. 1987) (antenuptial agreement) (citing Boswell v. Dickinson, 300 So.2d 61, 62 (Fla. 1st Dist. Ct. App. 1974) (specific enforcement of real estate purchase and sale agreement)); Cuppy v. Allen, 52 N.E. 61, 62 (Ill.

1989) (personal services contract/contract to devise real property) (citing Hale v. Bryant, __ N.E. __, 109 Ill. 34, 38, 1884 WL 9770 at *3) (assignment and debt settlement); Holingreen v. Piete, 52 N.W. 266, 266-267 (Ill. 1892); Blaise v. Stein, 394 N.E.2d 836, 840-841 (Ill. App. Ct. 5th Dist. 1979); King v. Morford, __ A. __, 1 N.J. Eq. 274, 281, 1831 WL 2465 at *6 (holding that "if a party has been grossly negligent of his rights, or has abandoned his contract, equity will not afford him extraordinary relief. The strict rule is this, that the party who comes into equity for a specific performance, must come with perfect propriety of conduct, otherwise he will be left to his remedy at law."); Eddy v. St. Charles Land Co., 271 F. 254, 257 (5th Cir. 1921); and Gerald L. Pollack & Assoc., Inc. v. Pollack, 2015 WL 339715 at *14 (Mich. Ct. App. 2015) (citing Higbie v. Higbie, 11 N.W.2d 248, 256 (1943)).

In this case, the Trial Court looked to the 1992 Agreement and cited RSA 547-C:29's reference to "any contractual agreements entered into between the parties in relation to sale of other disposition of the property", to conclude that "[a]lthough 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." It goes without saying that the reference in RSA 547-C:29 to "contractual agreements" has to and does refer to valid and enforceable "contractual agreements", particularly where the Trial Court had just concluded that the parties had abandoned the 1992 Agreement based on their actions over the 23 years between 1992 and 2015. These findings are inconsistent and irreconcilable, and therefore legally unsustainable. See, e.g., Employers Mu. Cas. Co. v. Nelson, 109 N.H. 6, 14 (1968); In the matter of Carvell and Carvell, 2015 WL 11071129 at *2 (N.H. April 7, 2015) (unpublished order). It was clearly erroneous to look to, adopt, and impose an abandoned "belie[f]" upon the next generation.

Indeed, when a party abandons something, it is because he or she does not want it around and is comfortable with all of the risks that come from that state of affairs, i.e., not having the abandoned item around to use anymore. The original parties, Ann Connolly, Clare Hayes and Edward F. Hayes, by ignoring the 1992 Agreement, not recording it, repeatedly changing the ownership structure, declining to seek enforcement at times when it would have been applicable, and not telling their children about it, made a conscious choice by their unequivocal conduct that they no longer wanted the mutual benefits and burdens of the 1992 Agreement. They were all clearly comfortable without the mutual compulsory appraisal-based private sale provisions of Section 6 of the 1992 Agreement, either as a potential buyer or a potential seller, whatever the case may be. That is why they abandoned it, as the Trial Court found. The three original parties to the 1992 Agreement having made that conscious and informed choice by their unequivocal conduct over the years, it was plain error for the Trial Court to reinstate it verbatim on the next generation as a partition remedy. Indeed, the next generation is even more removed from the abandoned 1992 Agreement than the three original parties who created and then abandoned it. As such, specific enforcement of the abandoned 1992 Agreement is even more unjust and inappropriate.

Having found that the 1992 Agreement was abandoned and not enforceable, the parties were returned to the status of co-tenants with full and equal rights to petition for partition, free from the contractual obligations of the 1992 Agreement. At that point, they stood on an equal footing as tenants in common with an equal and unfettered right to petition for partition, and to receive a fair and equitable price for the sale of a sentimentally significant asset if they did not end up with the Property.

C. The Trial Court Impermissibly Penalized the Petitioner for Seeking Partition

In its rationale for enforcing the 1992 Agreement as a partition remedy, the Trial Court reasoned that "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." See December 13, 2017 Order at 10. In doing so, the Trial Court penalized the petitioner for bringing the petition for partition, limited the potential recovery that could be obtained by placing the Property on the open market, and foreclosed any possibility for any member of the Hayes side of the family to acquire the Property.

Setting aside the basic truth that a party's reason for initiating litigation is and should be irrelevant to the partition remedy, the 1992 Agreement was an agreement between close family members directing what would happen if one of the co-owners or descendants did not want to continue the co-ownership. The Trial Court found that the original parties clearly abandoned it by their consistent actions over the years. It is clear from the finding of abandonment that the parties no longer wanted to be bound by its terms.

In that sense, it is analogous to the prenuptial agreement at issue in Gustafson v. Jensen, supra. If spouses have a prenuptial agreement, and one spouse files a no-fault divorce, and as part of the trial the court determines that they have mutually abandoned the prenuptial agreement, it would not be enforced and the court would instead apply the basic law of property division, with all of the presumptions and legal principles governing it.

It would be anomalous if the judge in a no-fault divorce case with an invalid prenuptial agreement decided to resurrect it and enforce it against the party who decided to file for divorce and successfully invalidated it. It would be even more anomalous if the judge stated that the

reason why he or she was resurrecting and enforcing the prenuptial agreement was because it was the petitioner who wanted to change the status quo of the marriage by filing for divorce. Such is the case here.

Co-ownership of real property brings with it known benefits and burdens that all co-owners or tenants-in-common accept when they become co-owners. An advantage is that a co-owner may have the use of a property he or she may not be able to afford to purchase and maintain individually.

A standard and universally accepted benefit and burden of joint ownership of real property is the risk that circumstances could change with a co-owner. This could include financial problems, deaths, illnesses and other matters which could necessitate a partition action. The occurrences of these events should not be the basis of a punitive order.

It has long been the black-letter law in New Hampshire that:

> [t]he power of compelling partition is incident to all estates held by tenants in common. . . . partition is said to be a matter of right; and the power and manner of compelling partition is prescribed by chapter 228, General Statutes . . . Undoubtedly, the right of partition may be waived by the parties in interest, who, by express condition or proviso, may restrain and inhibit the exclusive beneficial use and enjoyment of estates holden in common or joint tenancy, to any extent short of an absolute restriction of alienation. . . . But, if the language used in a deed is of doubtful meaning; courts will always interpret it with reference to the probable intention of the parties, which must always be made apparent in order to operate as a restraint or incumbrance [sic] upon the full and free enjoyment, title, and control of the property conveyed by deed. Thus, restrictive conditions are never favored in law; and if it be doubtful whether a clause in a deed imports a condition or a covenant, the latter construction will be adopted. . . . Courts, moreover, will avoid either construction, unless the one or the other is plainly demanded by the terms of the deed. If it appear in the slightest degree doubtful whether any restraint upon the full and free beneficial use of an estate conveyed was intended by the parties to a deed, they will look carefully for some motive which may seem to indicate the intention of the parties, and aid the interpretation of the deed.

See Spaulding v. Woodward, 53 N.H. 573, 575 (1873) (internal citations omitted). See also Hoyt v. Kimball, 49 N.H. 322, 324 (1870) (same, and citing Fisher v. Dewerson, 3 Met. 544, 44 Mass.

544 (1842) and holding that covenants will not defeat the right to partition even "where tenants in common covenanted that a certain part of the premises should forever remain to be occupied by them and their heirs and assigns as a yard, it was no bar to having a partition of the premises; but the right to this occupation, in the nature of an easement, would remain after, as before the partition."); Northern N.H. Mental Health & Developmental Services, Inc. v. Cannell, 134 N.H. 519, 521 (1991); Valley v. Valley, 105 N.H. 297, 299 (1964). At any time, one tenant in common has the absolute power and right to seek partition. In a case such as this, where the three beneficiaries of the Hayes Family Trust did not have the finances necessary to support their half of the carrying costs, Tr. 29, 89, December 13, 2017 Order at 4n.3, the petitioner should not have been penalized by the Trial Court for having brought the partition case.

The Trial Court's decision to effectively penalize the petitioner for bringing suit to change the status quo was even more unreasonable and unsustainable given the pre-suit behavior of the respondent. Specifically, in the discussions between Michael Hayes and James Connolly, Mr. Connolly was indifferent as to whether the petitioner sold the petitioner's half interest to them or a third party, and was otherwise adamant that the status quo remain. App. 179, 190, Tr. 36-38, 70-71. Beyond that, it was James Connolly who broke off pre-suit discussions, did not provide any counter-offer/counter-proposal, and indicated that the Connolly family would be comfortable dealing with the matter in court. App. 190. The respondent's steadfast and uncompromising insistence on preservation of the untenable status quo was just as, if not more responsible for initiation of the partition action, than the petitioner's family's circumstances. For that additional reason, it was unlawful and patently unreasonable to penalize the petitioner because he was the one who brought suit.

II. THE TRIAL COURT ERRED WHEN IT DECLINED TO ORDER THAT THE SUBJECT PROPERTY TO BE EXPOSED TO THE OPEN MARKET OR SUBJECTED TO A PRIVATE AUCTION, AS PART OF THE EQUITABLE REMEDY.

A. Standard of Review

In partition proceedings, which are remedial in nature, the Trial Court sits as a court of equity. See e.g., Foley v. Wheelock, 157 N.H. 329, 332 (2008). "The propriety of affording equitable relief in a particular case rests in the sound discretion of the trial court . . ." Id., citing Decker v. Decker, 139 N.H. 588, 590 (1995). This Court reviews equitable orders for an unsustainable exercise of discretion, where the party asserting unsustainability must "demonstrate that the ruling was untenable or unreasonable to the prejudice of his case." Id., citing Poland v. Twomey, 156 N.H. 412, 415-416 (2007).

For the reasons stated in Section I, supra, the Trial Court's remedy on partition is inherently contradictory and legally erroneous because it specifically enforces a contract that has been abandoned by the parties. Nevertheless, the Trial Court's remedy in this case was also unsustainable given the two available alternatives, i.e., a private auction, App. 22-67, or a public sale at which any party could make and match offers from anybody else. App. 171-175.

B. The Trial Court Erred when it Denied the Petitioner's Motion for Summary Judgment Proposing a Private Auction

Relatively early in the case, the petitioner moved for summary judgment on the ground that there was no dispute that the Property was not situated such that it could be physically partitioned. App. 22-67. This was, in fact, undisputed. See December 13, 2017 Order at 9. There was also no dispute, as adduced at trial, that members of both the Hayes and Connolly sides of the family, whether or not they presently held the title of Trustee, had long-term sentimental attachments to the Property. Tr. 96-100, 112-115, 156-166. The Trial Court acknowledged the

meaning that the Property had for "everybody": "And, you know, I'll say that I understand what this means to everybody. It's not lost on me." Tr. 171 and December 13, 2017 Order at 9. James Connolly also acknowledged that the Property has sentimental value to the Hayes side of the family. Tr. 112-113. Under those circumstances, the fairest and most reasonable remedy was the one proposed by the petitioner in his motion for summary judgment, i.e., the private auction where members of the Hayes and Connolly families would have the opportunity to bid against each other for the other's one-half interest in the property.

A private auction, as proposed by the petitioner prior to learning about the 1992 Agreement, is a well-known and commonly-employed tool to resolve ownership disputes between co-owners. See generally Foley v. Wheelock, supra, 157 N.H. 329, 330 (2008); Holman v. Bane, 698 So.2d 117, 118 (Ala. 1997); Giulietti v. Giulietti, 784 A.2d 905, 936-936 (Conn. App. 2001) (citing Doan v. Doan, 302 P.2d 565 (Or. 1956) and holding that "it is not inconceivable that a higher bid may obtain at a private sale than at a public auction. . . . That is especially possible here, where the Giulietti siblings likely place more subjective value on 325 Kelly Road than would an unrelated bidder, due to several decades of family ownership, and where they still own the corporate tenant that would need to negotiate at arms length with an unrelated landowner in determining future rental payments.")

To the extent that the Trial Court was required to reach a result that approximated "complete justice", see, e.g., Pedersen v. Brook, 151 N.H. 65, 67 (2004) (citing Northern N.H. Mental Health & Development Services, Inc. v. Cannell, 134 N.H. 519, 522 (1991)), a private auction was the only viable option that would have afforded all family members a full and fair opportunity to either (1) acquire the Property; or (2) receive more for the Property than the family members are willing to pay to retain it. That is, in a private auction, the participants bid openly

against each other, and they always have one more opportunity to outbid each other. At some point, the bidding will reach a point where one person or group of people has been offered enough money to fully and fairly compensate them for whatever sentimental attachments they have for the Property. On the other side of the equation, the winning bidder or group of bidders may be paying a higher price than would have been achieved on the open market, because of their special connection to the property.[2] See, Giulietti, supra.

Importantly, "complete justice" under the undisputed facts of this case may mean that the purchaser may have to pay more than what an appraiser or a tax assessor may deem the "fair market value", in order to convince the selling party to part with his or her interest in the Property.

Under New Hampshire law, "fair market value" is defined as "the price which in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy, taking into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining." See In re Pennichuck Water Works, Inc., 160 N.H. 18, 37 (2010) (quoting Daly v. State, 150 N.H. 277, 279 (2003)). Likewise, professional appraisers generally define "fair market value" as:

> [t]he most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.

See The Appraisal of Real Estate, 13th Ed. (Appraisal Institute, 2009) at 23. See also Good v. U.S., 39 Fed. Cl. 81, 103-104 (Cl. Ct. 1997). The petitioner's appraisal submitted by the respondent as Exhibit Q defines "market value" as:

---

2 The petitioner's proposed private auction included a reserve price equivalent to the tax assessed value, and provided that the Property would be listed for sale on the open market if no bidders reached the reserve price. App. 30.

> Market value means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:
> 1. Buyer and seller are typically motivated;
> 2. Both parties are well informed or well advised and acting in what they consider their own best interests;
> 3. A reasonable time is allowed for exposure in the open market;
> 4. Payment is made in terms of cash In U.S. dollars or in terms of financial arrangements comparable thereto; and
> 5. The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

See Respondent's Exhibit Q, App. 200.

In this case, the statutory and industry definitions of fair market value assume conditions that do not exist in contested partition cases such as this. That is, the respondent preferred to maintain the status quo of a tenancy in common, even to the point of allowing the petitioner to sell to a third party, App. 19, 124, 190, and therefore the respondent was not an "an owner willing to sell" free of "undue duress" or "undue stimulus". At the same time, Ted Hayes cared deeply about the Property, but was compelled by his personal financial realities and those of his siblings and beneficiaries, to liquidate the Hayes Trust's interest in the Property. Tr. 28-29. As such, he was not, in the legal sense, "an owner willing to sell" or free from "undue duress" or "undue stimulus". The compulsory nature of Ted Hayes' fiduciary responsibilities, the compulsory nature of partition proceedings, and the existence of many Hayes and Connolly family members who may want to retain ownership, sufficiently removed the generally accepted concept of fair market value from the appropriate fair and equitable remedy.

For example, it is well-established that the "sentimental or family historic value typically exceeds the monetary value that a non-family individual would pay for it." See, generally, In re Sempeles, 471 B.R. 178, 180 (Bnkr. W.D.Va. 2012) (citing In re Pullman, 317 B.R. 324 (Bnkr.

W.D.Va. 2004) and discussing state heirloom exemption as it applies to proportional shares in an 860-acre hunting club). The desire of family members to retain ownership of the property is an intrinsic value or intrinsic factor that must be considered in calculating the "fair value" of the property. It may or may not coincide with the "fair market value". See, generally, Trustees of Washington-Idaho-Montana Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 819 P.2d 158, 164 (Mont. 1991) (discussing the correlation or lack thereof between intrinsic value and fair market value in determining fair value of price paid at foreclosure sale).

Given the weight that the Trial Court eventually gave to the desire of the respondent to not risk losing the property and given "both families' strong emotional ties to the Property", see December 13, 2017 Order at 9, the only reasonable and fair remedy likely to afford "complete justice" was the private auction.[3] The Trial Court's exercise of discretion in this matter was unsustainable because no reasonable person could have specifically enforced the 1992 Agreement over and above the "complete justice" afforded by a private auction, particularly after invalidating it.

C. The Trial Court Erroneously Excluded Testimony from Michael Hayes Regarding his Desire, Willingness and Ability to Bid for and Purchase the Property

The petitioner acquiesced in the Trial Court's ruling denying summary judgment, but at trial advocated that the Property be exposed to the open market, such that family members would have the opportunity to bid against third-party purchasers. Implicit in this request was the option of the petitioner or respondent to "credit bid", in the sense that if either the Connolly Trust or the

[3] Notably, the petitioner's proposed private auction took all of the potential factors into consideration, in that it set a floor for the bidding at the equalized tax assessment of $780,000. App. 30. If nobody in the private auction was willing to bid $780,000 or more, the parties were directed to test the market by listing it for sale. Id.

Hayes Trust wanted to purchase the Property, it would only have to come out of pocket for half of the purchase price.

In support of this remedy, the petitioner, Ted Hayes, proposed to have his son, Michael Hayes, testify as to his desire, willingness and ability to purchase the Property, either in a private auction or if the Property is listed for sale on the open market. App. 125, 9-12-17 Tr. 4-6, 15-23. The purpose of this 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 enforcement of the 1992 Agreement would not yield an amount sufficient to fairly compensate whichever party might ultimately not purchase the Property.

The Trial Court excluded the testimony, reasoning as follows:

> 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 September 12, 2017 Order at 2.

This ruling was erroneous because Michael Hayes' proposed testimony supported and made the petitioner's proposed remedy more likely or favorable to the Trial Court than it would be without the evidence. See N.H. R. Evid. 401. Specifically, there was never any dispute that the Property could not be physically partitioned, so any remedy on partition would have to involve some sort of sale. This would certainly be the case if the 1992 Agreement was invalid, as the petitioner urged. Additionally, the respondent did not press any claim for an unequal distribution of the sale proceeds, so there was no dispute that the proceeds from the sale of the Property would be divided equally between the parties. The only real question before the Trial Court was,

therefore, what kind of sale would be ordered pursuant to RSA 547-C. The only four types of sales that exist are public sales, private sales, public auctions and private auctions.

The primary flaw of relying solely on appraisers for relatively unique, low inventory, high-demand Lake Sunapee waterfront property, is that they are tasked with determining the market value that would be achieved after the Property was exposed to the market, without actually listing the Property for sale. Actually listing the property for sale has the effect of drawing out all of the special circumstances that may exist, but which are unknown to the seller. This might include a neighbor willing to pay a premium for additional space, an abutter willing to pay a premium for additional privacy, or some other prospective purchaser with unique or strategic needs that may not be reflected solely by analyzing comparable sales of other properties—to the extent that recent and conforming sales can even be located. These circumstances are common with waterfront property on Lake Sunapee, one of the state's premier family vacation destinations.

Michael Hayes and his interest as a family member with strong connections to the property was documented at trial, and it was clear error to exclude the short and concise additional testimony about his interest in purchasing the Property and his financial wherewithal to do it. Had the Trial Court had the benefit of this testimony, it could have thoughtfully weighed the advantages and disadvantages of a private versus a public sale or auction. Michael Hayes' testimony would have provided an objective benchmark or data point against which to measure the remedy that it ultimately ordered, i.e., how much more can be achieved by listing the property for sale with the opportunity for the Hayes and Connolly family members to counter and bid against prospective purchasers.

Absent this testimony, the Trial Court's self-contradictory and circular rationale for enforcing the 1992 Agreement is based purely on speculation and unsupported by any competent or reviewable evidence.

D. The Trial Court's Rationale for Enforcement of the Abandoned 1992 Agreement is Self-Contradictory and Unsupported by the Evidence

The Trial Court's rationale for enforcing the abandoned 1992 Agreement may be summarized as follows: (1) the petitioner is the party seeking to change the status quo, so the Trial Court will be more protective of the respondent and more solicitous of the respondent's proposed remedies; (2) exposing the Property to a public sale could cause the respondent to lose its half-interest in the Property to another purchaser who is willing to pay more than the respondent is willing to pay; (3) the premium that may be achieved by the Hayes Trust from a public sale is "marginal" or not "so great"; and (4) whatever that "marginal" or not "so great" premium is, it would be "grossly inequitable" to require the respondent to pay it to purchase the petitioner's half-interest in an open market sale.

While reaching those conclusions, the Trial Court had before it several appraisals prepared for potential estate tax/stepped-up basis purposes, as well as some tax cards showing the recent tax assessments. Tr. 65-69, 116. Between the appraisals and the tax assessments, the assessed or appraised values of a 100% interest ranged from a low of $610,500 (2016 tax assessment), Tr. 64, to $740,100 (2015 tax assessment), Tr. 166, with appraisals between $630,000 and $675,000, Tr. 66, 68. Ted Hayes testified that, based on his knowledge of the market and as an owner, he believed that the market value was between $800,000 and $900,000. Tr. 57, 64, December 13, 2017 Order at 4.

The Trial Court, however, had no basis upon which to make an evaluative judgment about the worthiness of Ted Hayes' need, as a fiduciary, to maximize the return to the Hayes Family Trust. This should be and is irrelevant to fashioning a remedy on partition, which is an absolute right held by co-owners of real property. If courts are allowed to make value judgments about the reasons why one party has decided to file for partition, it will completely undermine the basic, settled investment-based assumptions of all joint ownership situations and the availability of a fair and equitable remedy upon partition.

There was also no basis in the evidence to conclude that the additional amount that may be obtained from an open market sale would be "marginal". "Marginal" compared to what? At the same time, the Trial Court had no basis upon which to conclude that the so-called "premium" over fair market value that might be realized from an open market sale was so significant that it would be "grossly inequitable to require the Connolly Trust" to spend that much money to buy it. See December 13, 2017 Order at 10. The fundamental inconsistency in the Trial Court's reasoning is that if the additional amount to be obtained from an open market sale is "marginal", then it is not so much money that it would be "grossly inequitable" for the Connolly Trust to pay it. On the other hand, if the amount that may be achieved really is so significant that it truly would be "grossly inequitable" for the Connolly Trust to have to pay it to hold onto the Property, then it cannot, by definition, be seen as "marginal". It has to be something more significant. By definition and common sense, it is not possible for a dollar amount to be "grossly inequitable" and "marginal" at the same time. It has to be one or the other, and it has to be based on actual evidence.

Setting aside the basic truth that, as stated above, "fair market value" assumes willing market participants and exposure to the market, both of which do not exist here, it was error to

exclude Michael Hayes' testimony as a potential buyer who had a connection to the Property and the wherewithal to buy it. Ted Hayes said that he thought that the Property was worth between $800,000 and $900,000, Tr. 64, even though the available appraisals and assessments ranged from the low $600's to the mid $700's. If Michael Hayes had been allowed to testify and had stated that he liked the Property so much that he would be willing to outbid all offers up to, for example, $850,000, that would have set a legitimate data point from which the Trial Court could have analyzed the competing equities. Is half of a hypothetical $150,000 premium over the appraisals and tax assessments before the Trial Court, or $75,000 "marginal"? How about $50,000? How about $200,000? At some dollar amount, the increase really is "marginal" and it is not unreasonable to actually require the Connolly Trust to pay it. Likewise, there is a dollar amount at which the Trial Court had to acknowledge the Hayes Trust's right to receive full and fair compensation for its one-half interest in the Property, such that it would not be "grossly inequitable" to require the Connolly Trust to "dig deep" to obtain a 100% ownership interest in their "well-beloved" Property. See December 13, 2017 Order at 10. Because of the Trial Court's erroneous ruling excluding the testimony of Michael Hayes, it is impossible to discern any of this from the Trial Court's Order. It is therefore impossible for this Court to review the value judgments and balancing that went into the findings and conclusions below.

E. The Petitioner Supplied Sufficient Evidence of the Hayes Trust's Need to Maximize the Return on its Interest in the Property

In enforcing the 1992 Agreement, the Trial Court made a significant value judgment and concluded that, among other things:

> . . . although Ted Hayes explained that the 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.

See December 13, 2017 Order at 9-10. As noted above, the Trial Court had no specific or reviewable basis to support or explain this value judgment, even though it really should not matter given the invalidation of the 1992 Agreement. This is particularly the case because the Trial Court excluded the proposed testimony by Michael Hayes regarding his interest and financial wherewithal in purchasing the Property. It is crucial to note that the more Michael Hayes or some other third party bid for the property, the more money the Connolly family would realize from the sale. In other words, the Connolly side might not bid enough to get their "beloved property", but they would be compensated for that with more money than their half share was worth.

Nevertheless, the Trial Court had before it clear and un-contradicted testimony that Ted Hayes' brother, Stephen Hayes, had been in an assisted living facility and was, at the time of trial, a patient at Butler Hospital. Tr. 80. Butler Hospital is a psychiatric hospital. His share of the Hayes Family Trust is administered as a special needs trust, Tr. 15-16, 28, as is common with beneficiaries who receive public assistance due to disabilities. Ted Hayes testified that he Stephen is, in fact, on disability and has approximately $73-$75 per month in spending money, Tr. 29, and that the Hayes family needed to take care of Stephen. Tr. 28. While the Trial Court acknowledged in a footnote that Ted Hayes testified that Stephen Hayes "has a disability that hinders his ability to care for himself", see December 13, 2017 Order at 4n.3, it failed to acknowledge the greater issue, which is that for someone who only has about $73-$75 per month in disposable income, thousands of dollars in additional assets in a special needs trust is extremely significant. As noted in the $850,000 hypothetical above, access to an additional $75,000-$100,000 would be transformative for Stephen Hayes' lifestyle, and not "marginal".

More importantly, however, Stephen Hayes' significant needs stemming from his disability, and Ted Hayes' and Maureen Helfrich's financial inabilities to continue maintaining the Property are two of the easily foreseeable risks to the other co-tenant of sharing real property. This is extremely common with waterfront property in New Hampshire, where values have increased significantly since the 1950's and 1960's, and where family circumstances change as these vacation properties pass down through the generations over time.

That the Trial Court discarded the significant needs of Stephen Hayes while enforcing the 1992 Agreement as a punishment of the Hayes Trust for having brought the partition action, further demonstrates the unsustainable internal inconsistencies in the Trial Court's reasoning to support the remedy ordered.

CONCLUSION

Once the Trial Court ruled that the 1992 Agreement had been abandoned and was of no further force and effect, the two tenants in common each had the right to seek partition. Neither party can have the decision to exercise that right held against it. Since this was a special interest property which had enormous intrinsic value to both co-tenants and their families, it was likely that a family member would end up with the property. The side of the family who did not get the property had the right to be compensated as much as possible. Nevertheless, the Trial Court fashioned a remedy, based on an abandoned agreement, which guaranteed that the Connolly side of the family would obtain the property, and the Hayes side would receive less than what was possible and achievable for its interest. The remedy fashioned by the court was extremely inequitable to the Hayes side of the family, and it cannot be sustained. The remedy violates the spirit, intent, and letter of the partition statute.

For the reasons stated above, the appellant respectfully requests that this Honorable Court reverse the December 13, 2017 decision of the Merrimack County Superior Court and enter the appellant's proposed order at App. 171-175, directing that the Property be listed for sale and exposed to the open market, and/or order the private auction under the terms set forth at App. 30, as well as ordering such other and further relief as is just, equitable and appropriate. Alternatively, the appellant respectfully requests that the case be remanded for re-trial with the improperly excluded evidence admitted.

CERTIFICATION PURSUANT TO RULE 16(3)(i)

Pursuant to Supreme Court Rule 16(3)(i), I hereby certify that the decisions being appealed were in writing, and that true and accurate copies of the same are appended to this brief.

Respectfully submitted,

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

By and through his Attorneys,
CLEVELAND, WATERS AND BASS, P.A.

Date: June 8, 2018

By: _____

David W. Rayment, NH Bar No. 2110
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ORAL ARGUMENT

David W. Rayment will argue the case for the appellant and fifteen minutes are requested for this purpose.

_____
David W. Rayment

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of the Appellant have been furnished via hand-delivery to Samantha D. Elliott, Esquire and Robert J. Dietel, Esquire. I further certify that the foregoing Brief of the Appellant conforms with Supreme Court Rule 16(3).

_____
David W. Rayment

COPIES OF DECISIONS BELOW BEING APPEALED

Date	Order	Pages
November 18, 2016	Notice of Decision on Motion for Summary Judgment	31
September 13, 2017	Order on Motion in Limine	32-35
December 13, 2017	Final Order	36-47

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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Concord NH 03302-2880

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NOTICE OF DECISION

DAVID W. RAYMENT, ESQ
CLEVELAND WATERS AND BASS PA
TWO CAPITAL PLAZA
PO BOX 1137
CONCORD NH 03302-1137

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: Samantha D. Elliott, ESQ; Maureen G. Helfrich; Stephen G. Hayes; James Connolly

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 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

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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 Property[1] 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. Connolly[2] 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 lakefront, 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 Property[6] 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't's 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