

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2018 AUG 27 A 11: 56

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AUGUST 2018 TERM

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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

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APPEAL FROM FINAL ORDER OF  
THE MERRIMACK COUNTY SUPERIOR COURT

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REPLY BRIEF OF THE APPELLANT

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David W. Rayment, Esquire (Orally)  
NH Bar No. 2110  
Mark S. Derby, Esquire  
NH Bar No. 13856  
CLEVELAND, WATERS AND BASS, P.A.  
Two Capital Plaza, Fifth Floor  
P.O. Box 1137  
Concord, NH 03302-1137  
603-224-7761

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## STATUTES AND ORDINANCES INVOLVED

### **N.H. Const. Pt. 1, Art. 14**

Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

### **RSA 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.

### **RSA 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.

**Conn. Gen. St. Ann. § 52-503o. Open-market sale. Sealed bids.  
Auction**

(a) If the court orders a sale of heirs' property, the sale shall be an open-market sale unless the court finds that a sale by sealed bids or an auction would be more economically advantageous and in the best interest of the cotenants as a group.

(b) If the court orders an open-market sale and the parties, not later than ten days after the date of entry of the order, agree on a real estate broker licensed in this state to offer the property for sale, the court shall appoint the real estate broker and establish a reasonable commission. If the parties do not agree on a real estate broker, the court shall appoint a disinterested real estate broker licensed in this state to offer the property for sale and shall establish a reasonable commission. The real estate broker shall offer the property for sale in a commercially reasonable manner at a price no lower than the determination of value and on the terms and conditions established by the court.

(c) If the real estate broker appointed under subsection (b) of this section obtains, within a reasonable time, an offer to purchase the property for at least the determination of value: (1) The real estate broker shall comply with the reporting requirements in section 52-503p; and (2) the sale may be completed in accordance with requirements of state law other than the requirements prescribed in sections 52-503f to 52-503r, inclusive.

(d) If the real estate broker appointed under subsection (b) of this section does not obtain, within a reasonable time, an offer to purchase the property for at least the determination of value, the court, after hearing, may:

(1) Approve the highest outstanding offer, if any;

(2) Redetermine the value of the property and order that the property continue to be offered for an additional time; or

(3) Order that the property be sold by sealed bids or at auction.

(e) If the court orders a sale by sealed bids or at auction, the court shall set terms and conditions of the sale. If the court orders an auction, the auction shall be conducted in accordance with the provisions of this chapter.

(f) If a purchaser is entitled to a share of the proceeds of the sale, the purchaser is entitled to a credit against the price in an amount equal to the purchaser's share of the proceeds.

## STATEMENT OF THE FACTS AND OF THE CASE

Pursuant to Supreme Court Rules 16(5) and 16(4)(a), the appellant, Edward F. Hayes, Jr., Trustee of the Survivors' Trust A C/U the Hayes Family Trust dated January 20, 2000, (the "appellant", "Hayes", the "Hayes Trust" or "Edward Hayes"), repeats and incorporates by reference the Statement of the Facts and of the Case set forth at Pages 1-8 of his opening brief dated June 8, 2018.

The appellant disagrees with the description of the 1992 Agreement, set forth at Pages 9-10 of the appellee's Brief. Specifically, although the text of the abandoned 1992 Agreement purports to make it binding on the "decendent's heirs", see Appendix to Brief of the Appellant submitted on June 8, 2018 at Page 80 (hereinafter "Hayes App. 80"), the Trial Court explicitly found that the 1992 Agreement had been abandoned by the parties. See Order dated December 8, 2017 with Notice of Decision dated December 13, 2017 (the "December 13, 2017 Order"), bound within the Brief of the Appellant at Pages 36-47, at Pages 7-8.

Additionally, the appellee also suggests, at Page 12 of the Brief, that the appellant's agreement to re-caption the case is somehow "telling", or an admission of some sort that Michael Hayes has no interest in the property at issue. This is not accurate because the initial petition clearly identified Michael Hayes as the "Agent under a Delegation of Trustee Powers", see Appendix to Reply Brief of the Appellant ("Reply Appendix"), at Pages 22-23, 27-29, which includes the actual delegation document filed with the initial petition, bound within this Reply Brief. As such, he was, at the commencement of this litigation, a party with a legal interest in the subject

property. Moreover, Michael Hayes was a contingent beneficiary and a successor trustee of the Hayes Trust, see Hayes App. 125, and he was at all times working in coordination with Ted Hayes with an eye toward finding a way to keep the property in the family if possible. See Transcript of September 20, 2017 Final Hearing at Page 38 (hereinafter “Tr. 38”).

In footnote 1 on Page 12, the appellee has also tried to create a conflict between one of the alternative prayers for relief set forth in the initial petition, and the more detailed proposals presented to the Trial Court during the pendency of the action. The appellee states that “the Hayes Trust’s petition, which requests valuation through an appraisal process, contradicts their present argument.” The appellee failed to mention that the initial Petition contained the following alternate proposals:

1. Order the sale of the Property either to Mike personally at a market value to be determined by a third party appraiser to be appointed by the Court; or,
2. If the Court determines it to be in the best interests of all of the parties, order the Property to be placed on the market and sold at the highest and best price obtainable in a reasonable period of time; and . . . .

See Hayes App. 9. In any event, the appellant requested a private auction in his motion for summary judgment, see Hayes App. 28-31, and exposure to the open market, with a fair opportunity for any family member to make offers. This relief was also requested at the final hearing. See Hayes App. 171-175.

At Page 15, the appellee’s description of the Trial Court’s reasoning in the December 13, 2017 Order implies that the appellant’s sole interest in the property is an economic need to liquidate, and that the Connolly Trust’s



emotional interest in the property is somehow exclusive to the Connolly family. During the trial, the witnesses for the Connolly family acknowledged that the Hayes side of the family had an emotional connection to the property, Tr. 112 (Testimony of James Connolly) and 169 (Testimony of Ann Maura Connolly), and that was also clear from the testimony of Ted Hayes, Tr. 38, and Michael Hayes, Tr. 99, as well as the Trial Court's closing admonition that he "underst[ood] what this means to everybody." Tr. 171. As such, both sides of the family had a strong emotional attachment to the property, and it was reasonable and equitable to expect that the side that did not end up with the property be equitably compensated for it. Put differently, the Hayes Trust's need to sell does not negate or minimize the Hayes family members' equal sentimental attachment to the property, and the Trial Court's ruling effectively strips them of the right: (1) to allow others, such as Mike Hayes, to keep the property in the family; or (2) to be equitably compensated for parting with their interest in the property.

## ARGUMENT

### I. THE TRIAL COURT'S REMEDY AND RATIONALE REMAIN SELF-CONTRADICTIONARY AND INEQUITABLE.

#### A. Fair Market Value is Not Extortionate to Either Party

Throughout its Brief, the appellee uses inflammatory language, such as “extort”, “extortion”, Page 22, “blackmail”, Page 21, “ransom”, Page 27, “leverage”, Pages 16, 18, 23, and “extract”, Pages 18, 20, 28, to describe the simple and perfectly equitable remedies proposed by the appellant. The evidence at trial was clear that both sides of the family had strong and equal emotional attachments to the property. Family ownership goes back to the 1950’s, the families split their time there equally, and everybody spent as much time there as they possibly could, where they made memories and developed a bond with the property. Ted Hayes obviously regretted that his and his siblings’ financial circumstances were such that they could no longer afford to keep up their half of the costs of owning the property. Tr. 15-16, 29-30, 38, Hayes App. 185-186. There was never any credible or credited suggestion that the Connolly side of the family was more emotionally attached to the property than was the Hayes side of the family. There was therefore no basis for the Trial Court to keep the property with the Connolly Trust and punish the Hayes Trust for bringing the partition action.

Seeking partition was not Ted Hayes’ first choice, but his and his siblings’ circumstances, along with the Connolly Trust’s refusal to entertain anything other than the status quo or a sale by appellant of a half interest to strangers, Hayes App. 179-180, 183, 190-191, compelled him to do so.

There was never a dispute that the property could not be physically partitioned, so the only issue after invalidation of the 1992 Agreement was how the property would be sold. Ordering appraisals of a unique and desirable waterfront property will not arrive at a fair market value as equitably, under the circumstances of this case, as exposing the property to the open market, with an opportunity for family members to meet or beat offers received. Tr. 39, Hayes App. 171-175.

Because of this, the Connolly Trust cannot argue that the Hayes Trust's solution – rejected by the Trial Court – might possibly “force the Connolly Trust to accept an offer that is more than it is able to pay to retain the property”, see Brief at Page 21 (emphasis original), when the Hayes Trust is already unable to pay the costs of the current co-ownership arrangement. The Hayes Trust came before the Trial Court with the need to liquidate its interest in a jointly-owned family vacation property. During this litigation, and today, Ted Hayes is experiencing this circumstance. Ted Hayes is actually suffering the precise harm that the Connolly Trust speculates might befall them. For the Connolly Trust, it is, at most, a remote possibility that someone else may come along and bid more than the Connolly family can physically afford to pay. For the Hayes Trust, that day is here. Therefore, any fair balancing of the equities in this situation would have militated in favor of the Hayes Trust's proposal for exposure to the open market and the ongoing right to outbid ‘outsider’ offers. This is not extortion or ransoming. It is equity after a fair balancing of the parties' interests and positions.

The speculative argument by the Connolly Trust that they may have to pay a “premium” for the property if it is put on the open market is

disingenuous. It is based on their belief that Michael Hayes may make a high bid for the property. However, the Connolly Trust successfully fought to keep Michael Hayes from testifying as to what he would bid for the property. This testimony should have been allowed, but wasn't. Therefore, it can't form the basis for an argument by the Connolly Trust that they might have to pay a "premium" for the property if the property is offered for sale.

This is the kind of reality inherent in all property co-ownership, i.e., that a co-tenant may fall upon hard times and be unable to meet the financial obligations of co-ownership. Ted Hayes and his siblings are just as entitled to receive fair compensation for parting with their "beloved property", as the Connolly Trust is entitled to a fair opportunity to retain it by paying fair market value. It was therefore clear and reversible error for the Trial Court to impute to the Hayes Trust the idea that the property was "a simple economic asset" because "[t]he Hayes Family Trust alone desires to change the family sharing arrangement that has been in place for decades", see December 13, 2017 Order at 10, and completely discount and ignore what the sale means to the Hayes Trust. Every argument advanced by the Connolly Trust as to why it should not have to pay fair market value applies equally to the Hayes Trust's right to receive fair compensation for parting with the same property, and that is consistent with the Trial Court's finding that "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." See December 13, 2017 Order at Page 10. (Emphasis added).

This is a classic example of a litigant being penalized for seeking judicial relief, and if the Trial Court's Order is sustained, it will allow courts to discount the sentimental or emotional attachment of the plaintiff solely because he is the plaintiff. It is also contrary to the letter and spirit of Part 1, Article 14 of the New Hampshire Constitution, which guarantees citizen the right "to obtain justice freely, without being obligated to purchase it."

Beyond that, actually testing the real estate market is always going to be more accurate than employing appraisers who will locate and adjust and reconcile comparable real estate sales. The only remote possibility of the Connolly Trust losing the property will be in the unlikely event that some buyer comes along and is willing to pay dramatically more than the current assessments and appraisals, such that it is beyond the entire extended Connolly family's financial ability to match the offer. If that happens, then the funds received will be an equitable substitute for owning the property.

B. The Trial Court's Rationale Remains Self-Contradictory

In Section II(C) of its Brief, the Connolly Trust attempts unsuccessfully to rationalize the Trial Court's self-contradictory balancing of the equities that caused it to enforce the 1992 Agreement that it just found to have been abandoned. There was nothing out of context or in isolation about Section II(D) of the Hayes Trust's Opening Brief. On one hand, the Hayes Trust reluctantly brought this partition action because it couldn't afford to keep the property and the Connolly Trust broke off pre-suit discussions. Tr. 29, Hayes App. 190. On the other hand, once suit was brought, and if the status quo could not continue, only then was the

Connolly Trust interested in purchasing the Hayes Trust's interest. The Trial Court's only finding about the nature and gravity of the Hayes Trust's financial needs came when it compared it to some unknown premium that an open market sale may cause the Connolly Trust to have to pay, which would "merely" be "to a marginal degree". See December 13, 2017 Order at Pages 4 and 4 n.3, 9-10. Nevertheless, it would be "grossly inequitable" to require the Connolly Trust to pay this "marginal" amount. Instead, the Trial Court accepted and acknowledged Ted Hayes' testimony about the needs of his siblings, but did not indicate whether they were valid, except in the context of whether they justified exposing the property to the open market. If the amount to be paid by the Connolly Trust, over and above what might be arrived at by an appraisal, is "marginal", it cannot be "grossly inequitable" to pay it, particularly where the Hayes Trust is also an unwilling seller because of financial circumstances. The Connolly Trust's suggestion, at Page 28 of its Brief, that the Trial Court somehow impliedly minimized Stephen Hayes' needs as a disabled person, is not in any way discernable from the December 13, 2017 Order. In sum, it cannot be "grossly inequitable" for one owner to pay a co-owner a "marginal" amount, when both co-owners were found to have an equal emotional and sentimental attachment to the property.

In that regard, there is no logical or principled way to reconcile these contradictions in the Trial Court's Order.

## II. THE TRIAL COURT SPECIFICALLY ENFORCED AN ABANDONED CONTRACT.

In Section III of its Brief, the Connolly Trust takes issue with the Hayes Trust's argument that the reference to "any contractual agreements entered into between the parties in relation to the sale or disposition of the property" in RSA 547-C:29, has to mean "enforceable" contractual agreements, rather than contracts that the parties have specifically abandoned. Given the Trial Court's invalidation of the 1992 Agreement, this meaning and qualification could not have been more clear or justified. Once the 1992 Agreement was invalidated, the parties stood as equals and had the right to a fresh remedy that was not dictated by an agreement that had been invalidated.

More importantly, however, RSA 547-C:29 states that a contractual agreement is qualified as one "entered into between the parties". (Emphasis added). The "parties" to this litigation are separate legal entities created in 2000 and 2003. The "parties" to the 1992 Agreement were three natural persons, all of whom are now deceased. If and to the extent that the Trial Court relied upon or could have relied upon the "contractual agreement" portion of RSA 547-C:29, the 1992 Agreement clearly was not an agreement "entered into between the parties" to this litigation. The Trial Court relied strongly on the fact that the "parties" to the 1992 Agreement conveyed their interests to separate entities with no mention of or reference to the 1992 Agreement as being binding on the trusts, see December 13, 2017 Order at Page 7, further compounding the error.

### III. PARTITION BY SALE REQUIRES AN OPEN-MARKET SALE.

In Section II of its Brief, the Connolly Trust suggests that the Uniform Partition of Heirs Property Act (the “UPHPA”), adopted in only 11 states and not New Hampshire, represents a trend in favor of the Trial Court’s remedy, i.e., forced sale of a partial interest based on appraisals. At this point, New Hampshire’s decision not to adopt the UPHPA stands as sufficient justification to ignore this argument. However, in this case, the Trial Court ordered a partition by sale under RSA 547-C:25, entitled “Sale”. This was a forced sale of the Hayes Trust’s interest to the Connolly Trust with no exposure to the open market.

Even under the UPHPA as adopted by Connecticut, the only state in the Northeast to adopt it, when a partition by “sale” is ordered, it must be exposed to the open market, unless sealed bids or an auction would be more advantageous:

(a) If the court orders a sale of heirs' property, the sale shall be an open-market sale unless the court finds that a sale by sealed bids or an auction would be more economically advantageous and in the best interest of the cotenants as a group.

(b) If the court orders an open-market sale and the parties, not later than ten days after the date of entry of the order, agree on a real estate broker licensed in this state to offer the property for sale, the court shall appoint the real estate broker and establish a reasonable commission. If the parties do not agree on a real estate broker, the court shall appoint a disinterested real estate broker licensed in this state to offer the property for sale and shall establish a reasonable commission. The real estate broker shall offer the property for sale in a commercially reasonable manner at a price no lower



than the determination of value and on the terms and conditions established by the court.

...

(e) If the court orders a sale by sealed bids or at auction, the court shall set terms and conditions of the sale. If the court orders an auction, the auction shall be conducted in accordance with the provisions of this chapter.

(f) If a purchaser is entitled to a share of the proceeds of the sale, the purchaser is entitled to a credit against the price in an amount equal to the purchaser's share of the proceeds.

See Conn. Gen. Stat. § 52-503*o*. (Emphasis added). Therefore, under existing New Hampshire law, the Hayes Trust's proposal is consistent with both RSA 547-C:25, entitled "Sale", and the UHPA.


### CONCLUSION

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 Hayes 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 Hayes App. 30, and order 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.

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: August 27, 2018

By:   
David W. Rayment, NH Bar No. 2110  
Mark S. Derby, NH Bar No. 13856  
Two Capital Plaza, Fifth Floor  
P. O. Box 1137  
Concord, NH 03302-1137  
(603) 224-7761

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, in accordance with Supreme Court Rule 26(7), two copies of the foregoing Reply Brief of the Appellant have been furnished via hand-delivery to Samantha D. Elliott, Esquire and Robert J. Dietel, Esquire.

  
\_\_\_\_\_  
David W. Rayment

CERTIFICATE AS TO COMPLIANCE WITH WORD LIMIT

I hereby certify that the within document complies with the word limit for reply briefs and contains 2,982 words.

  
\_\_\_\_\_  
David W. Rayment

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STATE OF NEW HAMPSHIRE

6<sup>TH</sup> CIRCUIT COURT – PROBATE DIVISION

In Re: Michael Hayes, Agent on behalf of 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 dtd 12/22/2003, as Respondent

Docket No. \_\_\_\_\_

PETITION FOR PARTITION OF REAL ESTATE UNDER RSA 547-C

TO THE HONORABLE JUDGE OF PROBATE FOR THE 6<sup>TH</sup> CIRCUIT COURT  
– PROBATE DIVISION, COUNTY OF MERRIMACK:

A. **Parties; Subject Matter.** The Petitioner is MICHAEL HAYES (“Mike”), as Agent under a Delegation of Trustee Powers on behalf of Edward F. Hayes, Jr. (“Ted”), Trustee of the SURVIVOR’S TRUST A (the “Trust”) c/u THE HAYES FAMILY TRUST Agreement dtd January 20, 2000 (the “Trust Agreement”). A copy of the Trust Agreement is attached as Exhibit “A”. A copy of the document by which Ted delegated to Mike Ted’s Trustee powers to bring and prosecute this Petition is attached as Exhibit “B”. Michael is Ted’s son. The Trust owns a one-half, tenant-in-common interest in certain real property located at 140 Bowles Road, Newbury, Merrimack County, New Hampshire (the “Property”), described as “Tract A as shown on a plan of Land entitled “Division of Property of John Dowd, et als, Newbury, New Hampshire, Scale 1” = 50’, Robert S. Bristol, Surveyor, dated September, 1967” (the “Plan”), as recorded in the Merrimack County Registry of Deeds as Number 2253. A copy of the Plan is attached as Exhibit “C”. The Respondent is the other tenant-in-common owning a one-half interest in the Property. The Petitioner seeks an Order that will resolve the deadlock between the Petitioner and the Respondent concerning the sale or retention of the Property as described in this Petition.

B. **Jurisdiction and Venue.** The Court has jurisdiction over this action for the partitioning of real estate under RSA Chapter 547-C, captioned “Partition of Real Estate, Disputed Partition”. The 6<sup>th</sup> Circuit Court – Probate Division (Merrimack County) is the proper venue for this Petition because the Property that is the subject of this petition is located in Merrimack County. See RSA 547-C:2.

C. Summary of Relief Requested. The Petitioner requests that this Court order the sale of the Property under the terms and conditions described in Paragraph B., below, and issue any other relief that the Court deems is just.

D. The Interested Parties. The names and addresses of the interested parties are as follows:

1. Michael Hayes, Agent for the Trustee  
282 Compo Road South  
Westport, CT 06880
2. Edward F. Hayes, Jr., Trustee and beneficiary of the Trust  
41 Freedom Trail Drive  
Portsmouth, RI 02871-1061
3. Maureen G. Helfrich ("Maureen"), beneficiary of the Trust  
3836 Dahlgren Court  
Ellicott City, MD 21042
4. Stephen G. Hayes ("Stephen"), beneficiary of the Trust  
180 Franklin Court, Apt. 224  
Bristol, RI 02809
5. The Respondent, Ann D. Connolly, Grantor, Trustee and sole beneficiary of the Ann D. Connolly Living Trust ("Ann's Revocable Trust")  
8601 Roaming Ridge Way  
Odenton, MD 21116
6. James Connolly ("Jim"), on behalf of Ann Connolly and the Connolly Family  
Department of History  
Burkhardt Building (BB), Room 200  
Ball State University  
Muncie, IN 47306

E. Pertinent Facts.

1. CLARE DOWD HAYES ("Clare"), JOHN DOWD, JAMES DOWD, JR. and ANN DOWD CONNOLLY ("Ann"), all siblings (collectively, the "parties"), transferred a one-half tenant-in-common interests in the Property to: (i) Ted's parents, EDWARD F. HAYES ("Edward") and Clare, as joint tenants with rights of survivorship; and (ii) to G. PHILLIP CONNOLLY ("Phillip") and Ann, who was Phillip's wife, as joint tenants with rights of survivorship, by a deed dated August 20, 1968, and recorded on September 26, 1968 in the Merrimack County Registry of Deeds at Book 1036, Page 345 (Exhibit "D"). The parties also recorded a second deed on October 9, 1968, presumably to correct the notarization of the signatures but obtaining the same result, at Book 1039, Page 1, and recorded a third deed to

clarify the homestead status of the property dated February 20, 1969, on March 29, 1969 at Book 1047, Page 402 (Exhibits "E" and "F").

2. The burdens and benefits of the ownership and use of the Property has historically been shared among Ann, Clare, their spouses and the various Hayes and Connolly "cousins", meaning the children of Ann and Clare. The Property has not been rented to third parties. The co-owners and their descendants split the costs of ownership, maintenance and improvements among themselves according to use and ability to pay.

3. Edward and Clare are designated in the Trust Agreement as the "Trustors". The Trustors funded the Trust with their one-half tenant-in-common interest in the Property by a deed dated January 20, 2000 and recorded on February 11, 2000 in the Merrimack County Registry of Deeds at Book 2193, Page 1725 (Exhibit "G"). A corrective deed to provide the names of the Trustees of the Trust, dated September 13, 2004, was recorded on September 27, 2004 at Book 2704, Page 1778 (Exhibit "H").

4. Phillip passed away on January 6, 1991, survived by Ann. Ann succeeded to Phillip's interest in the Property by her rights of survivorship such that she owned a one-half undivided tenant-in-common interest. Ann transferred her interest in the Property to herself as Trustee of her Revocable Trust by a deed February 4, 2004, and recorded in the Merrimack County Registry of Deeds at Book 2626, Page 177 (Exhibit "I").

5. Edward passed away on March 8, 2009. The Trust's one-half interest in the Property was transferred into the Trust by Clare, the Trust's surviving Trustor, by a deed dated December 3, 2009, and recorded on March 19, 2010 in the Merrimack County Registry of Deeds at Book 3184, Page 1476 (Exhibit "J").

6. Clare passed away April 15, 2014. Ted became the successor Trustee under the terms of the Trust Agreement as the "First Successor Trustee" [Trust Agreement, p. 7] and continues to serve as the Trust's sole Trustee. The Trust has only very limited liquid assets, requiring Ted to apply his own personal funds to pay a substantial portion of the carrying charges associated with the Trust's one-half interest in the Property.

7. The "first line" remainder beneficiaries of the Trust are Clare's children: Ted, Maureen and Stephen. [Trust Agreement, p. 37]. All of them are living. Stephen is disabled and is receiving public assistance in the form of supplemental security disability income ("SSDI"). He has no independent means other than SSDI and other government assistance to meet his needs and provide for his subsistence. Ted has taken it upon himself to provide financial assistance to Stephen to meet his supplemental needs beyond the basic subsistence level of support provided by Stephen's public assistance. Ted himself has limited personal financial resources and cannot continue to support his brother indefinitely.

8. The Trust is in its "winding-up period" following Clare's death. During this period the Trustee marshals Trust assets, and pays debts, expenses, taxes, creditors' claims and specific bequests that are payable out of the Trust's assets, before the Trust's residue can be distributed to the remainder beneficiaries. Upon the termination of that period, Ted is directed to



divide the Trust's residue into equal shares and distribute Ted's and Maureen's shares outright to them. He will hold Stephen's share in a Supplemental Needs Trust ("SNT") that has been established for Stephen's benefit. Because of the illiquid non-income producing nature of the Trust's assets, Ted has a fiduciary obligation to liquidate the Trust's interest in the Property to fund Stephen's SNT and provide for Stephen's supplemental needs and reimburse Ted for his personal expenditures to sustain the Trust's interest in the Property since Clare's death.

9. If the Trust's one-half interest in the Property is split into one-sixth shares among the remainder beneficiaries, the obligation to share in one-half of the Property's carrying charges will fall on Ted, Maureen and Stephen's SNT. Maureen has informed Ted that she is not able to provide financial support for the Property. Neither Ted nor Stephen's SNT have the means to fund the costs of co-ownership. Acting as agent for the Trustee, Mike has informed Ann of Ted's intention to satisfy his fiduciary obligation as Trustee to sell the Trust's one-half interest in the Property.

10. Each of the two family branches have selected a spokesperson to communicate each family branch's position concerning the Property. Mike is the spokesperson for Ted as Trustee of the Trust and the Hayes Family and Jim is Ann's spokesperson and representative of the Connolly Family.

11. Mike and Jim have corresponded numerous times about the sale of the Trust's interest in the Property. Jim has expressed for the Connolly Family an interest in retaining the Property among members of the two family branches, and continuing the families' informal procedure for use and burden sharing. Mike has communicated the Trustee's fiduciary obligation and desire to monetize the Trust's one-half interest. Acting in his personal, not representative, capacity, Mike has proposed to Jim that Mike purchase the Trust's and Ann's Revocable Trust's one-half interests at the Property's fair market value. The Connolly Family did not accept Mike's offer.

12. In an effort to break the deadlock, Mike, in his representative and personal capacities, has presented two possible scenarios for the sale of the Trust's interest in the Property:

a. Allow Mike or the Connolly Family to purchase the other family branch's one-half interest at fair market value, as established by either an appraisal or an agreed fair market value among the parties such that only Mike or the Connolly Family then owns 100% of the Property. If both sides wish to purchase the other side's share, each will make a sealed bid offer for the Property, with the higher bidding family buying the Property. Jim has indicated that the Connolly Family does not have the financial resources or desire to purchase the Trust's one-half interest. Based on conversations that he has had with his aunt, father and his cousins, Mike has concluded that he is the only Hayes family member who has the desire and means to purchase both the Trust's and Ann's Revocable Trust's one-half interests.

b. If neither side wishes to purchase the Property, or refuses to allow a family member to purchase it at an agreed value, place the entire property on the market for sale to a third party.

Jim as Connolly family representative has indicated that neither proposal is acceptable.

13. Mike is bringing this Petition on behalf of the Trustee to resolve this issue as soon as possible. Time is of the essence in this proceeding, as Ted is unable to fund Stephen's SNT until the Trust's interest in the Property is liquidated, and Stephen's financial needs are immediate.

F. **Relief Requested.** The Petitioner requests that the Court:

1. Order the sale of the Property either to Mike personally at a market value to be determined by a third party appraiser to be appointed by the Court; or,
2. If the Court determines it to be in the best interests of all of the parties, order the Property to be placed on the market and sold at the highest and best price obtainable in a reasonable period of time; and
3. Grant such further relief as may be just.

Dated this 24 day of November, 2015.

Respectfully submitted, the Petitioner:

Michael Hayes, as Agent for  
Edward F. Hayes, Jr., Trustee

By his Attorneys,  
McDONALD & KANYUK, PLLC

By: \_\_\_\_\_

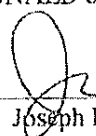
  
Joseph F. McDonald, III, Esquire  
89 North State Street, Concord, NH 03301  
(603) 228-9900  
NH Bar ID No. 1664

Exhibit B

THE SURVIVOR'S TRUST A c/u THE HAYES FAMILY TRUST  
Dtd JANUARY 20, 2000

DELEGATION OF TRUSTEE POWERS

Recitals

1. EDWARD F. HAYES ("Ted") is the Trustee serving under the THE SURVIVOR'S TRUST A c/u THE HAYES FAMILY TRUST Agreement dtd January 20, 2000 (the "Trust Agreement").

2. The Trust Agreement authorizes the Trustee to delegate any or all of such Trustee's rights, powers, duties and discretion as trustee to an agent who will act on the Trustee's behalf.

3. Ted wishes to exercise such power of delegation by delegating to MICHAEL HAYES ("Mike") all of Ted's Trustee powers, duties and responsibilities with respect to the signing, filing, and prosecuting a petition to partition the real property owned by Trust on the Trust's behalf. Such action to be brought in the 6<sup>th</sup> District Court -- Probate Division, Merrimack County, New Hampshire.


4. Mike wishes to accept such delegation.

5. This delegation of powers may be executed in several counterparts, each of which shall be deemed an original, but all of which together will constitute one and the same instrument.

NOW, THEREFORE, as Trustee Ted hereby delegates such powers and responsibilities to Mike, and by signing these presents, Mike accepts such delegation. This delegation shall remain in effect until the successful conclusion of the action being brought on behalf of the Trust or Ted revokes this delegation in a signed writing delivered to Mike. This delegation shall be effective immediately upon its execution. Any revocation of this deletion shall be effective upon its receipt by Mike.

EXECUTED this 12<sup>th</sup> day of November, 2015.

Witness

  
Edward F. Hayes, Trustee and Delegor

Witness

Michael Hayes, Delegee

STATE OF RHODE ISLAND  
COUNTY OF NEWPORT

On this the 18 day of November, 2015, before me, personally appeared Edward F. Hayes, in his fiduciary (and not individual) capacity as Trustee of the Survivor's Trust A, c/u The Hayes Family Trust, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF I hereunto set my hand and official seal.

Barbara A. Sherman  
Notary Public #756551



My commission expires: 7-1-2018

THE SURVIVOR'S TRUST A c/u THE HAYES FAMILY TRUST  
Dtd JANUARY 20, 2000

DELEGATION OF TRUSTEE POWERS

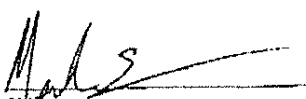
Recitals

1. EDWARD F. HAYES ("Ted") is the Trustee serving under the THE SURVIVOR'S TRUST A c/u THE HAYES FAMILY TRUST Agreement dtd January 20, 2000 (the "Trust Agreement").
2. The Trust Agreement authorizes the Trustee to delegate any or all of such Trustee's rights, powers, duties and discretion as trustee to an agent who will act on the Trustee's behalf.
3. Ted wishes to exercise such power of delegation by delegating to MICHAEL HAYES ("Mike") all of Ted's Trustee powers, duties and responsibilities with respect to the signing, filing, and prosecuting a petition to partition the real property owned by Trust on the Trust's behalf. Such action to be brought in the 6<sup>th</sup> District Court – Probate Division, Merrimack County, New Hampshire.
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EXECUTED this 25<sup>th</sup> day of November, 2015.

\_\_\_\_\_  
Witness

  
\_\_\_\_\_  
Witness

\_\_\_\_\_  
Edward F. Hayes, Trustee and Delegor

  
\_\_\_\_\_  
Michael Hayes, Delegee