

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0136

SAMUEL ROGERS, APPELLANT

v.

JOSEPH ROGERS, APPELLEE

APPEAL OF ORDER OF THE HILLSBOROUGH COUNTY SUPERIOR
COURT SOUTHERN DISTRICT UNDER RULE 7

BRIEF OF APPELLEE, JOSEPH ROGERS

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Appellee notes that Appellant cited to a number of cases, and Appellee discusses these cases below, however, these cases are not on point, they do not discuss RSA 547:3, and as these cases do not apply in this matter, these cases are not listed here individually. Appellee discusses these cases on pages 17 - 26.

TABLE OF STATUTES

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STATUTES

547:3 Jurisdiction. –

I. The probate court shall have exclusive jurisdiction over the following:

- (a) The probate of wills.
- (b) The granting of administration and all matters and things of probate jurisdiction relating to the composition, administration, sale, settlement, and final distribution of estates of deceased persons, including the establishment of death of a person presumed dead and assignment of homestead and claims against the executor or administrator for those services related to the prior care and maintenance of the decedent and the administration of insolvent estates and appeals therefrom.
- (c) The interpretation and construction of wills and the creation by judgment or decree, interpretation, construction, modification, and termination of those trusts described in RSA 564-A:1, I.
- (d) The administration of those trusts described in RSA 564-A:1, I, and the appointment, removal and surcharge of trustees of such trusts.
- (e) The appointment and removal of conservators, and of the guardians of minors, mentally incompetent persons and spendthrifts, and in relation to the duties imposed by law on such conservators and guardians, and the management and disposition of the estates of their wards.
- (f) The adoption of children.
- (g) The change of names of persons who reside in the county and who apply therefor.
- (h) The termination of parental rights.
- (i) Durable powers of attorney for health care under RSA 137-J.
- (j) The interpretation and effect of living wills under RSA 137-J.
- (k) [Repealed.]
- (l) Petitions to quiet title of real estate pursuant to RSA 547:11-c.
- (m) Declaratory judgment actions pursuant to RSA 547:11-b.
- (n) Any other jurisdiction as may be granted by statute.

II. The probate court shall have concurrent jurisdiction with the superior court over the following:

- (a) Subject to RSA 498:4-a, cases involving charitable uses and trusts other than those trusts described in RSA 564-A:1, I, over which the probate court has exclusive jurisdiction as provided in RSA 547:3, I(c) and (d).
- (b) Durable powers of attorney under RSA 564-E.
- (c) Waivers for marriage of minors pursuant to RSA 457:6-457:7.
- (d) Ancillary matters as defined in RSA 547:3-1.
- (e) Petitions for partition pursuant to RSA 547-C.

III. The probate court shall have concurrent jurisdiction with the district court over ancillary matters as defined in RSA 547:3-1.

IV. Nothing in this section shall be construed to confer upon the probate court any additional authority over inter vivos trusts beyond that

authority exercised by the superior court prior to the adoption of this section.

491:7 Jurisdiction. – The superior court shall take cognizance of civil actions and pleas, real, personal, and mixed, according to the course of the common law, except such actions as are required to be brought in the family division under RSA 490-D, district courts under RSA 502-A, or the probate courts under RSA 547; of writs of mandamus and quo warranto and of proceedings in relation thereto; of petition and appeals relating to highways and property taken therefor and for other public use; of actions commenced in the probate or district courts where a right to jury trial is guaranteed by the constitution; of actions commenced in a district court which are transferable by statute to the superior court; of suits in equity under RSA 498:1; of petitions for new trials; of petitions for the redemption and foreclosure of mortgages; of all other proceedings and matters to be entered in, or heard at, said court by special provisions of law; and of all other proceedings and matters cognizable therein for which other special provision is not made.

STATEMENT OF THE CASE

Martha Rogers was deceased on March 10, 2012. Martha Rogers was survived by her husband, Samuel Rogers (Appellant), and her son, Joseph Rogers (Appellee). At the time of her death, Martha owned several parcels of real estate in Hollis, including a 100% interest in a lot of 2.36 acres with a house of 2,772 square feet ("86 Worcester Road"); and a 50% interest in several unimproved lots near Rocky Pond ("the Rocky Pond lots").¹

Martha Rogers left a Will, and in her Will she appointed her son, Joseph, as Executor, and she left 2/3 of her estate to Joseph, and 1/3 of her estate to Samuel. Probate of the Estate of Martha Rogers opened on March 28, 2012 and closed on December 6, 2013.

In the course of administering the Estate, Joseph hired a professional appraiser to appraise the assets of the Estate. The appraiser determined that the value of 100% of 86 Worcester Road was approximately half of the value of 50% of the Rocky Pond lots. Joseph distributed the Worcester Road lot and house to Samuel, and the Rocky Pond lots to himself. Samuel did not object. To the contrary, he requested that he receive the Worcester Road lot and house, and he signed the deeds and gave his consent.

¹ There was another lot as well, which was sold to pay debts of the estate, however, this lot is not in controversy.

On September 20, 2016, Samuel Rogers filed an action in Superior Court against Joseph Rogers, alleging, in sum, that the assets of the Estate of Martha Rogers were not valued properly, and that he did not receive his full 1/3 of the Estate. Joseph Rogers moved to dismiss, as the Superior Court lacked jurisdiction in this matter, as the Probate Court has exclusive jurisdiction over all matters and things of probate jurisdiction relating to the administration, settlement, and distribution of estate assets, under RSA 547:3. On January 16, 2018, the Superior Court dismissed the case, for lack of jurisdiction, in accordance with RSA 547:3. The Superior Court had not addressed the issue of RSA 547:3 prior to January 16, 2018. Samuel Rogers then filed the present appeal.

The Superior Court was not in error in dismissing Samuel's claims due to lack of jurisdiction under RSA 547:3.

STATEMENT OF FACTS

I. Errors with Appellant's Statement of Facts

Under Rule 16(4)(a), the appellee need not make a statement of the case beyond what may be necessary in correcting any inaccuracy or omission in the statement of the appellant. Rule 16(4)(a). Here, the Appellant's Statement of Facts contains a number of errors, which the Appellee deems necessary in correcting. These errors are as follows.

Appellant's Brief, page 4, contains an error by omission. The Appellant omitted that the Will provided that Joseph had the option of distributing the Rocky Pond lots to himself as his share of the estate. Appx. 16 (Will, Second Article, B).

In Appellant's Brief, pages 4-5, Appellant uses the term "Land Swap." It is not clear what exactly Appellant means by "Land Swap," but the phrase implies an exchange of land. To clarify, there was no exchange of land. Samuel Rogers did not transfer any land or thing of value to Joseph Rogers. Rather, there was a disbursement of estate assets, in accordance with the terms of the Will. Appx. 16 (Last Will and Testament); Appx. 21-26 (Deeds); Appx. 50-59 (Requests for Admissions). Furthermore, any such agreement as to estate assets, or as to real estate, would need to be in writing to be enforced (RSA 506:1 – 506:2), and there is no such writing.

In Appellant's Brief, page 5, footnote 3, Appellant wrote, "The probate estate was subsequently reopened, Case No. 316-2017-EQ-

0089...” More accurately, in 2017, after Samuel Rogers brought an action against Joseph Rogers, Joseph Rogers moved to re-open the Probate of the Estate of Martha Rogers, case no. 316-2012-ET-00595, and the court re-appointed Joseph as Executor, and Joseph then brought a separate action against Samuel, no. 316-2017-EQ-89, to enforce the “no contest” clause of the Third Article of the Last Will and Testament of Martha Rogers. Joseph Rogers claims, to enforce the “no contest” provision of the Will, were in effect counterclaims to Samuel Rogers’ action, and once Samuel’s action was dismissed, Joseph withdrew his claims.

In Appellant’s Brief, page 5, Appellant wrote, “...Samuel uncovered an appraisal commissioned by Joseph in 2005...” It is not clear to what document Appellant is referring, as no such document appears in the record. Appellee’s best guess as to what Appellant is referring is a document created in 2005, which document states that it is not an appraisal. See Exhibit A. Furthermore, as Martha Rogers was deceased in 2012, the only relevant time for the value of assets is 2012, and the value in 2005 would be irrelevant. See e.g. RSA 554:1 (“...The inventory shall contain a detailed itemized list of all real and personal property and the fair market values thereof as of the decedent’s date of death...”). Furthermore, Samuel Rogers claims to have “uncovered” this document in his house, where he has lived since 1978, which makes his claim that he “uncovered” the document in 2015 not credible.

In Appellant's Brief, page 5, Appellant wrote, "...Joseph possessed a 2008 appraisal of the Rocky Pond Property..." It is not clear to what document Appellant is referring, as no such document appears in the record. Appellee's best guess as to what Appellant is referring is an appraisal that was done for a different estate in 2016, with a date of value of 2008. See Exhibit B. As this appraisal was done in 2016, there is no way it could have been in Joseph Rogers' possession in 2012 or 2013. Furthermore, again, the date of 2008 is not relevant in an estate in 2012. RSA 554:1.

II. Corrected Statement of Facts

As Appellant's Statement of Facts contains a number of errors, Appellee submits the following corrected Statement of Facts.

Martha Rogers was deceased on March 10, 2012. She was survived by her husband, Samuel Rogers (Appellant), and her son, Joseph Rogers (Appellee).

At the time of her death, Martha owned several parcels of real estate in the Town of Hollis, including a 100% interest in a lot of 2.36 acres with a house of 2,772 square feet ("86 Worcester Road"), and a 50% interest in several unimproved lots around Rocky Pond ("the Rocky Pond lots").²

² There was another lot as well, which was sold to pay debts of the estate, however, this lot is not in controversy.

Martha left a Will. In her Will, Martha appointed Joseph as her Executor, and left 1/3 of her estate to Samuel, and 2/3 to Joseph. Furthermore, the Will provided that Joseph could allocate the Rocky Pond lots to his share.

B. Two-thirds (2/3) to my said son Joseph H. Rogers, if he survives me. My said son shall have the right to request that any interest I may own in real property located at or near Rocky Pond in Hollis, NH and currently managed as the Rocky Pond Association be allocated to his share, and my Executor shall have the authority and discretion to make any necessary arrangements to accomplish this allocation.

Last Will and Testament of Martha Rogers, Second Article, B. Appx. 16.

Samuel Rogers requested that 86 Worcester Road (the lot with the house) be allocated to his share.

Joseph Rogers hired a professional appraiser to appraise the assets of the Estate. The appraiser determined that the value of 100% of 86 Worcester Road was approximately one half the value of 50% of the Rocky Pond lots.

Joseph Rogers used the values from the appraisal for the Inventory. Samuel Rogers did not object to the Inventory. Joseph Rogers distributed the Estate assets as follows: 86 Worcester Road to Samuel Rogers; the Rocky Pond lots to Joseph Rogers. Samuel Rogers did not object. To the contrary, Samuel Rogers gave his consent to these transfers and signed the deeds. Appx. 21-26. Joseph Rogers filed an Accounting accordingly. Samuel Rogers did not object. To the contrary, Samuel Rogers submitted receipts for the real estate he received. Appx. 13-15.

After receiving 86 Worcester Road, Samuel Rogers mortgaged it. See the Mortgage Deed to MERS for \$487,500.00 dated October 24, 2013, recorded at Book 8617 Page 0613 in the Hillsborough County Registry of Deeds, and the Mortgage Deed to the Secretary of HUD for \$487,500.00 dated October 24, 2013, and recorded at Book 8617 Page 0625 in said registry.

Years later, in 2016, Samuel Rogers brought an action against Joseph Rogers, in case no. 226-2016-CV-00487. Appx. 1-6. In sum, Samuel Rogers complained that the value of the Estate assets was not accurate, and that he did not receive his full 1/3 share of the Estate.

All of Samuel Rogers claims concern the administration, settlement, and distribution of estate assets. See paragraphs 19, 23, 28, and 31 (“...At all relevant times hereto the Defendant was the executor of Martha’s estate...”). Appx. 1-6.

As all of Samuel Rogers’ claims concern the administration, settlement, and distribution of estate assets, the Probate Court has exclusive jurisdiction under RSA 547:3. Therefore, Joseph Rogers moved to dismiss the case from the Superior Court. The Superior Court dismissed the case for lack of jurisdiction, in accordance with RSA 547:3. Samuel Rogers then brought the present appeal.

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SUMMARY OF ARGUMENT

NH SUPREME COURT

On appeal, the appellant has the burden to demonstrate reversible error. In this case, the Appellant cannot meet this burden. The Superior Court did not commit any reversible error.

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All of Samuel Rogers' claims in case no. 226-2016-CV-00487 concern the administration, settlement, and distribution of estate assets. See paragraphs 19, 23, 28, and 31 ("...At all relevant times hereto the Defendant was the executor of Martha's estate..."). Appx. 1-6.

As all of Samuel Rogers' claims concern the administration, settlement, and distribution of estate assets, the Probate Court has exclusive jurisdiction under RSA 547:3. Therefore, the Superior Court was not in error in dismissing the case for lack of jurisdiction, in accordance with RSA 547:3.

Samuel Rogers cites to a number of cases, however, these cases are not on point, they do not discuss RSA 547:3, and none of these cases negate RSA 547:3.

Furthermore, the relief Appellant requests would lead to absurd results, in which anyone who was a beneficiary to an estate could challenge the administration of the estate years later in superior court. Clearly such a position is contrary to New Hampshire law.

For these reasons, the appeal of Samuel Rogers should be denied.

ARGUMENT

On appeal, the appellant has burden of showing reversible error. See e.g. Gallo v. Traina, 166 N.H. 737, 740 (NH 2014); Coyle v. Battles, 147 N.H. 98, 100 (NH 2001).³ Here, Appellant cannot meet this burden.

The Superior Court was not in error in dismissing the case for lack of jurisdiction in accordance with RSA 547:3. All of Samuel Rogers' claims in case no. 226-2016-CV-00487 concern the administration, settlement, and distribution of estate assets. See paragraphs 19 ("...At all relevant times hereto the Defendant was the executor of Martha's estate..."), 23, 28, and 31, of the Complaint, Appx. 1-6. The Probate Court has exclusive jurisdiction over claims concerning the administration, settlement, and distribution of estate assets, under RSA 547:3. Therefore, the Superior Court was not in error in dismissing the case for lack of jurisdiction, in accordance with RSA 547:3.

I. The Probate Court Has Exclusive Jurisdiction Under RSA 547:3.

The Probate Court has exclusive jurisdiction over the administration, settlement, and distribution of estate assets under RSA 547:3.

³ At this point in the Appellant's brief, the Appellant cites to a case that is not on point, *State v. Gordon*, 146 N.H. 324, 326 (2001), which concerns an international extradition for criminal charges ("Whether the doctrine of specialty barred defendant's incarceration based on his probation violation is a question of law, which we review de novo. This doctrine, which applies to extradition treaties, is based on principles of international comity. It requires that persons who are surrendered by a government for prosecution based on specific alleged criminal activity will not be subject to indiscriminate prosecution by the receiving government. The extradition treaty between the United States and Belgium incorporates the doctrine of specialty.") (citations omitted). As the present case does not concern the doctrine of specialty, this case is not on point.

- I. The probate court shall have exclusive jurisdiction over the following:
- (a) The probate of wills.
 - (b) The granting of administration and all matters and things of probate jurisdiction relating to the composition, administration, sale, settlement, and final distribution of estates of deceased persons, including the establishment of death of a person presumed dead and assignment of homestead and claims against the executor or administrator for those services related to the prior care and maintenance of the decedent and the administration of insolvent estates and appeals therefrom.
 - (c) The interpretation and construction of wills and the creation by judgment or decree, interpretation, construction, modification, and termination of those trusts described in RSA 564-A:1, I.

RSA 547:3, I (a) – (c) (emphasis added).

Similarly, the Superior Court does not have jurisdiction over probate matters.

The superior court shall take cognizance of civil actions and pleas, real, personal, and mixed, according to the course of the common law, except such actions as are required to be brought in the family division under RSA 490-D, district courts under RSA 502-A, or the probate courts under RSA 547...

RSA 491:7 (emphasis added).

All of Appellant's claims arose during the probate of the Estate of Martha Rogers, and all of Appellant's claims arose from actions Appellee took as Executor in administering the Estate and distributing Estate assets. Appx. 1-6. All of Appellant's claims were against Defendant as Executor in the Estate. Id. ("...At all relevant times hereto the Defendant was the executor of Martha's estate..." Appx. 1-6, paragraphs 19, 23, 28, and 31.) In Count I, Appellant alleged that Defendant breached his fiduciary duties as Executor in the Estate of Martha Rogers. In Count II, Plaintiff alleges that Defendant as Executor committed constructive fraud. In Count III, Plaintiff alleges that Defendant was negligent in executing his duties as Executor. In Count IV, Plaintiff alleges that

Defendant's actions as Executor led to him being unjustly enriched. All of Plaintiff's claims are against Defendant as Executor.

Appellant attempts to argue that his claims are "personal" and are against Appellee "as an individual." However, a review of the claims, as discussed above, shows that all of the claims concern the probate of the Estate of Martha Rogers, and the administration of that Estate, and the valuation of assets of the Estate, and the distribution of those assets, and all of the claims are against Appellee in his role as Executor.

Furthermore, Appellant admitted that whatever rights Appellant had in the title to the land that is the subject of this action arose from the Last and Will Testament of Martha Rogers. Appx. 50-59 (Requests for Admissions, nos. 22 - 23).

Appellant's claims arise from his being a beneficiary under the Last Will and Testament of Martha Rogers. In sum, Appellant claimed that the value of the real estate that went to Appellee's share of the estate was incorrect, and therefore the Appellant did not receive the full 1/3 to which he was entitled under the Last Will and Testament of Martha Rogers.

In *Frost*, the Court determined that the plaintiff was not a legatee, heir, or creditor of the deceased, and thus the claim was not against the estate: "The plaintiff's action for the value of certain personal property which was allegedly hers has not been argued by either counsel. This action is not controlled by RSA556:1-3 since it involves no claim by the

plaintiff as a legatee, heir or creditor. *Rice v. Connelly*, 71 N.H. 382, 52 A. 446. Such a claim is against the defendant but not against the estate.” *Frost v. Frost*, 100 N.H. 326, 329 (NH 1956).

Appellant in this case is the exact opposite of the plaintiff in *Frost*. Appellant is a legatee and heir of Martha Rogers. Therefore, Appellant’s case does involve the Estate of Martha Rogers.

The Probate Court ruled that “All of the allegations in the Superior Court complaint concern the administration of the estate of Martha Rogers,” and, “RSA 547:3 speaks for itself.” Exhibit C (Order of the Probate Court dated August 18, 2017).

Under RSA 547:3, I (b), the Probate Court has exclusive jurisdiction over “[t]he granting of administration and all matters and things of probate jurisdiction relating to the composition, administration, sale, settlement, and final distribution of estates of deceased persons ...” RSA 547:3 (emphasis added). In sum, Appellant alleged that in course of administering the Estate, the value for the Rocky Pond land was incorrect, and that Appellant did not receive the full 1/3 he should have received under the Last Will and Testament of Martha Rogers. All of Appellant’s claims were about the administration, settlement and final distribution in the Estate of Martha Rogers. Therefore, under RSA 547:3, the Probate Court has exclusive jurisdiction over Plaintiff’s claims.

A. Appellant Cites To Cases That Are Not On Point.

Appellant cites to a number of cases that are not on point. These cases do not discuss RSA 547:3. Appellant depicts these cases as saying that the Probate Court does not have exclusive jurisdiction under RSA 547:3. However, these cases are either not on point, or they confirm that the probate court has exclusive jurisdiction (e.g. *DiGaetano v. DiGaetano*, 163 N.H. 588 (NH 2012), *In re Estate of Porter*, 159 N.H. 212 (NH 2009), *Lisbon Sav. Bank & Trust v. Moulton's Estate*, 91 N.H. 477 (NH 1941)). These cases are discussed briefly below.

Appellant cites to *In re Cigna*, 146 N.H. 683 (NH 2001) (Appellant 10). This case concerns whether or not the probate court had jurisdiction to hear certain claims of CIGNA in the charitable trust matter concerning Optima, CMC, and the Elliot hospitals. As the present matter does not concern a charitable trust this case is not on point.

Appellant cites to *Wood v. Stone*, 39 N.H. 572 (NH 1859) (Appellant 10, 11). This 1859 case discusses whether or not the probate court could rule on the validity of an assignment of a beneficiary's share in an estate. As the present matter does not concern an assignment of a beneficiary's interest, this case is not on point.

Appellant cites to *In re Bunker's Estate*, 110 N.H. 285 (NH 1970) (Appellant 11). This 1970 case concerns a claim by an executor against a bank where the deceased opened a bank account in the beneficiary's name, and whether or not the opening of the bank account in the

beneficiary's name constituted a completed gift to the beneficiary. As the present matter does not concern an action by the Executor against a third party, or the issue of whether or not a gift was complete, this case is not on point.

Appellant cites to *In re Guardianship of Simard*, 141 N.H. 525 (NH 1996) (Appellant 11). This case concerns a guardianship matter involving a minor plaintiff in an action in superior court, and the trust created and funded by the proceeds of that case. As the present matter does not concern guardianship or a trust, this case is not on point.

Appellant cites to *Kelley v. Peerless Ins. Co.*, 121 N.H. 253 (NH 1981) (Appellant 11). This 1981 case concerns the validity of settlement agreements with third parties by an executor when the executor obtained his appointment by fraud. As the present matter does not concern settlement agreements with third parties, or with a fraudulently-obtained appointment, this case is not on point.

Appellant cites to *In re Estate of O'Dwyer*, 135 N.H. 323 (NH 1992) (Appellant 11). This case was superseded by *In re Estate of Porter*, 159 N.H. 212 (NH 2009) (“...Accordingly, to the extent Fleming and O'Dwyer construed RSA 559:1 as limiting the probate court's jurisdiction over real estate, they have been superseded by the current statutory scheme...”). In *In re Estate of Porter*, the Court confirmed the probate court's jurisdiction.

Appellant cites to *In re Muller*, 164 N.H. 512 (NH 2013) (Appellant 11). *Muller* is a divorce case and concerns the jurisdiction of the family division, not the probate court. The jurisdiction of the family court and the probate court are different. Therefore, this case is not on point.

Appellant cites to *Tsiatsios v. Tsiatsios*, 144 N.H. 438 (NH 1999), and *Tsiatsios v. Tsiatsios*, 140 N.H. 173 (NH 1995) (Appellant 11). These cases involve an action by a decedent's children against decedent's second wife, to whom the deceased had transferred title to certain real estate prior to his death, contrary to an oral promise he made to his children to give them the real estate. As the present matter does not concern pre-death transfers or oral promises, this case is not on point.

Appellant cites to *Patey v. Peaslee*, 101 N.H. 26 (NH 1957) (Appellant 11). This 1957 case concerns an action to annul a marriage, fraudulent concealment, and a constructive trust (the plaintiffs, the decedent's children, argued that the decedent's marriage to the defendant was done fraudulently, in order for the defendant to become the primary beneficiary of the decedent's estate). As the present matter does not involve annulling a marriage allegedly obtained by fraud, or a constructive trust, this case is not on point.

Appellant cites to *Rice v. Connelly*, 71 N.H. 382 (NH 1902) (Appellant 12). This case from 1902 involves a bailment situation which occurred prior to the decedent's death. As the present matter does not involve a pre-death bailment, this case is not on point.

Appellant cites to *Blanchard v. Calderwood*, 110 N.H. 29 (NH 1969) (Appellant 12). This 1969 case involves an action arising from the oral promise the decedent made to the plaintiff before death. As the present matter does not concern a pre-death oral promise, this case is not on point.

Appellant cites to *Mansfield, Adm'r v. Holton*, 74 N.H. 417 (NH 1907) (Appellant 12). This case from 1907 involves title to real estate vesting in the heirs, and disputes regarding the payment of the debts of the decedent, and the costs of administration of the estate, and the real estate in the estate. In the present matter, there is no dispute as to the payment of the decedent's debts or cost of administration, and therefore this case is not on point.

Appellant cites to *Duncan v. Bigelow*, 96 N.H. 216 (NH 1950). This 1950 case concerned the concurrent jurisdiction at that time for the probate court and superior court in matters concerning trusts. Here, the present case does not concern a trust, and thus this case is not on point.

Appellant cites to *DiGaetano v. DiGaetano*, 163 N.H. 588 (NH 2012) (Appellant 12). This case concerns a trust, and which court had jurisdiction under the 2007 version of RSA 547:3. Here, in the present case, there is no trust, which makes the present case slightly different from *DiGaetano*. Although *DiGaetano* concerns a trust, it does have language that could assist this Court in its analysis of this matter, "We determine the probate court's jurisdiction by examining 'the nature of the

claim' at issue," and, "whether the action relates to an estate, will, or trust." *Id.* at 591. Using this analysis, all of Plaintiff's claims arise from allegations that he did not receive the full amount he was due under the Last Will and Testament of Martha Rogers, and all of Plaintiff's claims are against Defendant in his role as Executor of the Estate of Martha Rogers, and all of Plaintiff's claims arise from transactions that occurred during the administration of the Estate. The Plaintiff's claims do not concern third parties, or transactions prior to Martha Roger's death, or after the Estate was closed. All of Plaintiff's claims concern the administration of the Estate of Martha Rogers, and the settlement and final distribution of that Estate. Therefore, under this analysis, the Probate Court has exclusive jurisdiction under RSA 547:3.

Appellant cites to *Lisbon Sav. Bank & Trust v. Moulton's Estate*, 91 N.H. 477 (NH 1941). This 1941 case concerns an action by a creditor against the estate for debts of the decedent. As the present case does not concern the debts of the decedent, this case is not on point. However, even if this case were relevant, despite it being from 1941, it has language that is consistent with the Court's Order of January 16, 2018, for example: "By the constitution and the statute, the probate court has exclusive, original jurisdiction of the settlement and distribution of the estates of deceased persons. The superior court has no power to require an administrator to account for his administration upon a bill in equity or to revise proceedings in the probate court..." and, "While the

[superior] court may upon request advise the administrator as to the execution of his trust in a proper case, it has no power to advise or direct in advance the action of the probate court, or to interfere with due administration therein,” and, “By statute the probate court “has jurisdiction of the probate of wills, and of granting administration, and of all matters and things of probate jurisdiction relating to the sale, settlement, and final distribution of the estates of deceased persons. The jurisdiction of the supreme judicial court in such matters is simply appellate.”” Id. At 479-81.

The case to which Appellant cited are either not on point, they do not discuss the current version of RSA 547:3, or they support the Superior Court’s decision to dismiss Appellant’s claims due to lack of jurisdiction under RSA 547:3.

B. Appellant Cites To Federal Cases That Are Not On Point.

Appellant cites to a number of federal cases which are also not on point. The federal cases are not on point because they concern federal jurisdiction, which is not at issue in this case. Secondly, these cases interpret the jurisdiction of the probate courts in states in which the federal courts are sitting, and none of these cases concern New Hampshire probate courts. These cases do not discuss NH RSA 547:3. Therefore, these cases are not on point. These cases are discussed briefly below.

Appellant cites to *Dinger v. Gulino*, 661 F.Supp. 438 (E.D.N.Y. 1987). This New York case concerns an action by an executor against a third party, and diversity jurisdiction, and whether or not there is an exception to diversity jurisdiction.

Despite the existence of diversity jurisdiction, defendant argues that the Court should not exercise its jurisdiction because the case falls within the probate exception to diversity jurisdiction. This argument, too, lacks merit. While federal courts have no power to probate a will, administer an estate, or entertain any action that would interfere with probate proceedings pending in a state court or with the state court's control over property in its custody, they can adjudicate claims in personam that do not "disrupt the probate court's administration of the estate." In the Second Circuit, the standard for determining whether federal jurisdiction may be exercised is "whether under state law the dispute would be cognizable only by the probate court."

Id. at 442-43. Here, in this case, the Appellant's claims were cognizable only by the probate court, under RSA 547:3, as discussed above. Also, if this appeal were granted, the effect would be to reconsider the valuation of estate assets, and possibly alter the distribution of those assets, which would "disrupt the probate court's administration of the estate." Therefore, this case is either not on point, or supports the exclusive jurisdiction of the probate court under RSA 547:3.

Appellant cites to *Marshall v. Marshall*, 547 U.S. 293 (2006) (Appellant 13). This case concerns the bankruptcy of Vickie Lynn Marshall a/k/a Anna Nicole Smith, and claims in that case for defamation and tortious interference, and federal court jurisdiction, and probate court jurisdiction in Texas. Here, the present case does not involve bankruptcy, or defamation, or tortious interference, or a question of federal jurisdiction, or Texas probate court jurisdiction, and therefore

this case is not on point. Furthermore, this case has been questioned by *Abercrombie v. Andrew College*, 438 F.Supp.2d 243 (S.D.N.Y. 2006), 04-CV-7717.

Appellant cites to *Mangieri v. Mangieri*, 226 F.3d 1 (1st Cir. 2000). This case found that an action brought by an heir was a probate matter and therefore fell within the probate court exception to federal diversity jurisdiction.

Appellant cites to *Breaux v. Dilsaver*, 254 F.3d 533 (5th Cir. 2001) (Appellant 14), in which an executor of two estates was accused of siphoning off funds from one estate and funneling them into the second estate. *Id.* at 537. The alleged fraud did not correlate directly to either probate proceeding and could be properly addressed in this separate action in federal court. In contrast, in this case, the Appellant's claims correlated directly to the probate of the Estate of Martha Rogers, and the administration of the Estate, and the valuation of assets of the Estate, and the distribution of those assets. Therefore, this case is not on point.

Appellant cites to *Harhay v. Starkey*, 2010 WL 1904874 (D. Mass. May 10, 2010) (Appellant 14). This case involved the issues of federal court jurisdiction, Massachusetts law, and a default due to failure to comply with discovery obligations, and, as such, this case is not on point.

Appellant cites to *Junco Mulet v. Junco de la Fuente*, 228 F.Supp2d 12 (D.P.R. 2002) (Appellant 14). This case concerns federal jurisdiction

and Puerto Rico law, and, as such, is not on point. Furthermore, in this case, in which the plaintiff alleged that the executor failed to satisfy his duties as executor, and that he was negligent, the Court determined that the probate exception to federal jurisdiction applied in this case.

Appellant cites to *Lightfoot v. Hartman*, 292 F.Supp 356 (W.D. Mo. 1968) (Appellant 14). This case concerns federal jurisdiction and Missouri law and is therefore not on point. Furthermore, in this case, in which the plaintiff alleged that administrator withheld assets from the estate, and that the inventory that the administrator filed was false and fallacious, the Court held that the probate exception to federal jurisdiction applied.

The federal cases to which Appellant cited concern federal law and the jurisdiction of probate courts outside of the State of New Hampshire, and, as such, are not on point.

II. The Court Did Not Address RSA 547:3 Prior To Jan. 16, 2018.

Appellant argues that the Superior Court's Order of January 16, 2018, in which the Superior Court dismissed Appellant's claims for lack of jurisdiction under RSA 547:3, was somehow contrary to some prior order. However, Appellant is in error. Prior to January 16, 2018 the Superior Court had not addressed the issue of RSA 547:3.

In the Order of December 15, 2016, the Superior Court addressed the issue of RSA 556:3. However, the Superior Court did not address the issue of RSA 547:3.

In the Order of March 7, 2017, the Superior Court referenced its Order of December 16, 2016 (by which the Superior Court meant the Order of December 15, 2016), which did not address the issue of 547:3.

The Superior Court did not address the issue of RSA 547:3 prior to January 16, 2018. Therefore, there was no “law of the case” or right to appeal a decision on the issue of RSA 547:3 prior to January 16, 2018.

Appellant cites to *Ross v. Eichman*, 130 N.H. 556 (NH 1988). This case concerns specific performance under a real estate contract and is not on point.

Appellant cites to *State v. Wilkinson*, 136 N.H. 170, 177 (NH 1992), which is a case concerning criminal law and the marital privilege, and, as such, is not on point.

Appellant cites to *Goudreault v. Kleeman*, 158 N.H. 236, 250 (NH 2009), which involves medical malpractice and an answer to a question from the jury, and, as such, is not on point.

Appellant cites to *Jackson & Sons v. Lumbermen’s Mut. Casualty Co.*, 86 N.H. 341, 341 (1933), which is a case that involves a company in Ohio suing an insurance company in Illinois over an insurance policy, and the New Hampshire court declined jurisdiction, and, as such, this case is not on point.

Appellant has not produced any authority to support his position. In sum, the Superior Court did not address the issue of RSA 547:3 prior to January 16, 2018, which is the order that is the subject of this appeal.

III. Appellant's Request Would Produce Absurd Results.

In effect, what Appellant is requesting is that once a probate is closed, if a party to the probate is not satisfied with the result, the party could bring an action against the executor or administrator in Superior Court, at any time. This request, if granted, would produce absurd results, in which the Superior Court would act as an appellate court to the Probate Court. Clearly, New Hampshire law provides that the Supreme Court, and not the Superior Court, has appellate jurisdiction. The Probate Court has exclusive jurisdiction over the probate of wills, and all matters and things of probate jurisdiction relating to the administration, sale, settlement, and final distribution of estates, as discussed above. New Hampshire law provides that "[i]t is the policy of the law to insure the speedy administration and distribution of estates of deceased persons." Mitchell v. Estate of Smith, 90 N.H. 36, 38 (N.H. 1939) (citations omitted). To allow a beneficiary to sue an executor in Superior Court several years after probate is closed would be contrary to New Hampshire law.

CONCLUSION

On appeal, the burden is on the Appellant to show reversible error. Here, the Appellant has failed to meet this burden. To the contrary, the Superior Court was right to dismiss Appellant's action in Superior Court for lack of jurisdiction under RSA 547:3. All of Appellant's claims are related to the probate of the Estate of Martha Rogers, and actions Appellee took as Executor during the probate of the Estate, and the administration and distribution of estate assets. Therefore, the Probate Court has exclusive jurisdiction under RSA 547:3. For these reasons, Appellant's appeal should be denied.

Respectfully submitted by
The Appellee, Joseph Rogers,
By his attorneys,
Bielagus Law Offices PLLC

Dated: June 25, 2018

By: /s/ Jason A. Bielagus
Jason A. Bielagus
NH Bar # 19469
28 Jones Road
Milford, NH 03055
Tel. (603) 554-1612

CERTIFICATION

I hereby certify that I hand-delivered or sent by first class mail two copies of the pleading to the other counsel in this case.

Dated: June 25, 2018

By: /s/ Jason A. Bielagus
Jason A. Bielagus

Heath Appraisal Services

14 EVERETT STREET
MANCHESTER, NH 03104

SCOT D. HEATH
(603) 634-4356
FAX (603) 634-4357

November 7, 2005

Joseph Rogers
1143 Center Road
Lyndeborough, New Hampshire 03082

RE: Limited Restricted Summary Appraisal Report; fee simple interest in eight parcels totaling approximately 94.3 acres of vacant land, located on Rocky Pond and Rocky Pond Road, Hollis, New Hampshire.

Dear Mr. Rogers:

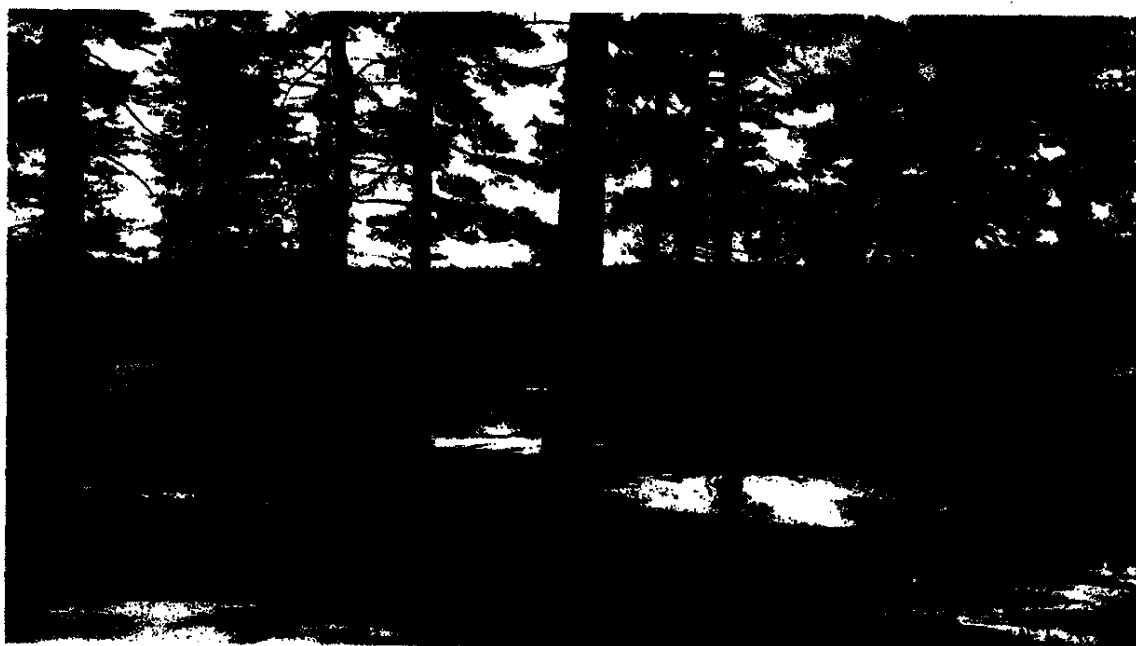
In accordance with your request, the purpose of this letter report is to communicate the results and conclusions of my investigations and analyses in regard to the market value applicable to the fee simple interest in the subject property as above referenced. It must be noted this letter report is prepared under the departure provisions of the Uniform Standards of Professional Appraisal Practice (USPAP) and as such, is considered to represent a "Limited Restricted Summary Appraisal Report". This letter is not intended to be a substitute for the customary, formal, complete, fully documented narrative appraisal report, although the appraiser has complied with the instructions, standards, and specifications of the Uniform Standards of Professional Appraisal Practice (USPAP) as promulgated by the Appraisal Foundation in conducting the research and analysis in formulating the conclusions as reported herein.

Purpose of this limited appraisal and restricted use, summary report is to communicate to you, my client, an opinion of the likely market value applicable to the fee simple interest in the subject property as of the most recent date of inspection, November 7, 2005. The intended use of this report is to assist with general decision making in regard to the potential sale of the subject property to the Town of Hollis. Intended users of this appraisal

EXHIBIT A

APPRAISED PROPERTY

A 150.17 Acre Parcel
Located on Rocky Pond Road in Hollis & Brookline, NH
And Owned by: The Nancy Bliden 1994 Trust



Prepared for:
Fredricka B. Olson
P.O. Box 1593
Hollis, NH 03049

Prepared By:
Kevin A. McManus

Date of Value: June 18, 2008

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McManus & Nault Appraisal Company, Inc.
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Tel. (603) 230-9788 FAX (603) 856-7829
E-mail Address: kevinamcmanus@comcast.net
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EXHIBIT B

August 19, 2016

Ms. Fredricka B. Olson
P.O. Box 1593
Hollis, NH 03049

RE: Appraisal of a 150.17± acre parcel, located on Rocky Pond Road in Hollis & Brookline, NH and owned by the Nancy Bliden 1994 Trust.

Dear Ms. Olson:

In accordance with your request, I have prepared, and am submitting herewith, an appraisal of property owned by the Nancy Bliden 1994 Trust, located on Rocky Pond Road in Hollis & Brookline, NH. The purpose of the appraisal is to estimate the market value of the subject property. The intended use of this appraisal is to determine the value of the property for estate purposes as of June 18, 2008, the date of passing of Nancy Bliden. As of the date of value, the subject ownership represents a 50% interest in the appraised property, the remaining 50% interest being owned by Martha B. Rogers, sister of Nancy Bliden.

The subject comprises a 150.17± acre parcel encompassing 15 lots of record in Hollis, NH and one in Brookline, NH. The property fronts on the town-maintained Rocky Pond Road and Hayden Road in Hollis, and has a total 4,879'± frontage on Rocky Pond. As per 1990 subdivision approvals by the Town of Hollis, 9 of the above lots, encompassing 97.58± acres with 4,575'± of pond front, are developable single family residential lots. The remaining 52.59 acres, as per the above subdivision plan, are designated as "open space" to be owned in common by the owners of the developable lots and are restricted from development in-perpetuity. The following tabulates the subject by town assessor's map & lot, including parcel size and highlighted open space lots.

Nancy Bliden 1994 Trust Property - Hollis, NH

McMANUS & NAULT APPRAISAL CO., INC.

THE STATE OF NEW HAMPSHIRE

JUDICIAL BRANCH

NH CIRCUIT COURT

HILLSBOROUGH COUNTY

9TH CIRCUIT - PROBATE DIVISION - NASHUA

Joseph H. Rogers, Executor, v. Samuel J. Rogers, Beneficiary
Case No. 316-2017-EQ-00889

Estate of Martha B. Rogers
Case No. 316-2012-ET-00595

ORDER

These matters came before the court on July 26, 2017 for a motions hearing. Appearing at the hearing were Joseph Rogers, executor of the estate of Martha Rogers and beneficiary thereunder, and his attorney, Jason Bielagus, Esq.; Samuel Rogers, beneficiary and surviving spouse of Martha Rogers, and his attorney, Seth Greenblott, Esq.

These two cases concern the will of Martha Rogers and the distribution of the estate assets. Samuel Rogers is the surviving spouse of the decedent and a beneficiary under her will. Joseph Rogers is the son of the decedent, nominated in the will and appointed as executor of the estate, and a beneficiary under the will. Martha Rogers was deceased on March 10, 2012. A petition for estate administration was filed by Joseph Rogers. The estate was administrated and the first and final account was approved October 17, 2013. The case was closed on or about December 6, 2013.

In April 2017, the executor filed a motion to re-open the estate in order to file an equity action seeking the enforcement of the *in terrorem* (or no-contest) clause against the beneficiary, Samuel Rogers.

Samuel Rogers, the surviving spouse and beneficiary under the estate, had filed an action in the Hillsborough Superior Court South against the executor of the estate, Joseph

Rogers, alleging that he had breached his fiduciary duties, engaged in constructive fraud, committed negligence in administrating the estate, and unjustly enriched himself in the distribution of estate assets. All of the allegations in the Superior Court complaint concern the administration of the estate of Martha Rogers.

The executor, Joseph Rogers, filed a petition in this court seeking to impose the *in terrorem* clause in the will of Martha Rogers.

The surviving spouse/beneficiary filed a Motion for a Safe Harbor Ruling and Motion to Dismiss, or in the Alternative to Stay Off Proceedings Pending the Disposition of the Superior Court Action. Samuel Rogers argued in his pleadings and at the hearing that an absolute bar to the imposition of the *in terrorem* clause is that the administrator had breached his fiduciary duties. Samuel Rogers argued that the court could not at this time make a determination as to whether the *in terrorem* clause should be enforced.

Joseph Rogers, through his attorney, argued in his pleadings and at the hearing that this court has exclusive jurisdiction under RSA 547:3 (b) of "[t]he granting of administration and all matters and things of probate jurisdiction relating to the composition, administration, sale, settlement, and final distribution of estates of deceased persons. . ." Thus, the Superior Court action should not proceed because all counts in the complaint concern the administration of an estate and whether the fiduciary had taken appropriate actions. Joseph Rogers argued those determinations are exclusively within the jurisdiction of the probate court.

Joseph Rogers had filed a motion to dismiss the superior court action arguing that the probate court had such exclusive jurisdiction. The superior court rejected such argument

stating that the action was filed as a tort claim for which the superior court could take jurisdiction.

RSA 547:3 speaks for itself. The probate court is granted exclusive jurisdiction as to the administration, settlement and distribution of an estate. Petitioner is seeking an order from this court that will directly contradict the order of the superior court. This court will not disrupt the ruling of the superior court in the companion case. It is not within the purview of this court to determine whether the superior court exceeded its jurisdictional limits.

After consideration of the information provided at the hearing as well the pleadings and exhibits provided by the parties, the court finds and rules as follows:

1. Given that this matter is currently being litigated in the superior court as to the breach of fiduciary duty, the motion to stay the petitioner's equity action is **GRANTED**.
2. The parties shall each file a status report on each December 1st and June 1st until the superior court action is resolved.

SO ORDERED.

August 18, 2017
Date


Patricia B. Quigley, Judge