State of New Hampshire
Supreme Court

NO. 2018-0202

2018 TERM

NOVEMBER SESSION

Evelyn Tarnawa

v.

Richard Goode

RULE 7 APPEAL OF FINAL DECISION OF THE
HILLSBOROUGH COUNTY (NORTH) SUPERIOR COURT

BRIEF OF PLAINTIFF/APPELLEE, EVELYN TARNAWA

November 19, 2018

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STATEMENT OF FACTS

The parties, Evelyn Tarnawa and Richard Goode, are sibling co-inheritors of their mother's home in Manchester, New Hampshire. For many years after their mother's death, Evelyn[1] forbore from selling her share, while Richard continued living in the house. The issues in this case arose from Evelyn learning from the City that Richard had not been paying real estate taxes during his long residence, and that he had been untruthful with her about it, prompting Evelyn to consummate her long-expressed intent to exit the co-ownership.

I. Siblings Jointly Own Deceased Mother's House in Manchester

Evelyn's and Richard's mother, Stella Goode, owned an urban residence in Manchester, New Hampshire. The lot is about 100 feet square, and the house was the siblings' childhood home. *Trial*[2] at 18, 76; ORDER (Jan. 29, 2018); APPRAISAL OF SINGLE FAMILY RESIDENCE (Dec. 29, 2008), *Appx.* at 90 (¼ acre ±); FIDUCIARY DEED (Nov. 21, 1968), *Appx.* at 127.

Evelyn has long made her life in Connecticut. *Trial* at 76. Richard has resided in Stella's home since 2004, and continues living there. *Trial* at 17, 26-27, 96, 105-09. In 2006 Stella executed a will, leaving the house "in equal shares" to Evelyn and Richard. WILL (June 22, 2006), *Appx.* at 5.

As she aged, Stella became a ward, with the Office of Public Guardian serving as conservator of her estate. CERTIFICATE OF APPOINTMENT (Oct. 3, 2008). Evelyn and Richard were appointed co-guardians of Stella's person, but Evelyn declined because Stella wished to remain in her New Hampshire house, and Evelyn felt she could not be effective from Connecticut, *Trial* at 44, 99, 108, making Richard guardian of Stella's person. CERTIFICATE OF

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[1]First names are used herein due to shared surnames. No disrespect is intended.

[2]*Trial* refers to the transcript of the December 19, 2017 trial, in the appellate record.

APPOINTMENT (Feb. 27, 2008). Toward the end of her life, Stella was committed to the New Hampshire Hospital. NOTICE OF CHANGE (July 2, 2009).[3]

[3]What appears to be the entire prior record of probate court proceedings were made a part of the superior court record in this matter, as "Defendant's Exhibit A," and admitted as a full exhibit. EXHIBIT LIST - BENCH TRIAL (Dec. 19, 2017), *Appx.* at 32; *Trial* at 16; PORTIONS OF PROBATE RECORD, *Appx.* at 77. The probate court record contains numerous documents related to both the probate of Stella's will, *Estate of Stella Goode*, Hills.Cnty.Prob.Ct. No. 316-2009-ET-01621, and to the guardianship of Stella's estate and person. *Guardianship Over Stella A. Goode*, Hills.Cnty. Prob.Ct. No. 316-2007-GI-02474. There appears, however, to be no provision in the superior court record for maintaining confidentiality of the guardianship record, RSA 464-A:8, VI, but no dispute regarding their contents. Consequently, guardianship documents cited herein are omitted from the appendix to this brief.

II. Summary Administration of Mother's Estate

Stella died in July 2009 with Evelyn and Richard as devisees of Stella's will. As co-executors, both hired lawyers for the probate proceeding. Evelyn employed Attorney Daniel W. O'Shaughnessy, of Manchester; Richard employed Attorney J. Marlin Hawthorne, of Pembroke, Massachusetts.

During administration of the estate, an appraisal was done, which estimated the house was worth $135,000 in 2008. APPRAISAL OF SINGLE FAMILY RESIDENCE (Dec. 29, 2008), *Appx.* at 90. Although the estate had sufficient liquidity to pay its obligations, HOME EXPENSES (July 13, 2009), Exh. H, *Appx.* at 30, it appears some estate expenses were paid by Evelyn or Richard personally. *Trial* at 89, 103, 113. The siblings did not talk about administration expenses, however, *Trial* at 81, and Evelyn did not pay any real estate taxes. *Trial* at 88, 89, 102-03, 113.

The will was uncontested, and the probate estate was closed in January 2011 pursuant to a jointly-filed Summary Administration. RSA 553:33. Both Evelyn and Richard attested "there are no outstanding debts, obligations or unpaid or unresolved claims attributable to the deceased's estate." MOTION FOR SUMMARY ADMINISTRATION (Dec. 13, 2010) (granted by margin order (Jan. 24, 2011)), *Appx.* at 14; NOTICE TO TOWNS AND CITIES (of real estate passed by inheritance) (Jan. 12, 2011), *Appx.* at 152.

III. Negotiations About Future Co-Ownership, No Written Agreement, Oral Understanding, Conduct of the Parties

During administration of the estate, Attorneys O'Shaughnessy (for Evelyn) and Hawthorne (for Richard) recognized that issues might arise post-probate regarding Richard and Evelyn sharing expenses for the jointly-owned property. Accordingly, starting shortly after Stella's death, and continuing for several months, they traded letters attempting to negotiate an agreement. Although their attempt at a written agreement ultimately failed, the parties reached an understanding, and conducted themselves accordingly.

A. Attempts at Written Agreement

In July 2010, O'Shaughnessy sent a proposed agreement to Hawthorne, noting the siblings are "tenants in common," and proposing that Evelyn would "defer the sale" of her inheritance while assenting to Richard residing in the house. (PROPOSED) AGREEMENT (July 9, 2010) (unsigned), Exh. B, *Appx.* at 7. In exchange, Richard would timely pay "all expenses associated with ... use and occupancy ... including ... taxes, insurance, utilities, upkeep and maintenance"; keep the property "clean and habitable"; and not sublet. O'Shaughnessy proposed that Richard's failure to comply with these terms would allow Evelyn to sell at an agreed-upon price, and Evelyn would provide four months' notice of sale. *Id.*; *Trial* at 58.

In his cover letter asking Hawthorne to obtain Richard's signature, O'Shaughnessy observed to Hawthorne that, "given that [Evelyn] is forbearing on the sale of the homestead ..., this is a reasonable request." LETTER FROM O'SHAUGHNESSY TO HAWTHORNE (July 9, 2010), Exh. B, *Appx.* at 9. Hawthorne issued a quick reply, noting he forwarded the proposed agreement to Richard. LETTER FROM HAWTHORNE TO O'SHAUGHNESSY (July 15, 2010), Exh. C, *Appx.* at 10.

Two weeks later, Hawthorne wrote another letter to O'Shaughnessy, replying to a communication not in the record. Richard had had medical issues

and was hospitalized for a period, and wanted to avoid paying costs during the time he was away. Thus, Hawthorne wrote that Richard's "offer to pay [costs] from the time he came home from the hospital was more than reasonable. Now that you tell me that Evelyn wants [Richard] to be responsible for the taxes from the date of Stella's death, it would appear that we do not have an agreement." LETTER FROM HAWTHORNE TO O'SHAUGHNESSY (July 28, 2010), Exh. D, *Appx.* at 11. Hawthorne then noted:

> Our options at this point would ordinarily be to ... list the property for sale by the estate or to close out the estate and deed the home to the two of them as tenants in the entirety.[4] The problem with the latter option, however, is that [Richard] has apparently paid some of the estate bills himself, which leaves us with unsettled distribution. The problem with the former alternative is that the property would be very difficult to sell in this market.

Id.[5]

Several month passed, and no agreement was signed. A letter in the probate court record from Hawthorne to his client Richard reveals in detail why Richard rejected Evelyn's proposal, and why the future-costs issue was abandoned. LETTER FROM HAWTHORNE TO RICHARD (Oct. 15, 2010), Exh. A, *Appx.* at 13. Hawthorne wrote to Richard:

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[4]This is clearly an error, as Richard and Evelyn are (obviously) not married, and tenancy by entirety "was abolished in New Hampshire in 1860." *Boissonnault v. Savage*, 137 N.H. 229, 231 (1993).

[5]Hawthorne also expressed chagrin that "the home should have been gifted to [Richard] under the caretakers exemption," citing a federal statute. It is understood, however, that the "caretakers exemption" is a benefit that would accrue to Stella, allowing her to avoid loss of Medicaid in the event she had deeded the property to Richard. It is not a method of gifting as Hawthorne implies, and there are no facts in the record to determine whether the exemption would have benefitted Stella. *See* 42 U.S.C. 1396p.

> I have already told Attorney O'Shaughnessy to tell his client that we reject the proposed agreement. In the interim that leaves us with an impasse as to who is responsible for what bills. *During this impasse however you have possession of the home*. If Evelyn wants to advance the matter of selling the house, the principal asset, she can do so, however you can buy a lot of time that way. You have to agree upon a sales price and it [is] hardly a market where things are selling. Despite all the mounting difficulties of an unsettled agreement, where your personal situation is recovering, *you benefit more form* [sic] *not having to worry about moving right away*. For that reason I have not sought to advance judicial determination of the dispute. The other reason for not seeking judicial determination of the disputes is that attorneys fees could easily eat up the estate, which I am trying to avoid. Therefore, *my recommendation in that regard is that we not push the issue, because it is a stalemate with you in possession of the fort*.

Id. (emphasis added).

A few days later, O'Shaughnessy wrote to Hawthorne reiterating Evelyn's "generous offer" of forbearing from selling and accepting Richard's continued residence. LETTER FROM O'SHAUGHNESSY TO HAWTHORNE (Oct. 19, 2010), Exh. E, *Appx*. at 15. O'Shaughnessy expressed frustration that Richard was "willing (as from his perspective he should) to allow the status quo to continue indefinitely." O'Shaughnessy said, however, that Evelyn was not so willing, "unless she receives some good faith indication that all matters can be [timely] resolved." In the absence of that, Evelyn would go to court seeking "rent from [Richard] for the period ... he has resided at the homestead, and sale of the homestead." *Id.*

Finally, Hawthorne answered O'Shaughnessy, denying any generosity by Evelyn, firmly rejecting the written agreement, and explaining Richard's

understanding:

> The estate is responsible for taxes, insurance, non-routine maintenance, and structural repairs until the house is sold or transferred. [Richard] is responsible for utilities while he resides there, but not while he was in the hospital and the house was vacant. I believe there are unpaid real estate taxes and possibly insurance. If Evelyn does not want to pay for needed repairs to the house, so be it. Sale of the house is a non-issue. I would agree to listing the house for sale now, if Evelyn would prefer.

LETTER FROM HAWTHORNE TO O'SHAUGHNESSY (Oct. 22, 2010), Exh. F, *Appx*. at 16.

B. Oral Understanding and Conduct of the Parties

In trial testimony, O'Shaughnessy, Evelyn, and Richard all agreed that at the time of the estate administration, it was probably in nobody's interest to divide and sell the property. *Trial* at 23-24, 62-63, 67-68, 88. Richard had a sentimental attachment to the Manchester house, was living rent-free, and his alternative housing options were limited. Evelyn understood it was a poor sellers' market, but knew she could not afford expenses of the Manchester house and also maintain her Connecticut home. *Trial* at 100, 125, 128, 133-34.

Evelyn believes their "impasse" or "stalemate," combined with conversations, nonetheless created between them an oral agreement. *Trial* at 9. She and Richard would co-own the premises, Evelyn would for the time being forbear from realizing her real estate inheritance, and Richard would have free, solitary use and enjoyment of the house. In exchange, Richard would maintain the property. *Trial* at 76, 85, 87-88, 92, 103-04. Evelyn understood these were the terms both because of the impasse, and because when she orally proposed those terms to him, Richard appeared to acquiesce. *Trial* at 81.

Richard has vacillated on whether an oral agreement existed. In his Answer and in one interrogatory, Richard seems to concede that an oral agreement existed, though he disagrees with Evelyn as to its terms. COMPLAINT ¶ 8 (Dec. 6, 2016), *Richard's Appx.* at 3; ANSWER ¶ 8 (Feb. 17, 2017), *Richard's Appx.* at 7; INTERROGATORIES ¶¶ 4.1, 4.2 (Mar. 27, 2017), *Appx.* at 22, 27. In a separate interrogatory and in his testimony, Richard denied the existence of an agreement. INTERROGATORIES ¶ 3; *Trial* at 48, 116.

Richard concedes that at the time of the estate administration, he understood that Evelyn did not have sufficient funds to maintain the New Hampshire house, *Trial* at 90-91, 100, but that Evelyn had rejected his alleged offer to buy her out for half the $135,000 appraised value. *Trial* at 30, 120. Richard nonetheless claims to have believed that Evelyn would nonetheless be

responsible for expenses of the property. *Trial* at 12-13.

In the years since, the parties appear to have acted in accord with some agreement. Evelyn forbore from selling the house, made no claim to its use or enjoyment, and assumed no responsibility for its costs or maintenance.

Richard continued living on the property. *Trial* at 90-91, 94, 99-101, 116-17, 136. He paid some of the costs of maintenance, including real estate taxes through 2011. He paid for household expenses including lawn care, an exterminator, and repair or maintenance of stairs, windows, and a porch. ORDER (Jan. 29, 2018) at 2, 4, 5 n.4, *Richard's Appx.* at 58; *Trial* at 15, 117, 122; INTERROGATORIES ¶ 4; RECEIPTS FOR HOUSEHOLD EXPENSES (Jan. 1, 2016), Exh. K, *Appx.* at 48; INSURANCE BILL (Jan. 6, 2014), Exh. G, *Appx.* at 42; MISC. BILLS & RECEIPTS (Apr. 13, 2015), Exh. J, *Appx.* at 34-67; EXTERMINATOR INVOICE (Aug. 20, 2012), Exh. I, *Appx.* at 39; CITY OF MANCHESTER TAX COLLECTOR ACCOUNT SUMMARY (Dec. 4, 2017), Exh. 3, *Appx.* at 68; MEMO FROM TAX COLLECTOR (Dec. 7, 2017), Exh. 5, *Appx.* at 71.

The siblings were in regular contact over the years, with Richard staying at Evelyn's home in Connecticut from time to time. *Trial* at 46, 77. Except for one insurance bill in 2012 (which Evelyn declined), Richard never asked Evelyn to share any expenses of the property, never told her he was behind on tax or utility bills, never suggested she had tax or utility obligations, and never consulted her before making infrastructure changes or improvements to the house. *Trial* at 76-79, 81-84, 88-94, 116-19, 135; INTERROGATORIES ¶ 4.2.

IV. Evelyn Aghast When Told of Tax Arrearage

From 2009 on, as the resident, Richard was the recipient of Manchester city tax bills, *Trial* at 129, but he did not tell Evelyn anything about them, and Evelyn knew nothing. ORDER at 2 (Jan. 29, 2018). In 2016, with no forewarning, Evelyn received a call from the Manchester tax collector. The City apprised her that real estate taxes and water utilities had not been paid on the house for seven years, that tax and utility arrearages were over $35,000, and that she was responsible for payment. *Trial* at 10, 77, 79-80, 92-93; ORDER (Jan. 29, 2018) at 2, 6. Evelyn testified that during the phone conversation, "they didn't even know who I was – or until I told them that Richard Goode was my brother. Then they said, well you realize he's behind? And I says, no. This was his responsibility, not mine." *Trial* at 92.

As of December 2017, real estate taxes due were $25,479.09, interest and penalties were $8,290.50, and interest was accruing at $11.17 per day. There was a total tax and penalties arrearage of $33,803.13, and there was an additional arrearage for water and sewerage utilities. CITY OF MANCHESTER TAX COLLECTOR ACCOUNT SUMMARY (Dec. 4, 2017), Exh. 3; MEMO FROM TAX COLLECTOR (Dec. 7, 2017), Exh. 5. When the tax clerk told her this, Evelyn said, "I was devastated. And when she told me the amount that was due, she said would you like to hear more, and I said no. I just couldn't even comprehend what she had just told me." *Trial* at 80.

Richard claims he paid some taxes – variously saying he paid all the 2010 taxes, or that he paid a total of $14,000 to $16,000 since 2011, or that he has always paid one-half of all taxes representing what he considered his share, or that he paid some amount from time to time "to pacify them." *Trial* at 117, 118, 122. The court noted, however, that Richard provided no documentation of payment, ORDER (Jan. 29, 2018) at 5 n.4, and City tax records show no taxes paid since 2011 or "levy year 2012." CITY OF MANCHESTER TAX COLLECTOR

ACCOUNT SUMMARY (Dec. 4, 2017); MEMO FROM TAX COLLECTOR (Dec. 7, 2017).

Richard also gave as excuse that he had several municipal tax refunds or abatements then pending. He claimed an appraisal error filed in 2009, *Trial* at 129; INTERROGATORIES ¶ 6 (including attachments), entitlement to an unspecified credit on 2010 taxes, INTERROGATORIES ¶ 6, asserted that he was awaiting another credit from the City, *id.*, claimed that he had sought a reduction based on disability, *Trial* at 118, 130, and also that he was awaiting a reassessment. *Trial* at 119. A letter from the tax collector admitted into evidence contradicts Richard's account:

> The prior owner of this property, Stella A. Goode, had been receiving an elderly exemption ... until 2009. In 2010 the exemption was removed. There is no record of exemption application activity for this property after 2010. There is no record of abatement activity on this property since at least 2006.

LETTER FROM BOARD OF ASSESSORS TO ATTORNEY ROY (Dec. 7, 2017), Exh. 6, *Appx.* at 70; *Trial* at 131-32.

Richard testified he has enough money to pay the taxes owing. *Trial* at 122. He said he believes the house is still worth what it was appraised for in 2008. He also testified he would like to buy out Evelyn's share – which would satisfy Evelyn – but he does have not enough money for that. *Trial* at 30-31, 80; INTERROGATORIES ¶ 6.

After recovering from the initial shock of potential liability, Evelyn felt betrayed by her brother – who had regularly visited her home and knew she struggled to maintain it, and whose living costs she had subsidized for nearly a decade – that he would so mislead her and then blame her. Evelyn felt the time had come to separate her finances from Richard's. Evelyn had no need for the house, having not visited since her mother died, and having no intention to

move there. In addition, the recovered housing market recalibrated their former stalemate. *Trial* at 46, 77, 80, 83, 91, 94-95, 100-02, 136. She tried to talk with Richard about it, but he did not respond. *Trial* at 10, 93.

Evelyn felt quick action was necessary in order to minimize additional arrearage interest, and to forestall municipal action. Although there was no tax lien against the house, Evelyn is over 80 years old, and she knew the City could at any time commence efforts to seize the property for back taxes. *See* RSA Ch. 80; ORDER (Mar. 27, 2018), *Richard's Appx.* at 99.

STATEMENT OF THE CASE

In December 2016, Evelyn filed in the Hillsborough County (North) Superior Court a petition to partition the property. She requested sale of the house, equitable division of the proceeds, and an order that all outstanding deficiencies be paid from Richard's share. COMPLAINT (Dec. 5, 2016), *Richard's Appx.* at 3.

Richard filed a motion to dismiss claiming the probate court, rather than the superior court, had jurisdiction, to which Evelyn objected, and about which both parties filed memoranda.[6] MOTION TO DISMISS (May 10, 2017), *Richard's Appx.* at 10; OBJECTION TO MOTION TO DISMISS (May 12, 2017), *Richard's Appx.* at 16. The court ruled that the case was properly before the superior court. ORDER (Aug. 9, 2017), *Richard's Appx.* at 19.

Richard then moved for summary judgment, arguing that Evelyn's partition action was barred by *res judicata*, to which Evelyn objected. MOTION FOR SUMMARY JUDGMENT - *RES JUDICATA* (Aug. 17, 2017), *Richard's Appx.* at 25; OBJECTION TO MOTION FOR SUMMARY JUDGMENT - *RES JUDICATA* (Aug. 25, 2017), *Richard's Appx.* at 36.[7] The court ruled the case was well plead. ORDER (Sept. 22, 2017), *Richard's Appx.* at 41.

Richard also sought summary judgment claiming that his and Evelyn's devise from Stella was not as tenants in common, but the court held the issue was inconsequential to the equities of partition, *id.*, and it was not pursued.

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[6]Both parties filed two memoranda, all of which are omitted from the appendix. *See* MEMORANDUM IN SUPPORT OF PLAINTIFF'S OBJECTION TO DEFENDANT'S MOTION TO DISMISS (June 29, 2017); MEMORANDUM IN SUPPORT OF MOTION TO DISMISS (July 7, 2017); REPLICATION IN SUPPORT OF PLAINTIFF'S OBJECTION TO DEFENDANT'S MOTION TO DISMISS (July 14, 2017); RESPONSE TO PLAINTIFF'S REPLICATION TO DEFENDANT'S MEMORANDUM (July 31, 2017).

[7]Both parties filed additional pleadings on the issue, which are omitted from the appendix. RESPONSE TO OBJECTION TO MOTION FOR SUMMARY JUDGMENT (Aug. 30, 2017); REPLICATION IN SUPPORT OF PLAINTIFF'S OBJECTION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Sept. 8, 2017).

In December 2017 the superior court held a bench trial (*Amy B. Messer*, J.) on Evelyn's petition to partition, at which Richard, Evelyn, and (retired) Attorney Daniel O'Shaughnessy testified. In January 2018, the court issued an order deciding the matter. ORDER (Jan. 29, 2018), *Richard's Appx.* at 58.

Regarding partition, the court found that the property could not be conveniently split. It found that while Richard contributed to the general upkeep of the house and Evelyn did not, Richard's expenditures were incidental to day-to-day ownership, he lived rent-free, and his occupancy prevented the house from being otherwise leased or sold. The court held that the parties' positions are therefore equitably even, and ordered the sale of the house, with the proceeds divided equally. *Id.* at 3-5.

As to the taxes owing, the court held that, as joint owners, both Richard and Evelyn are equally liable, and thus ordered equal payment. *Id.* at 5.

Regarding "the resulting accumulation of costs and interest," the court found Richard neglected to inform Evelyn of the arrearage, thus "robb[ing] her of the opportunity to either pay the outstanding taxes herself or take some other action that would mitigate her damages." *Id.* at 6. Accordingly, the court held Richard "liable for the entire amount of costs and interest that have accrued since 2012." *Id.* at 6.

After trial Richard made an argument regarding the existence and enforcement of a contract, and laches, to which Evelyn objected. MOTION FOR RECONSIDERATION (Feb. 19, 2018), *Richard's Appx.* at 64; OBJECTION TO MOTION FOR RECONSIDERATION (Feb. 19, 2018), *Richard's Appx.* at 92. The court rejected the arguments, and rejected reconsideration of the facts. ORDER (Mar. 27, 2018), *Richard's Appx.* at 99.

The superior court also denied postponement of the sale of the house, *id.*, but this court later granted a stay pending this appeal. SUPREME COURT ORDER (May 11, 2018).

SUMMARY OF ARGUMENT

Evelyn cites evidence in the record to support the court's finding that the house could not be partitioned in any way other than by sale, and shows that such result is equitable.

Evelyn then demonstrates, by citation to statutes, that the superior court had jurisdiction to reach the result. Evelyn also points out that a partition cause of action did not and could not have arisen in the probate proceeding, and thus argues there is no *res judicata* bar to the superior court having heard the case.

Evelyn shows that contract damages would be inadequate and unavailable, and that therefore any contract argument does not apply. She also shows that Richard benefitted from her forbearance from selling the house, and that therefore his laches argument also does not apply.

Finally, Evelyn discusses several instances of Richard's deceit, and the need to separate their financial relationship. She thus argues that the court appropriately ordered partition, sale of the house, split of taxes, and assignment of penalties to Richard.

ARGUMENT

I. Partition is Equitable, Reversible Only Upon Plain Error

Partition is "a division into severalty of property held jointly or in common or the sale of such property by a court and the division of the proceeds." *Pedersen v. Brook*, 151 N.H. 65, 66-67 (2004). New Hampshire law provides that "[a]ny person owning a present undivided legal or equitable interest or estate in real or personal property ... shall be entitled to ... partition or division." RSA 547-C:1. Although the right to partition is waivable, *Hunt v. Wright*, 47 N.H. 396 (1867), "[i]t is essential to an estate in common to be subject to partition." *Spaulding v. Woodward*, 53 N.H. 573, 574 (1873). "The right of partition is incident to all estates owned by tenants in common," *Valley v. Valley*, 105 N.H. 297, 299 (1964), including those who acquired by will. *Kelly v. Kelly*, 41 N.H. 501 (1860). "The right of partition is a remedial right and should be construed liberally." *Wallace v. Stearns*, 96 N.H. 367, 369 (1950); RSA 547-C:30.

While "the primary method of partition is by division of the land itself by metes and bounds," *DeLucca v. DeLucca*, 152 N.H. 100, 104 (2005) (quotations omitted), the statute allows partition by "other distinct description." RSA 547-C:11. A court may order sale of partitioned property when it "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," RSA 547-C:25, which the court must expressly find. *DeLucca*, 152 N.H. at 105. The court may also partition by awarding the real estate to one party, and ordering a buy-out. *Warner v. Eaton*, 78 N.H. 515 (1917); RSA 547-C:22.

The court in this case noted that the small residential lot Stella devised to Richard and Evelyn is physically "impossible" to divide. ORDER (Jan. 29, 2018) at 3. Richard admitted he does not have enough money to buy out

Evelyn's share, even at a depressed 2008 appraisal price. "Accordingly," the court held, "the property must be sold." *Id.*

Given these circumstances, this court should affirm the partition and sale.

II. Superior Court Had Concurrent Jurisdiction, and Properly Heard Partition Action

Although Richard has not suggested how the probate court might decide differently from the superior court, he claims that the probate court should have heard this matter and that the superior court lacks jurisdiction. *Richard's Brf.* at 12-14.

A. Superior Court Jurisdiction Statute

The superior court jurisdiction statute delineates jurisdiction for partition actions between the superior and probate courts. It provides:

> The superior court shall have the powers of a court of equity in the following cases: ... the affairs of partners, joint tenants or owners and tenants in common; ... cases in which there is not a plain, adequate and complete remedy at law; and in all other cases cognizable in a court of equity, *except that the court of probate shall have exclusive jurisdiction over equitable matters arising under its subject matter jurisdiction authority in RSA 547 [and] RSA 547-C.*

RSA 498:1 (emphases added).

Richard ignores the general partition power granted to the superior court in the first clause of the statute, and instead focuses on the exception in the last clause. *Richard's Brf.* at 12-14. It is apparent, however, that the two courts share concurrent jurisdiction over partition, and that the superior court jurisdiction statute, RSA 498:1, defers to the probate court jurisdiction statute, RSA 547, and the partition statute, RSA 547-C, regarding jurisdictional sharing.

B. Probate Court Jurisdiction Statute

The probate court jurisdiction statute, RSA 547, contains several provisions that are of interest in this context, but not particularly informative. In his brief, Richard points to the following:

• RSA 547:3, I(a) – "The probate court shall have exclusive jurisdiction over ... [t]he probate of wills."

That the probate court probates wills is undisputed, and not at issue here.

• RSA 547:3, I(c) – "The probate court shall have exclusive jurisdiction over ... [t]he interpretation and construction of wills."

That the probate court interprets wills is also undisputed and not at issue here.

To the extent that there might be probate court jurisdiction based on the need to interpret Stella's will, initially Richard claimed there was a dispute regarding whether the will created a joint tenancy or a tenancy in common. After the superior court found that the difference was inconsequential to the equities of partition, however, ORDER (Aug. 9, 2017) at 4-5; ORDER (Sept. 22, 2017) at 2-3, Richard abandoned the issue, conceding that no will interpretation is implicated in this case.

• RSA 547:3, II(e) – "The probate court shall have concurrent jurisdiction with the superior court over ... [p]etitions for partition pursuant to RSA 547-C."

This statute largely repeats the similar provision in the superior court jurisdiction statute, RSA 498:1, *supra*, which makes clear the two courts share jurisdiction over partition.

• RSA 547:3-b – "The probate court shall have the powers of a court of equity in all cases within its subject matter jurisdiction in which there is not a plain, adequate, and complete remedy at law."

This statute makes clear the probate court is an equity court, not an issue in dispute here (although historically there was doubt, *see generally,* 10 DeGrandpre & Zorn, *New Hampshire Practice, Probate and Administration of Estates, Trusts & Guardianships* §§ 5.2 & 5.3.1, at 5-3 & 5-10 (4th ed. 2008)).

• RSA 547:9 – "All proceedings in relation to the settlement of the estate of a person deceased shall be had in the probate court of the county in which his will was proved or administration on his estate was granted."

This is a venue statute, not at issue here.

C. Partition Statute

The partition statute, RSA 547-C, also contains provisions of interest in this context, but also not particularly informative. In his brief Richard points to:

• 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."

This statute, cited *supra*, gives a partitioning court authority to accomplish a partition by awarding the real estate to one party, and ordering a buy-out. *See, e.g., Warner v. Eaton*, 78 N.H. at 515.

• RSA 547-C:2 – "A petition [for partition] may be filed ... in the superior or probate court ...; 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." (emphasis added)

When there is a "related pending matter," a partition action gets filed in the court where it is pending. "Related" has its usual meaning.

Appeal of Kelly, 167 N.H. 489, 492 (2015) ("Employment-related risks," include "injuries generally recognized as industrial injuries, such as fingers being caught in gears."); *State v. Schonarth*, 152 N.H. 560, 562 (2005) ("Related offenses are those that are based upon the same conduct, a single criminal episode or a common plan."). "The word 'pending' means 'remaining undecided.'" *Buswell v. Babbitt*, 65 N.H. 168 (1889) (quoting *Clindenin v. Allen*, 4 N.H. 385, 386 (1828)).

There was no pending case between these parties in any court when Evelyn filed her petition.[8] *See In re Estate of Porter*, 159 N.H. 212, 214 (2009) ("[T]he probate court has jurisdiction to resolve issues involving real estate of the decedent if the property is 'in' the estate of the decedent."). Accordingly, RSA 547-C:2 also does not illuminate any issue here.

D. Jurisdiction is Properly in Superior Court

In this case, the superior court held that, collectively, the statutes provide concurrent jurisdiction, that there was no related pending matter in either court, that the genesis of the co-ownership from a will did not make the partition related to probate, that the superior court had jurisdiction, ORDER (Aug. 9, 2017) at 3-4, *Richard's Appx.* at 19, 21-22, and that therefore Evelyn's petition was properly filed. *Id.* at 6.

Richard reviews a smattering of statutes, none of which confer exclusive jurisdiction over this matter in the probate court. If Evelyn had filed her petition in the probate court, jurisdiction may have been rejected, because RSA

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[8]After Evelyn filed her petition for partition in the superior court, Richard tried to reopen the inheritance and guardianship cases in the probate court, and thus create a "related pending matter" in the probate court. The effort appears to have been unsuccessful. The effort is further discussed *infra*.

547:9 provides that the probate court has authority over "[a]ll proceedings in relation to the settlement of the estate of a person deceased," but neither Richard nor Evelyn are deceased.

Accordingly, the superior court properly heard and ruled on Evelyn's petition for partition.

III. *Res Judicata* Does Not Bar Partition Now, Because No Dispute Giving Rise to a Partition Action Existed in the Probate Case, and Because Probate Does Not Adjudicate Anticipatory Arguments Among Heirs

Title to the real estate of a deceased person vests in the decedent's heirs immediately upon death. *Wentworth v. Wentworth*, 75 N.H. 547 (1910); *Perkins v. Perkins*, 58 N.H. 405, 406 (1878); *Lucy v. Lucy*, 55 N.H. 9, 10 (1874); *Gregg v. Currier*, 36 N.H. 200, 202 (1858) ("land descends, on the death of the testator or intestate, to the devisees or heirs"). This "common law rule is a very important guidepost" regarding devise of real estate. 10 DeGrandpre & Zorn, *New Hampshire Practice, Probate and Administration of Estates, Trusts & Guardianships* § 35.2, at 35-3 (4th ed. 2008).

Consequently, "[i]n the absence of the necessity of the executor seeking a license to sell the real estate the probate court has no jurisdiction of the real estate of a decedent." *Fleming v. Aiken*, 114 N.H. 687, 690 (1974). Likewise an administrator of an estate "has no duty to perform as to the partition of the remaining real estate between the legatees entitled," *French v. Lawrence*, 75 N.H. 609 (1910), and has "no interest in the care and preservation of the real estate." *Sibley Oil Co. v. Stein*, 100 N.H. 356, 357 (1956); *In re Robbins' Estate*, 116 N.H. 248, 251 (1976) (estate has limited duty to pay taxes); *Ruel v. Hardy*, 90 N.H. 240, 242 (1939) (estate has no duty to pay insurance). Only an "heir or devisee [is] entitled to maintain any action, real or personal, which he might find necessary for the protection of his rights." *Bergin v. McFarland*, 26 N.H. 533, 536 (1853). And courts do not issue advisory opinions or decide matters not before them. *Piper v. Town of Meredith*, 109 N.H. 328, 330 (1969).

When Stella died in 2009, Richard and Evelyn became co-owners of the house. What their co-owning arrangement would be thereafter was not, in the probate proceeding, within the authority of the court to adjudicate, nor within the authority of an executor or administrator to litigate.

Richard nonetheless says that *res judicata* bars Evelyn from ever partitioning the property, because the co-ownership arose from a probated will. *Richard's Brf.* at 14-16. He claims support in *Canty v. Hopkins*, 146 N.H. 151 (2001).

In that case, Canty, the former administrator of his father's probate estate, long after probate was settled, claimed in superior court that Hopkins had wrongfully wrested a property from the deceased's estate. This court held that Canty had opportunities to address that matter during probate, but did not, and he was therefore barred by *res judicata* from later raising it. *Canty v. Hopkins*, 146 N.H. at 155-56 ("In order for res judicata to apply to a finding or ruling, there must be a final judgment by a court of competent jurisdiction that is conclusive upon the parties in a subsequent litigation involving the same cause of action.").

Richard's and Evelyn's co-ownership commenced upon Stella's death. Their dispute regarding payment of rent, taxes, exterminator's fees, and other household expenses, did not and could not arise until after they became co-owners. While it is unclear exactly when Richard stopped paying taxes, it appears that it was in "levy year 2012," MEMO FROM TAX COLLECTOR (Dec. 7, 2017), Exh. 5, *Appx.* at 71, at least a year after the probate proceeding reached finality in January 2011. As long as the siblings' forbearance-and-occupy stalemate held, Evelyn did not have an interest in pursuing legal action. It was only when she discovered the unpaid taxes, and Richard's deceit, that she realized a financial relationship with her brother was no longer viable. *See In re Estate of Bergquist*, 166 N.H. 531, 535 (2014) ("cause of action" for *res judicata* requires already-existing facts, absent when a dispute arises subsequent to a former adjudication).

Even if she wanted to, Evelyn could not have raised the issue of partition in the probate case, because neither the probate court nor the estate, in

that matter, had authority to address matters among devisees. Moreover, it appears that Richard's *res judicata* argument relies on the fact that Richard's and Evelyn's attorneys anticipated the dispute that later erupted in the post-probate future. Whatever they were unable to settle during their negotiations, it is clear – by their not litigating at the time – that they felt the parties had enough of an agreement to be satisfactory to both, that their stalemate was adequate resolution at the time, and that partition was not necessary to the probate proceeding.

Finally, Richard's position is contrary to the law, which provides that partition "is essential to an estate in common," *Spaulding*, 53 N.H. at 574, and that property owners have a right to partition whenever they wish. RSA 547-C:1; RSA 547-C:30; *Valley*, 105 N.H. at 299; *Wallace*, 96 N.H. at 369; *Kelly*, 41 N.H. at 501.

Accordingly, Evelyn's petition to partition was properly heard by the superior court.

IV. Contract Damages Are Inadequate and Unavailable

Richard makes a claim that Evelyn's cause of action should have sounded in contract, not equity, because her remedy is damages, but that because there was no contract, she cannot maintain a contract action. *Richard's Brf.* at 16-17.

The argument presumes that contract damages would be satisfactory to Evelyn's situation, which they are not, for several reasons.

First, as noted, property owners have a right to partition.

Second, damages would not be adequate, because what Evelyn seeks is a termination of any financial relationship with her brother. RSA 498:1 (equity available in "cases in which there is not a plain, adequate and complete remedy at law").

Third, it appears that Richard believes damages would be merely his payment of the back taxes – which he says he can afford. Evelyn would be seeking damages in the nature of the current buy-out price of the house plus many years of lost rent – which Richard says he cannot afford. Thus contract damages could not provide Evelyn a "complete remedy." *Id.*

Finally, the probate court does not have jurisdiction to award general contract damages, *see In re CIGNA Healthcare, Inc.*, 146 N.H. 683, 689 (2001), making Richard's contract claim at odds with his jurisdiction claim.

Whatever the exact nature of Richard's contract claim, this is a partition action, and Richard's contract argument is not apposite.

V. Laches Inapplicable Because Richard Benefitted From Evelyn's Forbearance

Richard claims that Evelyn's partition action is barred by laches. *Richard's Brf.* at 17-18. The argument fails for several reasons.

First, as noted, property owners have a right to partition at any time.

Second, Evelyn did not know of the tax arrearage until 2016 when the City called her, and had no reason to inquire before that because she was in regular contact with her brother, and understood he had taken responsibility for the maintenance costs of the property.

Third, Richard's laches claim appears to turn on his alleged reliance on Evelyn's forbearance, in that he made improvements to the house. The court noted, however, that Richard offered no evidence of any significant improvements "such as photographs or receipts," and found that whatever work Richard did was merely "incidental to the day-to-day ownership of real estate [during which he] enjoyed the full use and benefit of residing on the property." ORDER, (Jan. 29, 2018) at 4, *Richard's Appx.* at 61. Even if the house did appreciate in value, Richard is myopic when he claims Evelyn "contributed nothing." *Richard's Brf.* at 12. Evelyn contributed time and forbearance; she did not force a sale in 2008 when the value was low, and has waited until now, when housing prices in New Hampshire have rebounded. *See* New Hampshire Housing Finance Authority, *Housing Market Report* at 7 (June 2018), <www.nhhfa.org/assets/pdf/NHHFA_HMR_06-2018_Final_ Indexed.pdf>.

Fourth, Richard claims Evelyn's partition action was "seven years" too late, *Richard's Brf.* at 18, but he also says it was "premature," *Richard's Brf.* at 12, undermining his own position.

Finally, laches is an equitable doctrine requiring proof of prejudice. *In re Estate of Laura*, 141 N.H. 628, 636 (1997). As the court noted, Evelyn's forbearance "was beneficial to him," because Richard lived free of most housing

costs for many years, essentially subsidized by his sister. ORDER, (Jan. 29, 2018) at 3.

Accordingly, the court was correct in denying Richard's laches claim.

VI. Court Equitably Split the Proceeds of the House, Divided the Tax Owed, and Allocated the Penalties

"Partition is equitable in nature," requiring "a fair division of the proceeds in the light of the attendant circumstances." *Bartlett v. Bartlett*, 116 N.H. 269, 272 (1976). "Equity does not require that the proceeds in partition always be divided strictly according to the relative value of the estates held by the respective parties." *Id.* Rather,

> [i]n exercising its discretion in determining what is fair and equitable ..., 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.

RSA 547-C:29.

Because partition is equitable, "the jurisdiction of the court extends to adjustment of conflicting claims in a fair division of the proceeds in the light of the attendant circumstances," and the court has "broad power to determine the rights of those with an interest." *Brooks v. Allen*, 168 N.H. 707, 711 (2016). "An action for partition calls upon the court to exercise its equity powers and consider the special circumstances of the case, in order to achieve complete justice." *Boissonnault v. Savage*, 137 N.H. 229, 232 (1993).

"The party asserting that a trial court order is unsustainable must demonstrate that the ruling was unreasonable or untenable." *Brooks v. Allen*, 168

N.H. at 711. A trial court's findings of fact are "final unless they are so plainly erroneous that such findings could not reasonably be made. Legal determinations and the application of law to fact are reviewed independently for plain error." *Pedersen v. Brook*, 151 N.H. at 66 (quotation and citation omitted).

Richard claims that the remedy of selling the house was not equitable, and that he should have a life estate instead. *Richard's Brf.* at 20-21.

When Evelyn received a call from the City and learned about the tax arrearages, she realized Richard had been deceitful with her for many years, and thus it became clear to her that she had to sever their financial relationship. In addition, several items from their earlier history became relevant.

First, in the probate proceeding, Evelyn learned that Richard had been convicted of financial crimes, his criminal history apparently being made part of the probate record as part of the guardianship proceeding. DEPT. OF HEALTH & HUMAN SERVICES RECORD RELEASE AUTHORIZATION (Dec. 12, 2007), *Appx.* at 145; DEPT. OF SAFETY RECORD AUTHORIZATION FORM (Dec. 12, 2007), *Appx.* at 146; CRIMINAL HISTORY RECORD (Dec. 24, 2007), *Appx.* at 147. It revealed crimes committed when Richard was in his 30s and 40s, including convictions for issuing bad checks in violation of RSA 638:4, resisting arrest or detention in violation of RSA 642:2, disorderly conduct in violation of RSA 644:2, reckless conduct in violation of RSA 631:3, and being a fugitive from justice in violation of RSA 612:2. CRIMINAL HISTORY RECORD (Dec. 24, 2007), *Appx.* at 147; *Trial* at 40-42.[9]

Second, Evelyn recalled that Richard had borrowed $20,000 from her, but had never paid it back. *Trial* at 28-30.

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[9]Additional portions of Richard's criminal history were ruled inadmissible by the superior court in the partition action, *Trial* at 40-41, and are not reported here.

Third, in the partition proceeding, Evelyn learned that Richard had been forging Stella's name on his truck registration every year since Stella died. This came to light because, to bolster Richard's argument that Evelyn's partition action should be heard in the probate court (by creating a "related pending matter," RSA 547-C:2), during the pendency of the partition action, Richard filed a motion to re-open the 2009 probate estate and the 2007 guardianship case. In his motion to reopen, Richard explained that just before Stella died, he had sold Stella's car, and bought a pickup truck in Stella's name. NOTICE OF DECISION (Mar. 18, 2009), *Appx.* at 121; ASSENT (Feb. 2, 2009); *Appx.* at 143; MOTION TO REOPEN (May 25, 2017); *Appx.* at 171; OBJECTION TO MOTION TO REOPEN (Aug. 28, 2017), *Appx.* at 157. Richard admitted that after Stella died, he forged her signature on annual registration documents. Richard conceded he may therefore be guilty of six misdemeanor crimes of unsworn falsification. *Trial* at 42; *see* RSA 641:3. MOTION TO REOPEN (May 25, 2017), *Appx.* at 74, 78; OBJECTION TO MOTION TO REOPEN (Aug. 28, 2017), *Appx.* at 82; LETTER FROM RICHARD TO EVELYN (undated), Exh. 1, *Appx.* at 73. While it is not clear from the record what, if any, ruling was entered on the motion to reopen the probate and guardianship proceedings, it is apparent that Richard's attempt to transport jurisdiction for the partition action was not effective. For Evelyn, it was evidence of Richard's pattern of inveracity and irresponsibility.

When Evelyn learned that Richard had been living in the house but not paying the taxes, she was livid. Not only was she faced with a surprise $35,000 tax liability, it became clear to her that her brother had been deceiving her for years. Despite Richard being in regular contact, despite his knowing from annual tax bills that there was an arrearage, and despite him knowing Evelyn was a co-owner and therefore had an interest, Richard said nothing. *Id.* Evelyn grieved that Richard "did everything behind my back," and felt betrayed and

"devastated ... that my brother would do this to me. I'm his sister." *Id.* On the witness stand Evelyn asserted, "You're a hypocrite." *Trial* at 80.

In addition to not paying the taxes and deceiving her about it, during the partition hearing Richard claimed he was seeking abatements from the City, about which the City knew nothing. For Evelyn, this was further evidence of Richard's deceit and financial imprudence.

The 2010 stalemate was in part informed by the low value of the house due to the recession. In the current market, the house is probably worth more, so both parties will likely realize a greater return on the sale, making partition and sale equitable for both.

Richard's situation was of his own making, and probably could have been avoided. Ongoing financial relationships require trust, which Richard eviscerated. Granting Richard a life interest, however, would force Evelyn to continue an unwanted financial link. Partition is not inequitable just because it results in dispossessing a resident of his home. *Boissonnault*, 137 N.H. at 232. Accordingly, the superior court's approval of partition, thus severing the financial relationship, is equitable, and this court should affirm.

Finally, Richard claims that because Evelyn, as joint owner, was responsible for taxes, "she alone should be responsible for the penalties and interest attributable to nonpayment of her share." *Richard's Brf.* at 21. This ignores the fact, cited by the court, that Evelyn did not know of the tax arrearage. She had no reason to inquire about taxes because she believed Richard, as resident, was paying the regular expenses of the house, and Richard's deceit "robbed her of the opportunity to either pay the outstanding taxes herself or take some other action that would mitigate her damages." ORDER (Jan. 29, 2018) at 6. The court's assignment of the penalties and interest to Richard was therefore equitable, and this court should affirm.

CONCLUSION

The superior court appropriately took into consideration the relevant circumstances. It was apparent that the time had arrived for the siblings to sever their financial relationship, the house cannot be physically split, and Richard does not have the resources to buy out Evelyn's share. The superior court lawfully exercised its equity jurisdiction in ordering a sale, and in assigning tax penalties to Richard.

REQUEST FOR ORAL ARGUMENT

Because the issue raised in this appeal is of concern to heirs, devisees, taxpayers, and municipalities in New Hampshire, this court should entertain oral argument.

Respectfully submitted,

Evelyn Tarnawa
By her Attorney,
Law Office of Joshua L. Gordon

Dated: November 19, 2018

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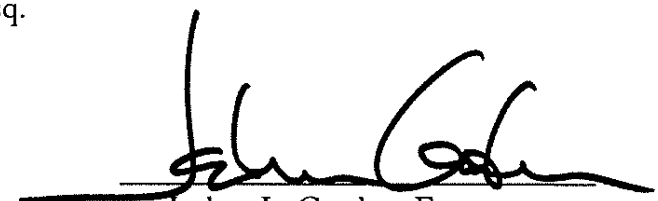
CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief. I further certify that this brief contains no more than 8,227 words, exclusive of those portions which are exempted.

I further certify that on November 19, 2018, copies of the foregoing will be forwarded to Leslie Nixon, Esq.

Dated: November 19, 2018



Joshua L. Gordon, Esq.

ADDENDUM

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
NORTHERN DISTRICT

Evelyn Tarnawa

v.

Richard Goode

Docket No. 216-2016-CV-869

ORDER

Petitioner, Evelyn Tarnawa, has brought this petition seeking to partition property owned by the parties. Respondent, Richard Goode, has moved to dismiss for lack of subject matter jurisdiction. The court held a hearing on June 29, 2017. Thereafter, the parties submitted memoranda of law. Upon consideration of the pleadings, arguments, and applicable law, respondent's motion to dismiss is DENIED.

Factual Background

For purposes of the present motion, the court assumes the truth of the following facts set forth in petitioner's complaint. Parties are the only children and heirs of Stella A. Goode who died July 8, 2009. Ms. Goode's estate was devised and bequeathed equally to both parties and her estate was closed by the Hillsborough County Probate court on January 24, 2011. The estate included Ms. Goode's home, located at 22 Orchard Avenue in Manchester, NH (the "Property"). Respondent resided at the property with his mother prior to her passing. Upon the estate's division, the parties agreed to own the home equally and that respondent would continue to reside in the

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home.[1] In exchange for solitary use of the home, respondent was to pay all living, maintenance, utility, and real estate tax expenses, along with all other carrying costs and expenses associated with the home.

Despite this agreement, respondent has not paid real estate taxes or the water bill for the home. The outstanding real estate taxes total $34,756.39 and the outstanding water utility totals $557.76.

Analysis

In ruling on a motion to dismiss, the court determines "whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery." Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The court rigorously scrutinizes the facts contained on the face of the complaint to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). The court "assume[s] the truth of the facts alleged by the plaintiff and construe[s] all reasonable inferences in the light most favorable to the plaintiff." Lamb v. Shaker Reg'l Sch. Dist., 168 N.H. 47, 49 (2015). The court "need not, however, assume the truth of statements that are merely conclusions of law." Id. "If the facts do not constitute a basis for legal relief, [the court will grant] the motion to dismiss." Graves v. Estabrook, 149 N.H. 202, 203 (2003).

Relying upon RSA 498:1, respondent moves to dismiss, arguing the probate court has exclusive jurisdiction. "When construing the meaning of a statute, we first examine the language found in the statute, and where possible, we ascribe the plain and ordinary meanings to words used." State v. Rix, 150 N.H. 131, 132 (2003). Further,

[1] In her memorandum in support of her objection, plaintiff indicates that a copy of the parties' agreement regarding use of the home had been filed with the court as an attachment to defendant's interrogatory answers, however, the court has not received a copy of the agreement.

statutory provisions are not read in isolation "but in the context of the overall statutory scheme." Id. "When interpreting two statutes which deal with a similar subject matter, we will construe them so that they do not contradict each other and so that they will lead to reasonable results and effectuate the legislative purpose of the statute." Id. at 132–33.

Here, RSA 498:1 provides that the probate court has exclusive jurisdiction "over equitable matters arising under its subject matter jurisdiction authority in RSA 547, RSA 547-C and RSA 552:7." Because RSA 552:7 is inapplicable here, the court analyzes the jurisdiction defined by chapters 547 and 547-C.

RSA 547:3 sets out the probate court's jurisdiction. Specifically, RSA 547:3, II(e) provides that "the probate court shall have concurrent jurisdiction with the superior court over . . . [p]etitions for partition pursuant to RSA 547-C." 547-C:2 further provides that "[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."[2] (Emphasis added). Reading all three statutes together, the court finds the superior and probate courts have concurrent jurisdiction over the instant partition action. Therefore, the action was properly filed in this court.

To the extent respondent claims the partition is related to the estate and therefore RSA 547:9 controls, the court is unpersuaded. RSA 547:9 states, "all proceedings in relation to the settlement of the estate of a person deceased shall be had in the probate court of the county in which his will was proved or administration on his estate was granted." Respondent maintains that because this action pertains to

[2] Though the statute contains additional provisions regarding jurisdiction, none are applicable in the instant matter.

property inherited from the estate it is "in relation to the settlement of the estate," and must be brought in probate court. The court disagrees. Here, the estate was settled and closed on January 24, 2011. This action does not challenge the estate's settlement. Instead, this action arises from respondent's alleged failure to pay the property taxes in the years following the estate's settlement. While there may be a factual dispute as to who is responsible for the taxes, this proceeding is independent of the estate's settlement.

Next, respondent contends the will must be interpreted by the probate court to determine the form of ownership before a partition action can occur, as "partition would potentially give [petitioner] more than she is entitled to." (Mem. in Supp. of Mot. Dismiss 1.) Though respondent raises a dispute as to whether the parties are tenants in common or joint tenants, the court finds the difference inconsequential to the present action. RSA 547-C:1 provides "any person owning a present undivided legal or equitable interest or estate in real or personal property . . . , not subject to redemption, or the holder of an equity of redemption shall be entitled to have partition or division." Thus, as a party with an undivided interest, whether as tenant-in-common or as joint tenant, petitioner is entitled to partition the property. Further, neither ownership designation would necessarily give petitioner more than she is entitled as "[e]quity does not require that the proceeds in partition always be divided strictly according to the relative value of the estates held by the respective parties." Bartlett v. Bartlett, 116 N.H. 269, 272, (1976). Additionally, even if the will created a joint tenancy, the court finds petitioner's partition action evidences her intent to sever and does sever the joint tenancy. See Croteau v. Croteau, 143 N.H. 177, 179 (1998) ("[T]he intent of the parties

controls when analyzing whether a joint tenancy has been severed."). Thus, interpretation of the will is unnecessary in this instance.

Respondent also contends petitioner's attorney should be disqualified from representing her because Attorney Roy was the appraiser of Ms. Goode's estate in 2010. The court is unpersuaded.

New Hampshire Rule of Professional Conduct 1.9(a) states, in pertinent part:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Here, the court finds Attorney Roy did not previously represent respondent. In his role as alternate appraiser of Ms. Goode's estate, Attorney Roy did not represent the interests of either petitioner or respondent in appraising Ms. Goode's property, nor did he communicate with, or learn confidential information from, respondent. (Pet.'s Repl. Mot. Dismiss, p. 1.) In fact, Attorney Roy did not perform the property's appraisal—Gwen Timbas did—he merely endorsed it. (Pl.'s Surreplication, p. 1.) Therefore, no attorney-client relationship existed in 2010 between Attorney Roy and respondent.

Moreover, as respondent correctly points out, the 2010 appraisal has no bearing on the property's current value, making Attorney Roy's role in said appraisal even less relevant to the instant matter. Finally, respondent has failed to establish Attorney Roy is likely to be a necessary witness, as neither party disputed the property's appraised value in 2010, and therefore, any testimony Attorney Roy would offer regarding the foregoing would relate to an uncontested issue. See N.H. R. Prof. C. 3.7(a)(1) ("A

lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: the testimony relates to an uncontested issue . . . .").

In light of the foregoing, the court finds it has subject matter jurisdiction and respondent's motions to dismiss and disqualify counsel are DENIED.[3]

SO ORDERED.

8/9/2017
Date

Amy B. Messer
Presiding Justice

[3] The court also notes that while petitioner asserts that neither party waived their right to a jury trial, in the case structuring order, the parties indicated they were not seeking a jury trial. Therefore, the court considers the issue waived.

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Evelyn Tarnawa

v.

Richard Goode

Docket No. 216-2016-CV-869

ORDER

Petitioner, Evelyn Tarnawa, has brought this petition seeking to partition property jointly owned by the parties. Respondent, Richard Goode, now moves for summary judgment, arguing: (1) this matter is barred by the doctrine of res judicata; and (2) the parties' mother, Stella Goode, expressed in her will the intent that the parties take possession of the property in question as joint tenants with rights of survivorship. Respondent also moves for an interlocutory appeal. Petitioner objects. Upon consideration of the pleadings, the parties' arguments, and the applicable law, respondent's motions are DENIED.

I. Res Judicata

Respondent argues this action is barred by the doctrine of res judicata as it could have been brought during the initial probation of Stella Goode's estate. The doctrine of res judicata seeks to "avoid repetitive litigation in order to promote judicial economy and a policy of certainty and finality in our legal system." Osman v. Gagnon, 152 N.H. 359, 362 (2005). Thus, "[r]es judicata precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action

between the same parties for the same cause of action." Meier v. Town of Littleton, 154 N.H. 340, 342 (2006). A "cause of action" is "the underlying right that is preserved by bringing a suit or action." In re Estate of Bergquist, 166 N.H. 531, 535 (2014). It encompasses "all theories upon which relief could be claimed on the basis of the factual transaction in question." Id. (brackets omitted). "Thus, if several theories of recovery arise out of the same transaction or occurrence, they amount to one cause of action." Finn v. Ballentine Partners, LLC, 169 N.H. 128, 147 (2016). Three conditions must be met for res judicata to apply: "(1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered in the first action." Meier, 154 N.H. at 342.

An action to partition property is not a theory of recovery that arises out of the settlement of a probate estate. A partition action is a right held by any joint owner of property that need not be raised at any particular time. Respondent cites no authority to the contrary. Therefore, the present action is not barred by the doctrine of res judicata. Accordingly, respondent's motion for summary judgment is DENIED.

II. Tenants in Common vs. Joint Tenants

Respondent next argues that Stella Goode's will created a joint tenancy between the parties. Respondent argues this requires summary judgment in his favor as it is "impossible to determine the value of each party's share of the property while both are still alive." (Resp.'s Mot. Summ. J. – Joint Tenancy at 2.) The court disagrees.

As the court previously noted in its order denying respondent's motion to dismiss, the status of the parties as joint tenants or tenants in common is not relevant to this

case, and certainly not a dispositive fact. Even assuming the parties presently hold title to the property as joint tenants, the act of partitioning property serves to sever the joint tenancy. See Wentworth v. Remick, 47 N.H. 226, 227 (1866) ("[A] joint tenancy may be terminated by partition which severs the unity of possession, or by alienation which severs the unity of title, or by any act that severs either of the unities of time or interest."); see also Jackson v. Estate of Green, 771 N.W.2d 675, 677 (Mich. 2009) ("A party can sever joint tenancy by compelling a partition."); DeLoatch v. Murphy, 535 A.2d 146, 150 (Pa. Super. 1987) ("Upon severance, which occurred upon entry of the partition judgment, the joint tenancy became a tenancy in common."); Cofer v. Perkins, 258 N.W.2d 807, 809 (Neb. 1977) ("Joint tenancy may be terminated or severed by any act which destroys one or more of its unities, and may also be severed by the act of joint tenancy in destroying unity of possession, as by partition."); Schuck v. Schuck, 108 N.E.2d 905, 907 (Ill. 1952) ("[A] decree of partition which severs the unity of possession between joint tenants and reduces their joint possession into a several one, operates as a severance or destruction of the joint tenancy."). Therefore, respondent's argument that the present action cannot continue due to the existence of a joint tenancy is without merit.

Accordingly, respondent's motion for summary judgment is DENIED.

III. Interlocutory Appeal

Respondent has moved for an interlocutory appeal on the question of the court's jurisdiction over this matter, as well as whether petitioner's attorney should be disqualified. Upon review of respondent's interlocutory appeal statement, the court finds he has failed to demonstrate a substantial basis for a difference of opinion on these

issues. See Sup. Ct. R. 8. The question of jurisdiction is clearly set forth in the plain language of the relevant statutes, and respondent has failed to provide support for his claim that Attorney Roy's minimal involvement in the probate of Stella Goode's estate requires his disqualification from this case. Further, the court notes respondent's concerns about waiting for the conclusion of an "expensive, lengthy trial" are unfounded, as this case is currently scheduled for a one-day bench trial on November 16, 2017.

Accordingly, respondent's motion for interlocutory appeal is DENIED.

SO ORDERED.

9/22/2017
Date

Amy B. Messer
Presiding Justice

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Evelyn Tarnawa

v.

Richard Goode

Docket No. 216-2016-CV-00869

ORDER

Plaintiff, Evelyn Tarnawa, has brought this petition seeking to partition property jointly owned by the parties. The court held a bench trial on December 19, 2017. The parties have submitted requests for findings of fact and rulings of law. Upon consideration of the evidence submitted, the parties' arguments, and the applicable law, the court finds and rules as follows.

Factual Background

The parties submitted requests for findings of fact and rulings of law. The court's findings and rulings are in narrative form in this order. Therefore, any requests of the parties for findings and rulings are granted, denied, or determined to be unnecessary, consistent with the following. See Geiss v. Bourassa, 140 N.H. 629, 632–33 (1996).

Plaintiff and defendant are brother and sister. Their mother, Stella Goode, owned a house located at 22 Orchard Avenue in Manchester, New Hampshire. Ms. Goode passed away on July 8, 2009. Following her death, the parties received joint title to the residence, conferred to them under their mother's will. (Pl.'s Ex. 1.)

Defendant, who had been living in the residence with his mother prior to her death, opted to continue living there. In 2010, plaintiff submitted a proposed agreement to defendant. (Pl.'s Ex. 2.) Both parties were represented by counsel at this time. The agreement contained a number of provisions purporting to define the scope of defendant's rights and responsibilities with respect to the property while he continued to reside within it. (Id.) There were some back and forth discussions between the parties, but the agreement was ultimately never signed. Neither party presented any evidence of the existence of any other agreement between the parties with respect to the property.

Over the years, defendant maintained the property and claims to have made a number of improvements to it. However, beginning in 2012, defendant did not fully pay property taxes. Defendant never notified plaintiff of his actions, and plaintiff did not learn of the unpaid taxes until the City of Manchester contacted her by phone in 2016. As of December 7, 2017, the total amount owed, including costs and interest, was $33,803.13, with interest accruing at $11.17 daily. In response to the large outstanding debt, plaintiff filed this action.

Analysis

Plaintiff has brought this action seeking to partition the property. "Partition actions are governed by RSA chapter 547-C, which vests the trial court with broad power to determine the rights of those with an interest in real property." Brooks v. Allen, 168 N.H. 707, 711 (2016). RSA 547-C:1 provides that "[a]ny person owning a present undivided legal or equitable interest in real or personal property . . . shall be entitled to have partition or division in the manner hereinafter provided." "Partition is equitable in nature, and the jurisdiction of the court extends to adjustment of conflicting claims in a fair

division of the proceeds in the light of the attendant circumstances." Brooks, 168 N.H. at 711.

"[T]he primary method of partition is by division of the land itself by metes and bounds among the tenants in common." DeLucca v. DeLucca, 152 N.H. 100, 105 (2005). However, the court may instead order the sale of the property where the foregoing is not possible. See RSA 547-C:25. "[T]he trial court must make an *express* finding that the property cannot be divided without causing great prejudice or inconvenience before ordering sale." DeLucca, 152 N.H. at 104. Here, the property consists of a single-family residence located on a quarter-acre lot measuring 100' x 100' x 110' x 100'. (Def.'s Ex. A at 396.) Given the small size of the parcel and the residence already constructed thereon, it would be impossible to divide the land itself into two useable lots. (See id. (noting the minimum frontage required for the district is 75').) Therefore, the property cannot be divided without causing great prejudice or inconvenience to the parties. Accordingly, the property must be sold,[1] with the proceeds of the sale being divided between the parties as set forth below.

"Equity does not require that the proceeds in partition always be divided strictly according to the relative value of the estates held by the respective parties." Bartlett v. Bartlett, 116 N.H. 269, 272 (1976). "The partition statute looks at the parties' contributions to the acquisition, maintenance, repair, preservation, improvement, and appreciation of the property, and any disparities in those contributions." Pedersen v.

[1] The court notes that in defendant's requests for findings of fact and rulings of law, defendant raises two arguments: first, that this litigation is barred by the doctrine of res judicata, and second, that "it is premature to determine whether [the property] should be sold, because upon the death of one of the parties, the other will take the entire property." (Def.'s Requests at ¶ 24.) However, the court already addressed both of these arguments and found them to be without merit in its September 22, 2017 order. The court incorporates the reasoning of that order herein.

Brook, 151 N.H. 65, 68 (2004); see also RSA 547-C:29. The statute "also allows the court to consider the duration of the occupancy and nature of the parties' use, contractual agreements as to the disposition of the property, the status of legal title to the property and other factors the court deems relevant." Pedersen, 151 N.H. at 68.

Plaintiff seeks an equal split of the proceeds of the sale of the house. Defendant argues this would not be equitable, as plaintiff would unfairly benefit from the increased value of the house directly attributable to the improvements he made to the property. During the original probate of Ms. Goode's estate, the property was appraised at $135,000. While the property has in all likelihood increased in value since then—the City has recently assessed its value for tax purposes at $176,300 (Pl.'s Ex. 3)—neither party had the house appraised for purposes of the instant action. More importantly, defendant failed to present any evidence indicating what, if any, increase in value was due to his claimed improvements. Defendant also failed to present evidence proving the existence of the improvements or the cost of the same, such as photographs or receipts.[2]

Defendant did make contributions to the general upkeep and maintenance of the property for the past several years. In that time, plaintiff contributed nothing with the exception of paying one half of a single extermination bill. (Def.'s Ex. I.) However, the costs incurred by defendant were incidental to the day-to-day ownership of real estate, and defendant also enjoyed the full use and benefit of residing on the property. Further, defendant's occupation of the property prevented the house from generating a rental income or simply being sold. In light of the foregoing, the court finds no grounds on

[2] While defendant did submit some receipts into evidence, they were for minor expenses related to services like pest control, lawn care, and stair maintenance. (See Def.'s Ex. I & K.)

which to offset plaintiff's proceeds by the amount of defendant's contributions to the property. Accordingly, the proceeds of the sale shall be divided equally.

The parties also dispute the respective share of the outstanding property taxes and penalties that each should bear. Plaintiff argues defendant ought to be responsible for the entirety of both the taxes and the penalties, as defendant has had sole use and enjoyment of the property. Defendant, on the other hand, maintains he already paid his share of the taxes, and that any unpaid share was plaintiff's responsibility.

"[E]ach tenant in common[3] is obligated for the entire tax bill on any commonly-owned property." Greene v. McLeod, 156 N.H. 724, 730 (2008). "[A] tenant in common who pays the entirety of a tax bill has an automatic claim for contribution from his cotenants for their proportionate share of the burden, absent an agreement to the contrary." Id.; see also Howland v. Stowe, 194 N.E. 888, 891 (Mass. 1935) ("One tenant in common may recover from another his proportionate share of money expended in paying . . . taxes . . . ."). Accordingly, as joint owners of the property, both parties shall be liable for equal portions of the property taxes owed.[4]

That being said, the court finds the circumstances surrounding the failure to pay taxes requires a different allocation of the resulting accumulation of costs and interest. Though plaintiff may have been under the mistaken impression that she had no legal obligation to pay taxes for a property she did not reside in, defendant at no point alerted her to the fact that he himself was not paying taxes either. The record indicates that

[3] While defendant has in the past argued over whether the parties own the property as tenants in common or joint tenants with rights of survivorship, this issue is moot. As the court has already ordered the partition of the property, to the extent there was any argument that a joint tenancy may have existed, it has been severed and has reverted to a tenancy in common. See Wentworth v. Remick, 47 N.H. 226, 227 (1866).

[4] While defendant claims to have paid a portion of the taxes over the years, he did not provide documentation for any such payment.

taxes were not paid, at least in part, beginning in 2012. (Pl.'s Ex. 3.) However, plaintiff was not notified of the delinquency until 2016 when a representative of the City of Manchester contacted her by phone. By failing to provide notice of his actions to plaintiff, defendant robbed her of the opportunity to either pay the outstanding taxes herself or take some other action that would mitigate her damages. As a result, the court finds defendant is liable for the entire amount of costs and interest that have accrued since 2012.

The parties may opt to pay their respective tax obligations directly to the City of Manchester. In the alternative, the amounts owed shall be removed from the proceeds of the sale of the property, with the remaining balance distributed to the parties consistent with the foregoing. The parties may jointly select an individual to serve as a commissioner to arrange for and oversee the sale of the property and the distribution of the proceeds. Should the parties be unable to agree, the court shall appoint Attorney Charles A. Russell of Concord, New Hampshire as commissioner, if he is willing to serve. The parties shall notify the court of the status of the commissioner within thirty (30) days.

SO ORDERED.

Date: 1/24/2018

Amy B. Messer
Presiding Justice

3/27/18 COPY FO... INFORM...

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Evelyn Tarnawa

v.

Richard Goode

Docket No. 216-2016-CV-00869

ORDER

Plaintiff, Evelyn Tarnawa, has brought this petition seeking to partition property jointly owned by the parties. Prior to trial, the court issued orders on defendant's motion to dismiss and motion for summary judgment on July 10, 2017 and September 22, 2017, respectively (Messer, J.). The court held a bench trial on December 19, 2017 and issued a final judgment by order of the court dated January 29, 2018 (Messer, J.). Before the court is defendant's motion for reconsideration and stay. Upon consideration of the pleadings, arguments, and the applicable law, the court finds and rules as follows.

A motion for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended." Super. Ct. Civ. R. 12(e). However, while "[the rule] entitles a party who has received an adverse ruling on a motion to seek reconsideration, [it] does not purport to authorize either party to submit further evidence bearing on the motion." Smith v. Shepard, 144 N.H. 262, 265 (1999). Moreover, the Court is not obligated to consider new arguments raised for the first time in the motion for reconsideration. See Mountain Valley Mall Assocs. v. Municipality of Conway, 144 N.H. 642, 655 (2000) (finding no abuse of discretion where

"the trial court expressly refused to consider the merits of the claim" first raised in a motion for reconsideration); Smith, 144 N.H. at 265 ("Because the plaintiffs first raised the issue in their motion for reconsideration, the trial court had the discretion to . . . not consider the issue . . . .").

Defendant first argues that the court should reconsider its ruling on the grounds of *res judicata*. However, the court has already addressed this argument and found it to be without merit in its September 22, 2017 order. Although defendant now seeks to convince the court that reconsideration is warranted based upon the ruling in Canty v. Hopkins, 146 N.H. 151 (2001), the court is unpersuaded. The facts in Canty are substantially dissimilar to the facts in this matter. Most notably, this is an action to partition property which was not before the probate court during the administration of the estate. Here, unlike Canty, defendant did not challenge title to the property as joint tenants (or tenants in common) in the probate court, and neither party sought a partition of the property. Therefore, the cause of action here was never before the probate court and there was no final judgment on the merits in the matter presently before this court.[1] The court finds the additional cases cited by defendant, Adamson v. Marill, No. CV 166055562S, 2017 WL 715686 (Conn. Super. Ct. Jan. 13, 2017), and Judy v. Judy, 712 S.E.2d 408 (S.C. 2011), similarly distinguishable where the parties in those cases not only had the opportunity to litigate the issues in a prior action, but in fact did so. Such are not the circumstances here.

Defendant further argues that plaintiff's partition action is barred by the doctrine of laches. "Laches is an equitable doctrine that bars litigation when a potential plaintiff

[1] Although defendant has argued that this action should have been heard by the probate court as the partition action existed at the time of the probating of the will, the court notes that a partition action is a right held by any joint owner of property that need not be raised at any particular time.

has slept on his rights." In re Estate of Laura, 141 N.H. 628, 635 (1997). The Court considers four factors when contemplating the doctrine: (1) the knowledge of the plaintiffs; (2) the conduct of the defendants; (3) the interests to be vindicated; and (4) the resulting prejudice." Appeal of City of Laconia, 150 N.H. 91, 93 (2003). "In determining whether to apply the doctrine of laches, most courts will look for guidance to the analogous statute of limitations." State Emps. Ass'n of N.H., Inc. v. Belknap County, 122 N.H. 614, 622 (1982). "When an action is brought within the limitations period, laches will present a bar only if the delay in bringing suit was unreasonable and prejudicial to the defendant." Id. "The party asserting laches bears the burden of proving both that the delay was unreasonable and that prejudice resulted from the delay." Appeal of Plantier, 126 N.H. 500, 505 (1985).

As discussed at length in both the court's order on defendant's motion to dismiss and motion for summary judgment, "any person owning a present undivided legal or equitable interest or estate in real or personal property . . . , not subject to redemption, or the holder of an equity of redemption shall be entitled to have partition or division." RSA 547-C:1. The fact that plaintiff did not object to defendant living on the property rent-free, and did not move to partition sooner, was beneficial to him and certainly does not eviscerate plaintiff's right to seek partition of the property, a right she may exercise at any time.

Finally, defendant argues that the court did not consider the special circumstances in this case before ordering partition and sale of the property. The defendant is incorrect. The court carefully considered all of the information before it in

determining that the appropriate remedy is partition and sale of the property. (Order, January 29, 2018.)

With respect to defendant's request for a stay, the court finds that justice would not be served by a stay of this action. In particular, the court notes that the taxes on the property have not been paid and there is nothing that would prevent the City of Manchester from moving forward with a tax lien or taking other action on the property. The plaintiff is over eighty years old. She has not objected to defendant's continued use and enjoyment of the property, without compensation, for approximately eight years. Although defendant has purportedly maintained the property during that time, he does not have a right to force that continued arrangement indefinitely. The grant of a stay would be of significant detriment to the plaintiff as she would be required to continue contributing to the taxes on the property and arguably required to pay her share of the back taxes without the benefit of the proceeds from the sale.

For all of the foregoing reasons, defendant's motion for reconsideration and stay are DENIED. The parties shall notify the court of the status of the commissioner within thirty days of this order.

SO ORDERED.

Date: 3-27-2018

Amy B. Messer
Presiding Justice