THE STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET NO. 2019-0027

AMANDA COLBURN

V.

WAYNE SAYKALY, JR.

&

NICHOLAS SAYKALY

DISCRETIONARY APPEAL

FROM A FINAL DECISION OF THE

9th CIRCUIT COURT-GOFFSTOWN

BRIEF OF PLAINTIFF/APPELLEE

AMANDA COLBURN

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TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

QUESTIONS PRESENTED FOR REVIEW

1. Was it proper for a judge of the district division of the Circuit Court to determine a matter indirectly evicting the appellant from residing at a home deemed a marital asset, when the family division of the same court, acting through the same judge, had earlier entered a temporary order providing for the appellant's permissive occupancy at the very same marital asset?

2. Did the District Division of the 9th Circuit Court-Goffstown lack jurisdiction over Nicholas Saykaly, named in the eviction action as an occupant of the premises rented to his co-defendant tenant brother, Wayne Saykaly?

STATEMENT OF THE CASE

In this case the divorcing husband and wife (Amanda and Nicholas Saykaly)) and their children resided in a home titled solely in the name of husband Nicholas Saykaly, located in close proximity to a non-restricted residential rental single family house owned by the wife from long before her marriage. The couple initially resided in the home owned by the wife prior to the marriage, and then subsequently purchased the marital home which is titled solely in the husband's name. As fate would have it, the wife had rented the rental house to her divorcing husband's brother (Wayne Saykaly). The marital "Temporary Order" (Appellant's Appendix at A2-A3) and "Temporary Decree" (Appendix at A4-A7) issued by the family division of the Goffstown Circuit Court had provided that the divorcing wife would continue to live in the marital home with the mortgage paid by the husband, while the husband would live as a guest of his brother at the nearby home owned by the wife. For the purpose of this appeal both houses are considered marital property. Id.

Within several months after the issuance of the Temporary Order the wife, in her continuing role as the landlord of the property rented to brother Wayne, filed for eviction against both Wayne (the tenant) and Nicholas (an occupant) in the district division of the 9th- Circuit Court- Goffstown. The judge who heard the matter (Hon. Suzanne Gorman) had also presided over the marital matter and had issued the Temporary Order and Decree. The ground for the eviction was bacterially contaminated water from a dug well serving the property, which Amanda Colburn claimed had rendered the premises unsafe and necessitated that the property be vacated.

Whether Amanda Colburn's eviction action was a good-faith effort to address a genuinely compromising condition of the premises, or was merely a device to harass and trouble her divorcing husband, was contested at the district division trial. Since Judge Gorman found that the property was "nonrestricted property" within the meaning of New Hampshire landlord-tenant statute, the Court did not have to resolve the merits of the contamination issue and ruled that Ms. Colburn was at liberty to remove the property from the rental market (and evict the occupants). Appellant's Brief at 20. Under New Hampshire law, an owner of nonrestricted property does not need good cause for eviction pursuant to RSA 540:2,I.

Judge Gorman awarded judgment to the owner, finding that appropriate notice had been given to the tenant. The order was issued "without prejudice to any rights and responsibilities" of the parties as determined in their family division matter. Appellant's Brief at p.20.

According to the husband's brief on appeal, the district division (which appellant erroneously calls "the Landlord-Tenant Court") erred in determining that it had "jurisdiction" to hear the eviction matter, given the family division's prior determination in the Temporary Order that the husband could reside with his tenant brother. Appellant urges a "bright-line ruling" that the family division, upon the filing of the

marital action, has "exclusive jurisdiction over marital property" with respect to the "rights and responsibilities of the litigant spouses." Appellant's Brief at 15.

The husband argues in the alternative that the district division had no authority to interrupt the occupancy of husband Nicholas as Nicholas had no "landlord-tenant relationship" with his wife, the owner of the property.

SUMMARY OF ARGUMENT

Read narrowly (and literally), the appeal has no merit as presented. There is no "Landlord-Tenant Court," but rather a "district division" of the *Circuit Court*, and that Circuit Court also includes a family division of that same Circuit Court. Only one Court has spoken to the travails of the parties: *the 9th Circuit Court- Goffstown Division.* Also, only one judge has spoken to those travails: Judge Suzanne Gorman. Appellant does not suggest that some OTHER COURT should have addressed the parties' disputes. In that sense, there is no jurisdictional issue, as without question the matters resolved by the 9th-Circuit Court- Goffstown were within its jurisdiction.

The Appellee is mindful that the Supreme Court has exercised its discretion to hear this non-mandatory appeal, and the appellee suspects that the Court expects a broader view of the matter than merely underscoring that all of the proceedings took place in a single court – the same court – and that there can thus be no jurisdictional complaint. Rather, read broadly, the proceedings might be deemed to raise a question not of jurisdiction, but rather a more precise inspection of how the family and district divisions should mesh when – as here – the district division inherits a case posture

fashioned by the family division and in effect alters that case posture by modifying a spouse's relationship to a marital asset.

In essence, the appellate issue could be stated: "In the context of the Circuit Court with its multiple divisions, is that kind of modifying ok?" In answering this question, one would seemingly look to several parameters: Is the action of the modifying division inconsistent or contradictory to the actions of the family division? Is the action of the modifying division in violation of any court rule or statute? Is the action of the modifying division subject to remediation by the family division, in order to alleviate harshness or unfairness? And, lastly, can it reasonably be said that the action of the modifying division, even if unfavorable to a party, caused that party legal prejudice?

For the reasons set forward below, appellee answers that the modifications *made by the district division* are: 1) consistent with the Order of the family division; 2) not offensive to any court rule or statute; 3) in any event wholly remediable by the family division, should remediation be deemed desirable: and 4) wholly without legal prejudice to the defendant. Thus, on multiple grounds, the order of the district division of the Circuit Court should be affirmed.

As to Nicholas Saykaly's argument that the Circuit Court lacked jurisdiction over him because he was merely an occupant and not a tenant, the argument is premised on a definition of "tenant" contained in RSA 540-A:1, which is *not* the chapter governing evictions. The chapter governing evictions, RSA 540, makes clear that an occupant is subject to eviction in the same manner as a tenant. RSA 540:1, 540:2(I), 540:12. Certain types of occupancy do not qualify as tenancies (e.g., occupancy in rooming houses (RSA 540:1-a (IV)), but those exceptions are inapplicable here.

ARGUMENT

I. The Appellant's claim of lack of jurisdiction is not supportable, but it is appropriate to evaluate how the district and family divisions are meant to coordinate their functioning in a single case.

Jurisdiction is the judicial power to hear and decide a legal dispute. A court also has the jurisdiction (power) to determine whether it has jurisdiction. The appellant posits that there is a jurisdictional defect in this case, insofar as the "landlord-tenant court" [sic] took control of this matter from the family division, which had previously afforded to the appellant indirect residency in the home owned by the plaintiff.

There can be no merit to this argument. There is no "landlord-tenant court." There is a district division of the Circuit Court, which shares divisional status with the family division of that Court. The Court with the power to resolve the domestic and tenancy matters arising from the conduct of the divorcing spouses is the 9th Circuit Court- Goffstown. There is only one *court* that exercised jurisdiction, and it is not possible to argue that the court that acted – being that one court – was without jurisdiction.

The statutory history of the creation of the Circuit Court gives every indication that its divisions were intended to function together, comprising a single court. The Court was formed from the joinder of the former probate and district courts with the more recently formed "judicial branch family division." RSA 490-F:3. Each location of

the Circuit Court has the authority to hear all matters within its subject matter jurisdiction. RSA 490-F:2. Further, cases may be reassigned within the court "as justice or efficiency requires." Id. Judges may be certified to hear cases in all divisions of the court. RSA 490-F:6 (VII). The statutory provisions thus make clear that the divisions are meant to comprise an indivisible court, and not to function as three separate bodies under a single roof. There is nothing in the statutory organization of the Circuit Court to restrain the Court's three divisions from addressing severable aspects of a common dispute, as "justice and efficiency may require."

Of course, there is a non-jurisdictional issue emanating from the circumstances of this case; i.e., did the two divisions of the Court acting in this matter, the district and family divisions, comport themselves properly, given the organizational structure of the Circuit Court? Did one division or the other fail to yield when it should have? Did one division or the other owe a duty of deference which was not fulfilled? Although not properly put forward in this appeal, the issue of whether the two divisions comported themselves properly is worthy of argument, and Plaintiff will proceed to argue the matter on the possibility that the Court intends to see the matter addressed.

II. The Eviction Order by the district division was not a challenge to the authority of the family division, as the "Temporary Order" of the family division did not guarantee the husband an ongoing residency, and the good-faith interruption of that residency was thus not inconsistent with the authority of the family division.

The Transcript of the district division hearing describe (by offers of proof) that the premises rented to Wayne Saykaly were served by a dug well of considerable vintage that had become contaminated with e coli bacteria and bacteria from dead animals. Tr. At 4-5. The property was found to be nonrestricted and, proper notice

having been given, the landlord was at liberty to remove the property from the market. Appellant's Brief at 20.

The district division's granting of the eviction was not in any way offensive to the Temporary Order of the family division. It is mere happenstance that the eviction affects the interests of husband Nicholas Saykaly, and that happenstance arises from the further unusual circumstance that Nicholas's brother Wayne was a long-term tenant of Amanda Colburn. While this provided a convenient peg upon which to hang the problem of finding a home for Nicholas during the divorce while minimizing the strain on the marital estate, there is no respect in which the Temporary Order locked in or guaranteed that permitted occupancy, which was obviously derivative of the tenancy of brother Wayne.

By its terms, the Temporary Order recognized that the husband's dwelling in the rental home "does not appear to be sustainable for the long term," particularly given the possibility that tenant Wayne might move out of the rental property. Appendix at A2. The Temporary Decree provides that the husband "shall temporarily be permitted to reside" with his tenant brother at the residence wholly owned by the wife. Id. at A6. The permitted occupancy of Nicholas could have been interrupted by any number of calamities: the failure of the heating system, the well going dry, or a building fire. As it turned out, the calamity that came into play was the safety of the water supply.

By analogy the permissive occupancy allowed by the temporary order in favor of Nicholas is similar to the occupancy rights of a tenant at will, or tenant at sufferance, which can be terminated through lawful procedures for eviction pursuant to RSA 540 (See RSA 540-A:2). In each of these cases the Circuit Court Judge-District Division, is tasked to determine whether the "owner, lessor, or purchaser at foreclosure sale" has a superior right to possession of the premises than a "lessee, occupant, mortgagor, or other person in possession" under all the facts and circumstances of each case. RSA

540:12. The transcript certainly confirms that Judge Gorman was cognizant of the occupancy rights created by the temporary order she issued in the divorce case, and likewise confirms that she weighed the husband's temporary permissive occupancy rights against the property right of wife owner in reaching her decision that under all the facts and circumstances the property right of the owner was superior to the occupancy rights of the "other person in possession."

The ultimate remedy for husband Nicholas is to return to the family division for a modification of the temporary order. However, it is not a cause for complaint that before doing so the *district division* assessed the merits of the building infirmity that resulted in the eviction against the temporary permissive occupancy allowed by the Temporary Order. This is a matter squarely within the competence of the district division. If anything, the situation was rendered even more palatable by the fact that the judge of the district division hearing the landlord complaint was the same judge who had rendered the Temporary Order in the family division. She would be (and was) acutely sensitive to preserving the Temporary Order to the extent preservation could be accomplished. It is no one's fault – and no cause for complaint – that building failure had rendered one aspect of that Order inoperable.

III. The decision of the Circuit Court was not violative of any statute or court rule.

The Appellant has not identified any respect in which the rulings of the Circuit Court were violative of any New Hampshire statute or court rule. Instead, the Appellant urges this Court to adopt a "bright-line" rule, announced more than a century ago in a 1908 United States Eighth Circuit appeal, Sullivan v. Algrem, 160 F. 366 (8th Cir. 1908). The Appellant reads that case as holding that "the court that first exercises jurisdiction over property retains jurisdiction over that property until the purposes of the seizure is

[sic] accomplished." Appellant's Brief at p. 13. The Appellant characterizes the first-in-time court as establishing a principle of "exclusive jurisdiction." Id.

Whatever the merits of Algrem's "first-in-time" rule, a case decided before the development of the first formal federal "doctrine of abstention" (Pullman Doctrine 1941) is not apposite to the instant case. In Algrem, the US Circuit Court was presented with a true jurisdictional quandary, as at least one Missouri state court had taken jurisdiction over property in receivership that was the subject of later proceedings by the same parties in the federal district court in St. Louis. The US Court of Appeals stated that "the only question" posed by the appeal was whether the property in question had been withdrawn from federal jurisdiction by the prior acquisition of jurisdiction by one of the state courts of Missouri. Thus, unlike this case, which involves only a single court, the controversy in Algrem involved two different courts of two different jurisdictions and how they should interact when called upon to adjudicate a single, common property. (Perhaps owing to its vintage, the Algrem court did not address the matter of whether the federal forum should be favored simply by virtue of concepts of federal supremacy.)

Perhaps more important, the answer to the problem did not require the federal court, even though clearly second-in-time, to divest itself of jurisdiction, or see the federal action dismissed. Rather, the federal court in Algrem required of itself that it merely stay its hand, and temporarily withdraw. The federal court "should proceed as far as may be necessary or convenient without creating a conflict concerning the possession or disposition of the property, and should then be stayed until the proceedings of the court of co-ordinate jurisdiction regarding the property have been concluded, or ample time for their termination has passed, *or that court has relinquished dominion.*" Id. at 372 (emphasis added).

Here It is plain that the circuit court did nothing offensive to any other court. Its district division made a decision affecting Nicholas Saykaly's status with respect to a marital asset, but it did so only in the face of health and safety concerns involving the marital asset, and with pertinent regard for the caution appropriate to the circumstances. It did not "create a conflict," but resolved a conflict emanating from the status of the marital asset itself.

It becomes apparent that the Algrem case, upon which the appellant almost wholly relies, actually refutes the appellant's argument in its entirety. As noted above, the Algrem court was careful to state that the federal (second-in-time) court, should not decline jurisdiction or order the matter dismissed. Rather, the second-in-time court should stay its hand, and wait as the first-in-time court either concludes the matter, exhausts a reasonable time period to act, or itself relinquishes dominion. Algrem, at 372. Since the district division and the family division comprise the same court, the decision of the district division to act serves as an implicit determination by the court that it has relinquished dominion of the marital asset insofar as necessary to resolve the landlord-tenant issue. The Circuit Court clearly had that authority, and Judge Gorman chose to exercise it. Thus, Algrem is wholly supportive of the action taken here by the district division, since Algrem allows for such action if the "competing" entity has relinquished dominion.

The underlying principle of "first-in-time" announced in Algrem has been reaffirmed many times in the reported cases, and characterized as "well stated." Hack v. Bolint, 191 N.E. 177, 179 (Ind.App. 1934). The most important point about Algrem and the cases in its wake, is that the "first-in-time" principle is not a restraint compelling the first court to a course of "exclusive jurisdiction." The court exercising "prior jurisdiction" has "the right . . . to determine for itself how far it will permit any other court to interfere with such possession and jurisdiction." In re New York, N.H. & H.R.

CO., 26 F.Supp 18, 24 (D. Connecticut, 1939). Here, the family division of the court determined for itself that justice and efficiency would be served by permitting the district division to act on the eviction action. Such a determination creates no jurisdictional issue and does not generate any proper complaint of unfairness. Even if the family division and the district division were in fact separate courts with potentially clashing jurisdictions, there would be nothing suspect in the family division determining for itself that justice would be served by allowing a competing court to hear the eviction matter.

IV. The Defendant's complaints are remediable through the auspices of the family division, eliminating the prospect of harshness or unfairness.

As noted previously, the Temporary Order of the family division is not a grant of tenancy. The family division itself recognized that the permissive occupancy did not appear to be "sustainable for the long term particularly if his brother moves out of the rental property." Appendix at A2. Indeed, Nicholas does not even enjoy a tenancy, but rather a mere occupancy, making his tenure even more subject to interruption. There are any number of circumstances that could have interrupted this occupancy, wholly apart from the unclean water making the premises unsafe and potentially unhealthy.

The law provides a remedy for Nicholas Saykaly's impaired occupancy. RSA 485:16 does not limit a party to a single Temporary Order. Rather, the family division is empowered to "issue *orders* with such conditions and limitations as the court deems just which may, at the discretion of the court, be made on a permanent or temporary basis." Id. The district division's order specifically provided that the eviction order was "without prejudice to any rights and responsibilities" of the parties to the family division proceeding. Appellant's Brief at 20.

Given that Nicholas' status with respect to a marital asset has changed, he is empowered to seek a new Temporary Order in the family division. He has a remedy for any disadvantage imposed on him by the eviction action.

V. In any event, it is impossible for the Appellant to show that the mere functioning of the Circuit Court bespeaks "prejudice."

Appellant seeks to confine these proceeding to the family division, and bar the district division from acting with respect to the property question, even though that property question implicated the health and safety of tenants at the property. However, Appellant has no legal basis to bar a family division judge from "relinquishing dominion" to a district division judge, particularly where both the court and the judge are one and the same. There is no "prejudice" in allowing the relevant divisions of the Circuit Court to function so as to fully address the matter of whether an eviction is warranted from property which has become a marital asset, potentially injurious to tenants.

While the drawing of analogies is impaired by the fact that the instant case involves only a single court, it would be perfectly within the power of the family division (the first-in-time division) to relinquish dominion to the district division (the second-in-time division), for the purpose of resolving the eviction action. **Indeed, this is what *de facto* occurred, given that Judge Gorman was keenly mindful of the Temporary Order she had issued in the family division.** Nicholas Saykaly is not harmed or prejudiced simply by virtue of the Circuit Court fully exercising its jurisdiction.

Claiming, in the name of "jurisdiction," that the family division should have acted to the exclusion of the district division, works to impair the full jurisdiction of the multi-division Circuit Court. There is no authority supporting such a limitation on the court's

authority. There are many limitations (rules) which in any given case may work to the disadvantage of a party: for example, a monetary jurisdictional limit, or a requirement as to how service of process is to be achieved. The implementation of these rules to the disadvantage of a party is not legal prejudice, but merely the conditions under which the Court exercises its jurisdiction. The Court should not be impaired in the exercise of that jurisdiction by a bright-line rule, unsupported by any case, rule or statute, designed not for a multi-division court but rather to resolve clashes between competing courts.

VI. As an occupant of the premises, the Circuit Court had jurisdiction of Nicholas Saykaly notwithstanding that he lacked the status of "tenant."

Appellant argues that "there was no landlord-tenant relationship between the parties [meaning Amanda Colburn and co-defendant Nicholas Saykaly], which is required for the Landlord-Tenant Court [sic] to have jurisdiction." Appellant's Brief at p.16. Appellant cites to the definition of tenant in RSA 540-A:1(II), which provides that a tenant is a "person to whom a landlord rents or leases residential premises." Appellant takes the position that a mere occupant cannot be a tenant within the meaning of RSA. 540-A.

RSA 540-A is the chapter providing for specialized proceedings and penalties in cases in which a landlord or tenant has engaged in a "prohibited practice." Chapter 540-A has no application to the instant case.

The chapter of the New Hampshire statutes governing residential evictions is RSA 540. The Chapter contemplates that a notice to quit premises may be directed to a tenant or an occupant. RSA 540:2 (I), (II). RSA 540:12 expressly provides that possession may be recovered "from a lessee, occupant, mortgagor, or other person in

possession." There is no merit to Appellant's position that the Circuit Court's jurisdiction over Nicholas Saykaly is defeated because he is merely an occupant.

CONCLUSION

The decision of the district division of the Circuit Court should be affirmed. In acting on the eviction, the Circuit Court exercised its full jurisdiction. There was no bar to exercising that jurisdiction simply because the family division had earlier issued a Temporary Order which the district division then implicitly modified. The Circuit Court was empowered to resolve the eviction controversy, and the resulting modification of the Temporary Order was accomplished by the same judge who had issued the Temporary Order, quelling any complaint that the Circuit Court was in conflict with itself. In the words of the Algrem case upon which the Appellant relies, the family division relinquished any dominion it might possess so that the district division could act. The Appellant has suffered no prejudice and has no cause for complaint.

REQUEST FOR ORAL ARGUMENT AND CERTIFICATIONS

It is anticipated that Attorney Brian Shaughnessy will present the oral argument on behalf of the Appellee. Fifteen minutes is requested. Appellee certifies that this Brief contains less than 4558 words and is in compliance with Rule 16 (11).

On June 12, 2019, a copy of this Brief was electronically delivered to all counsel of record, and a physical copy was sent by first class mail, postage prepaid, to Wayne Saykaly, Jr.

June 12, 2019

s/ Brian Shaughnessy, Esq. (Bar #6894)