THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2019-0590

In re Estate of Lorraine R. O'Neill

Appeal Pursuant to Rule 7 From a Judgment of the 10th Circuit – Probate Division – Brentwood

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BRIEF OF APPELLEE JOHN G. DUGAN, ESQUIRE

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Oral Argument Requested. Ms. Cote will argue.

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QUESTIONS PRESENTED

1. Whether a New Hampshire probate court has subject matter jurisdiction over the ancillary administration of a nondomiciliary decedent's estate under New Hampshire law when the decedent owned real property within the state at the time of her death, and the decedent's estate claims insolvency and lack of sufficient personal property to pay the costs of administration.

2. Whether the probate court committed plain error under New Hampshire law when it granted ancillary administration of the decedent's estate without a prior finding of insolvency by the foreign court in which the decedent was domiciled.

3. Whether the probate court committed plain error under New Hampshire law when it granted ancillary administration of the decedent's estate where the verified petition for administration identified the decedent's real property within the state, which property is subject to divestment for payment of the just demands against the decedent's estate, including estate administration expenses, and where the decedent's will expressly empowers the executor to sell the property at-issue.

4. Whether the probate court committed plain error under New Hampshire law when it granted ancillary administration of the decedent's estate after expiration of the creditor nonclaim period where nonclaim statutes usually do not apply to obligations incurred after the decedent's death, such as costs of administration.

RELEVANT STATUTES

The statutes cited in this brief are included in the appendix to this brief.

STATEMENT OF THE CASE AND OF THE FACTS

The decedent, Lorraine R. O'Neill, died on June 28, 2015. Trust Apx. at 004.[1] At the time of her death, she was a Massachusetts domiciliary, and owned real property in New Hampshire. Id. at 004, 010. This real property now consists of several beach cottages and a beach parking lot in Hampton. Id. at 014; Admin. App. at 4, n.1. The decedent had also owned two properties in Franconia at the time of her death, but these properties were lost by tax deed in 2016. Trust Apx. at 014. At the time of this loss, the Franconia properties were controlled by the Appellant, Paul T. O'Neill ("Mr. O'Neill" or the "Trustee"), who served as trustee of the Lorraine R. O'Neill Revocable Trust – 2004 (the "Trust"), the named devisee of the decedent's New Hampshire properties.[2] See id. at 014, 021, 087.

Mr. O'Neill, also the decedent's son and one of the named executors in her will, instituted formal probate proceedings in Massachusetts in November 2015. Id. at 021, 026–27, 033. The decedent's will was admitted to probate pursuant to an agreement approved on May 18, 2018, by the Middlesex County Probate Court. Id. at 053. Through this court-approved agreement, the named executors further agreed not to serve as co-

[1] The Appendix to the Brief filed by the Appellant is referred to as "Trust Apx." The Appendix to the Brief filed by the Appellee is referred to as "Admin. App."

[2] Although the Trust is the named devisee, the decedent's will requires the executor to pay lawful "expenses of administration" to the extent they are not paid by the Trust, and expressly grants the executor the power to sell the decedent's real estate "without license of court or notice to or consent of beneficiaries." Trust Apx. at 022–24.

personal representatives in the Massachusetts probate proceedings, and that John G. Dugan ("Mr. Dugan" or the "Ancillary Administrator") would serve in their stead. Id. Mr. Dugan's appointment in Massachusetts became effective in January 2019. See Admin. App. at 4. The Massachusetts probate estate remains open. See id. at 4–6.

On June 19, 2019, Mr. Dugan filed a Petition for Estate Administration with the New Hampshire Circuit Court, 10th Circuit – Probate Division – Brentwood (the "probate court"), seeking appointment as ancillary administrator. Trust Apx. at 004. The petition, verified by Mr. Dugan, identified the decedent's real estate located in New Hampshire, and estimated its value to be $2,449,400. Id. at 010–011, 014. Mr. O'Neill was issued a Notice to Beneficially Interested Parties on July 10, 2019, notifying him that this petition had been filed. Id. at 058–59.

The probate court (Moran, J.) granted the petition on August 23, 2019, and the accompanying Notice of Decision was issued on September 9, 2019. Id. at 012; Admin. App. at 4–5. On September 20, 2019 — eleven days after issuance of the probate court's Notice of Decision and one day after expiration of the applicable deadline, see Prob. Div. R. 59-A (1) — Mr. O'Neill filed a motion for reconsideration of the probate court's grant of administration, raising a number of arguments. Trust Apx. at 086–94. Mr. O'Neill's motion made no argument concerning, or reference to, RSA 556:29 (2019). Id. Mr. Dugan submitted a timely objection to the motion, verifying, among other things, that "the known costs of administration exceed the [e]state's assets, and the New Hampshire real estate will likely need to be sold." Admin. App. at 3–4, 8 (footnote omitted).

Mr. O'Neill appealed the probate court's August 23, 2019 grant of administration. Trust Apx. at 103. The probate court (Weaver, J.) thereafter held a hearing on the motion for reconsideration and ruled that "no further action may be taken on the motion as all action is stayed pursuant to RSA 567-A:7." Id.; see RSA 567-A:7 (2019).

Underlying the pending litigation is a separate litigation brought by Mr. Dugan, as the personal representative of the decedent's Massachusetts estate, against Mr. O'Neill (individually, as trustee of the Trust, and as trustee of another trust, not a party to this action) and other individuals in the Middlesex County Probate Court in Massachusetts (the "Massachusetts Equity Action"). Admin. App. at 5–6, 13–36. As against Mr. O'Neill, the Massachusetts Equity Action arises out of Mr. O'Neill's misconduct, which resulted in the decedent's gross estate being so significantly diminished in size and value (at the time the decedent's husband died in 2002, there were assets in excess of $8,000,000–$9,000,000) that the decedent's Massachusetts assets are now insufficient to cover the expenses of the principal administration. Id. at 5–6.

SUMMARY OF THE ARGUMENT

The Appellant contends, without the support of controlling authority, that New Hampshire probate courts only have subject matter jurisdiction over a nondomiciliary decedent's New Hampshire real property where the decedent's principal estate is insolvent and there has been a prior finding of insolvency by a foreign court, reasoning that there is otherwise no "estate" in New Hampshire subject to administration. Appellant's Br. at 14–17, 22. This position ignores the process by which estates are administered in New

Hampshire. See, e.g., Judge of Prob. v. Nudd, 107 N.H. 173, 174–75 (1966) (administrator appointed, bond approved, inventory filed, inventory accepted, motion for license to sell filed, license granted, real estate sold).

It is the role of New Hampshire probate courts — not foreign courts — to determine whether the circumstances justify a sale of the decedent's real property located within our state. The decedent died holding real property in New Hampshire. The estate's claim of insolvency and/or lack of sufficient personal property to satisfy the demand against the estate, and its resulting claim to that real estate, are the basis of the probate court's jurisdiction over the decedent's assets. New Hampshire law requires administrators to file with the probate court an inventory of claimed ownership interests in New Hampshire property, and provides a period of time for interested parties to object. See RSA 554:1 (2019) (requiring filing of inventory within 90 days of appointment); Prob. Div. R. 105-A (providing parties and beneficiaries ten days to object). When an interested party objects, as would likely happen here, the resulting dispute can then lead to an adjudication by the probate court as to whether the estate's asserted interest in the decedent's real property is meritorious.

This is the process by which estates are administered every day in our courts, see, e.g., Nudd, 107 N.H. at 174–75, and is the process which should be followed in this case. The Appellant has cited no case in New Hampshire or elsewhere requiring a foreign adjudication of insolvency as a pre-condition for ancillary jurisdiction.

The probate court has jurisdiction over this case, see RSA 547:3 (2019), and did not commit plain error by granting the petition for ancillary administration. New Hampshire law does not require a prior determination

of insolvency by a foreign court to allow ancillary administration to proceed here. The verified petition demonstrated a sufficient interest in the decedent's real property — property that is, by statute, subject to divestment for payment of the estate's administration expenses and is, under the terms of the decedent's will, expressly permitted to be sold. See RSA 559:1 (2019); Trust Apx. at 022–24. The expiration of the creditor nonclaim period has no effect upon the Ancillary Administrator's claim, as RSA 556:29 does not govern the recovery of estate administration expenses. This Court should affirm the probate court's grant of administration, and remand the case to allow proceedings to continue in the normal course.

STANDARD OF REVIEW

The Appellant's arguments regarding the subject matter jurisdiction of the probate court are subject to de novo review by this Court. In re Estate of Mullin, 169 N.H. 632, 636 (2017); see Maldini v. Maldini, 168 N.H. 191, 194 (2015) (The Court "may address jurisdictional issues even if they are raised for the first time on appeal[.]").

The Appellant's arguments unrelated to subject matter jurisdiction, however, have not been preserved; the Appellant failed to timely raise these arguments, depriving the probate court of the opportunity to consider them. See State v. Batista-Salva, 171 N.H. 818, 822 (2019) (The Court "do[es] not [generally] consider issues raised on appeal that were not presented to the trial court."). Consequently, any consideration of such arguments by this Court would be subject to plain error review. See Sup. Ct. R. 16-A. (providing that the Court may consider "[a] plain error that affects substantial rights . . . even though it was not brought to the attention of the

trial court"). This Court has articulated the standard for plain error review as follows:

> The [plain error] rule is used sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result. For [the Court] to find plain error: (1) there must be error; (2) the error must be plain; and (3) the error must affect substantial rights. If all three of these conditions are met, [the Court] may then exercise [its] discretion to correct a forfeited error only if the error meets a fourth criterion: the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. The defendant bears the burden of demonstrating plain error.

Batista-Salva, 171 N.H. at 824 (citations omitted).

ARGUMENT

I. THE PROBATE COURT HAS SUBJECT MATTER JURISDICTION OVER THE ANCILLARY ADMINISTRATION OF THE DECEDENT'S NEW HAMPSHIRE ESTATE.

The Appellee sought appointment as ancillary administrator of the decedent's New Hampshire estate so that he could establish standing to put before the New Hampshire probate court the issue of whether the decedent's New Hampshire real property could be sold. The appellant seeks to prevent the probate court from ever considering this issue.

The Appellant's contention that a foreign court must first declare a decedent's principal estate insolvent before a New Hampshire probate court can exercise its jurisdiction over the decedent's real property located within this state is unsupported by applicable law, and is directly contrary to the process by which estates are administered in New Hampshire. See, e.g.,

Nudd, 107 N.H. at 174–75 (administrator appointed, bond approved, inventory filed, inventory accepted, motion for license to sell filed, license granted, real estate sold). The estate's claim to the decedent's New Hampshire real estate, which is subject to divestment by statute, and which the will expressly authorizes the executor to sell, provides a sufficient basis for the probate court's jurisdiction. See Robinson v. Dana's Estate, 87 N.H. 114, 116 (1934) ("Appointment or refusal to appoint does not depend upon the probable merits of the decedent's title or claim."); RSA 559:1; RSA 559:17 (2019). Seeking ancillary administration of a decedent's estate and seeking license to sell a decedent's real property are two distinct actions — only one of which has thus far occurred in the instant case (specifically, seeking ancillary administration).

This Court should affirm the probate court's grant of the petition for ancillary administration because: (A) New Hampshire law does not require a determination of insolvency — by a foreign court or otherwise — at the time ancillary administration is granted, even in cases where the decedent's New Hampshire assets consist solely of real property; and (B) in any event, the record establishes a sufficient basis for the probate court's exercise of jurisdiction in this case.

A. Insolvency is not a prerequisite to the probate court's exercise of jurisdiction over the ancillary administration of a decedent's real property.

The jurisdictional powers of the probate court are set forth by statute and, therefore, "determining the jurisdiction of the probate court [will] require [the Court] to engage in statutory interpretation," which is a question of law. In re Athena D., 162 N.H. 232, 234 (2011).

> In matters of statutory interpretation, [the Court is] the final arbiter[] of the legislature's intent as expressed in the words of the statute considered as a whole. [It] first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning. [It] interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. [It] construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover, [it] do[es] not consider words and phrases in isolation, but rather within the context of the statute as a whole.

Id. at 235 (citations omitted).

The subject matter jurisdiction of New Hampshire probate courts is governed by RSA 547:3. Relevant here, this statute grants probate courts exclusive subject matter jurisdiction over "[t]he granting of administration and all matters and things of probate jurisdiction relating to the composition, administration, sale, settlement, and final distribution of estates of deceased persons." RSA 547:3, I(b) (2019). The legislature's use of the phrase "[t]he granting of administration" is without limitation and, therefore, encompasses both circumstances where the decedent was a New Hampshire domiciliary (principal administration) and circumstances where the decedent was a nondomiciliary with a New Hampshire estate (ancillary administration). See In re George, 160 N.H. 699, 704 (2010) (interpreting medical injury screening panel statute to broadly include actions brought by non-patients where the statute "contain[ed] no language limiting its coverage to suits brought by recipients of medical treatment"); Clark v. Clement, 33 N.H. 563, 567 (1856) ("When an individual dies

possessed of estate in different governments, it is in general necessary that an administration should be granted in each government where the property is situated."). Further, where the legislature did not include language limiting the probate court's jurisdiction over ancillary administration proceedings when the estate consists solely of real property, it would be unreasonable to read an insolvency requirement into the statute. See In re Athena D., 162 N.H. at 235 (the Court "will not consider what the legislature might have said or add language that the legislature did not see fit to include"); Clark, 33 N.H. at 567.

Contrary to the Appellant's suggestion, see Appellant's Br. at 19, the probate court's jurisdiction of the administration of estates is not limited by RSA 554:15 (2019) or RSA 554:17 (2019). By their plain language, these statutes govern an administrator's powers and duties relative to real estate — not the jurisdiction of the probate court. See RSA 554:15 ("The administrator shall receive the rents and profits of the real estate, in case the estate is insolvent, and keep the same in repair, and account for the net proceeds thereof in his administration account." (emphasis added)); RSA 554:17 ("Every administrator shall apply for and procure license for the sale of so much of the real estate as may be necessary to pay debts and legacies, if the personal estate is insufficient[.]" (emphasis added)).

The probate court's jurisdiction is, similarly, not restricted by RSA 559:1. This statute provides one basis[3] upon which the probate court may

[3] RSA 559:1 is not the sole statutory authority governing when a decedent's real estate may be sold. See RSA 559:17 (by provision of will); RSA 559:18 (2019) (by consent). Also relevant here, RSA 559:17 provides: "When it shall appear by the will of a person deceased to have been his

grant a license to sell a decedent's real estate; it does not control whether the probate court has jurisdiction to consider a motion to sell. See RSA 559:1 ("The judge, on application of the administrator, may grant a license for the sale of the real estate of any person deceased . . . when the personal property shall be insufficient to pay the just demands by law chargeable to the estate."); In re Estate of Porter, 159 N.H. 212, 215 (2009) ("RSA 559:1 does no more than authorize an administrator to seek a license to sell property to satisfy debts . . . ."). Whether the administrator, once appointed, has the power to dispose of the decedent's real property in New Hampshire is a separate question from whether an administrator can be appointed in the first instance. See RSA 559:1 (authorizing probate court to grant license to sell "on application of the administrator," suggesting that the court can only entertain a motion for license to sell after an administrator has been appointed); see also 10 Charles A. DeGrandpre and William V.A. Zorn, New Hampshire Practice: Probate and Administration

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intention that his executor should dispose of his real estate for any lawful purpose, the judge may license the administrator to sell it for the purpose and in the manner intended by the testator." This Court has previously interpreted the predecessor statute to RSA 559:17 as "authoriz[ing] the probate court to give the administrator the power of sale which the will gives the executor." Rollins v. Rice, 59 N.H. 493, 496 (1880). Thus, here, even if RSA 559:1 were inapplicable, the New Hampshire properties could nevertheless be sold because the decedent's will demonstrates an intention that the executor be permitted sell it under the circumstances. See Trust Apx. at 021 (leaving residue of estate to Trust), 022 (providing that unpaid administration expenses "shall be borne by [decedent's] residuary estate."); 023–24 (granting executor power, "without license of court or notice to or consent of beneficiaries," to "sell, exchange, lease, mortgage, or pledge any property" of the decedent).

of Estates, Trusts & Guardianships § 32.5 ("There are no provisions for the issuance of a license to sell real estate by a foreign executor . . . without the necessity for ancillary administration . . . .") (4th ed. 2019); cf. RSA 554:28 (authorizing foreign administrator to move to sell a decedent's personal property situated in New Hampshire without ancillary appointment).

In Estate of Porter, the appellant, claiming to be the decedent's common law spouse, obtained by settlement agreement a life estate interest in certain real property of the decedent, which interest was conditioned upon his agreement to pay the mortgage, insurance, and tax costs associated with the property. In re Estate of Porter, 159 N.H. at 213. Upon the appellant's failure to make these payments, the decedent's estate "filed a petition in the probate court seeking to terminate the life estate." Id. The probate court terminated the appellant's life estate, and the appellant challenged the merits of the probate court's decision on appeal. Id. at 214. Specifically, the appellant argued, among other things, "that the probate court was without jurisdiction because the property was not subject to a license to sell under RSA 559:1." Id. The Supreme Court rejected this argument, reasoning that, since the adoption of the Omnibus Justice Act of 1993, "the probate court has jurisdiction to resolve issues involving real estate of the decedent if the property is 'in' the estate of the decedent." Id. at 214–15.

Here, the Ancillary Administrator's verified petition sufficiently demonstrates that the real properties at issue are "in" the decedent's estate. See Trust Apx. at 005, 010, 014 (representing properties at-issue were owned by the decedent at the time of her death). The Appellant will have the opportunity to object to the inclusion of the decedent's New Hampshire

real property on the inventory, which the Ancillary Administrator will be required to file with the probate court. See RSA 554:1; Prob. Div. R. 105-A. In addition, the Appellant will have the opportunity to challenge the Ancillary Administrator's authority to sell the properties when a motion for license to sell is filed, which, as noted above, can occur only after appointment. See RSA 559:1; Prob. Div. R. 58. Should the Appellant also wish to challenge the title to the decedent's real property, the probate court would have jurisdiction over that claim as well. See RSA 547:3, I(l)–(m) (2019); RSA 547:11–b (2019) (governing declaratory judgment actions regarding title to real property in decedent's estate); RSA 547:11–c (2019) (governing quiet title actions regarding real property in decedent's estate).

It would make little sense to require a prospective ancillary administrator to demonstrate insolvency of the estate at the time of filing his or her petition for ancillary administration. First, the estate can demonstrate a sufficient interest in the property without being insolvent. See, e.g., RSA 559:1. RSA 559:1 does not require insolvency for the probate court to grant a license to sell a decedent's real estate; the administrator — ancillary or otherwise — need only shown that "the [decedent's] personal property [is] insufficient to pay the just demands by law chargeable to the estate." RSA 559:1; see Goodall v. Marshall, 11 N.H. 88, 96 (1840) ("[T]he administrator may sell the lands, under a license, for the payment of debts, if they are necessary for that purpose, whether the estate be solvent, or insolvent." (emphasis added)); 11 Charles A. DeGrandpre and William V.A. Zorn, New Hampshire Practice: Probate and Administration of Estates, Trusts & Guardianships § 49.5 (4th ed. 2019) ("RSA 559:1 provides that the administrator can ask the court to

grant a license to sell estate real property to pay the debts of the estate when the value of personal property is insufficient (regardless if the estate is insolvent or not) to pay the estate debts by filing probate court Form 2134-p." (emphasis added)). This is an entirely different standard than insolvency, which requires consideration of all assets of the decedent, rather than just the decedent's personal property. Cf. RSA 554:19-b (authorizing administrator to petition the court for an "initial determination" of insolvency when "it appears to [the] administrator . . . that the known claims and expenses of administration exceed the value of the assets").[4]

Second, in a different but analogous context, this Court has previously held that a prospective administrator can demonstrate a sufficient interest in the decedent's property to justify initiation of ancillary proceedings without proving the merits of the underlying claim at the time of appointment. See Robinson, 87 N.H. at 117 (concluding that a creditor need not "prove his claim to be valid before the petition [for appointment as ancillary administrator] is granted"). "Appointment or refusal to appoint does not depend upon the probable merits of the decedent's title or claim . . . . [I]f anyone having a proper interest deems it worth while to be asserted, an appointment should be made." Id.

[4] Similarly, to demonstrate an interest under RSA 559:17, the petitioner would need only show that the sale is authorized by the will. See RSA 559:17 (license to sell proper "[w]hen it shall appear by the will of a person deceased to have been his intention that his executor should dispose of his real estate for any lawful purpose").

This is perhaps why the New Hampshire Probate Court form Petition for Estate Administration (NHJB-2145-Pe) requires the petitioner to list the value of the decedent's estate to the extent it can then be ascertained, but does not require that the petitioner certify or otherwise represent the extent of the decedent's debts and likely administration expenses. See Admin. App. at 37–45. In contrast, the New Hampshire Probate Court form Motion and License to Sell Real Estate (NHJB-2136-Pe) requires that the movant set forth a schedule of demands (including debts/legacies, funeral expenses, allowances to widow, and estimated administration expenses), and identify a total deficit as compared to the estate's non-real assets. Id. at 46–48; see also Prob. Div. R. 106-A ("Motions for a license to sell real estate for the payment of debts or legacies must include a statement, under oath, showing the assets of the estate, the debts (and legacies, if any) due from the estate, and the estimated amount of the expenses of administration.").

The Appellant also appears to argue that, even if the probate court would have jurisdiction over the ancillary administration of the decedent's estate, RSA 556:29 operates to divest the probate court of jurisdiction in the instant case. See Appellant's Br. at 24; RSA 556:29 (prohibiting "creditor[s] of the deceased" from instituting claims against decedent's New Hampshire real estate more than two years after decedent's death). However, even putting aside that RSA 556:29 is a statute of repose (i.e., not a jurisdictional statute), the Appellant cites no authority to support his contention that RSA 556:29 applies to estate administration expenses (which are incurred after the decedent's death) and, for the reasons more fully articulated in Section III below, an administrator is not a "creditor" as the term is used in the statute.

Ultimately, by the plain language of applicable statutes, the probate court has subject matter jurisdiction over ancillary administration proceedings, regardless of whether the decedent's estate consists solely of real property and/or whether the domiciliary estate is or has been declared insolvent. See RSA 547:3, I(b). The estate's claim to the decedent's New Hampshire real property — again, property which is subject to divestment by statute and is expressly permitted to be sold pursuant to the terms of the decedent's will — provides a sufficient basis for the probate court's jurisdiction. See Robinson, 87 N.H. at 116; RSA 559:1. Although this Court has recognized that ancillary administration "may not be required where the estate is solvent and the property consists of real estate only," Clark, 33 N.H. at 567 (emphasis added), it has never held that a finding of insolvency is a prerequisite to the probate court's subject matter jurisdiction. While certain preconditions must be established before a decedent's real property may be sold, see, e.g., RSA 559:1, these conditions need not be established prior to appointment of an ancillary administrator.

B. Even if the Court were to conclude that the requirements of RSA 559:1 must be established before the probate court can exercise jurisdiction over the ancillary administration of a decedent's estate, such requirements are met in the instant case.

The Appellee has asserted, by verified pleading, that the "known costs of administration exceed the Estate's assets, and the New Hampshire real estate will likely need to be sold." Admin. App. at 3–4, 11 (footnote omitted). Administration expenses are just demands of the estate of the highest priority. See RSA 554:19, I(a) (2019) ("The administrator of an estate shall make payment of the claims in the following order: (a) Costs

and expenses of administration of the estate."); RSA 559:1 (requiring that "the [decedent's] personal property [is] insufficient to pay the just demands by law chargeable to the estate" to obtain license to sell). The verified statement that the costs of administration exceed the assets of the estate meet the requirement of RSA 559:1. See Prob. Div. R. 106-A ("Motions for a license to sell real estate . . . must include a statement, under oath, showing . . . the estimated amount of the expenses of administration."); Admin. App. at 46 (requiring that the movant set forth a schedule of demands, including, among other things, estimated administration expenses).

To the extent the Appellant now denies that the Appellee represented to the probate court that the principal estate lacks sufficient assets to satisfy the estate's just demands, this position is inconsistent with that taken by the Appellant before the probate court. See Trust Apx. at 088 (alleging that the Ancillary Administrator "has misrepresented to th[e] [probate] court that there is a need for ancillary administration").

II. THE APPELLANT'S REMAINING ARGUMENTS WERE NOT PRESERVED FOR APPELLATE REVIEW.

The Appellant appears to argue that, even if this Court concludes that the probate court's exercise of jurisdiction was proper, the probate court nevertheless erred by granting ancillary administration: (1) without a prior finding of insolvency by the Massachusetts Probate Court; (2) where, under New Hampshire law, title to the decedent's real estate passed to the Appellant upon the decedent's death; and (3) after lapse of the two-year creditor nonclaim period set forth in RSA 556:29. See Appellant's Br. at

5–6, 23–27. However, the Appellant failed to timely raise these arguments, depriving the probate court of the opportunity to consider them. See Batista-Salva, 171 N.H. at 822 (discussing "the general policy that trial forums should have an opportunity to rule on issues and to correct errors before they are presented to the appellate court").

Although the Appellant raised the first two arguments in a motion for reconsideration, the Appellant concedes that the motion was untimely and that the probate court has not considered it. See Prob. Div. R. 59-A(1) (requiring motions to reconsider to be filed within 10 days of the notice of decision); Trust Apx. at 103 (probate court order declining to consider Appellant's motion for reconsideration in light of pending appeal); Appellant's Br. at 5, n.1 (recognizing same). The Appellant failed to even raise his third argument in the untimely motion for reconsideration. See Trust Apx. at 086–94; Appellant's Br. at 6 (not citing to where argument preserved in the record as required by Sup. Ct. R. 16(3)(b)). Accordingly, these arguments were not preserved for appellate review. See Batista-Salva, 171 N.H. at 822 (The Court "do[es] not [generally] consider issues raised on appeal that were not presented to the trial court."); Sup. Ct. R. 16(3)(b) (requiring specific reference to portion of record where issue was raised).

While the Court has discretion to correct a plain error affecting an appealing party's substantial rights, see Randall v. Abounaja, 164 N.H. 506, 510 (2013); Sup. Ct. R. 16-A, the plain error rule should be "used sparingly" and its use should be "limited to those circumstances in which a miscarriage of justice would otherwise result." Batista-Salva, 171 N.H. at 824. The Court should decline to apply the plain error rule in this case

because the probate court's grant of administration has had no effect upon the Appellant's substantial rights. The probate court's grant of administration did not give the Ancillary Administrator authority to sell or otherwise take possession of the decedent's New Hampshire real estate, see Lane v. Thompson, 43 N.H. 320, 325 (1861), and the Appellant will be afforded opportunities to object after filing of the inventory and before any sale of the property. See RSA 554:1; RSA 559:1.[5]

III. THE PROBATE COURT DID NOT COMMIT PLAIN ERROR BY GRANTING THE APPELLEE'S PETITION FOR ANCILLARY ADMINISTRATION.

The Appellant argues that the probate court committed plain error by granting ancillary administration: (1) without a prior finding of insolvency by the Massachusetts Probate Court; (2) where, under New Hampshire law, title to the decedent's real estate passed to the Appellant upon the decedent's death; and (3) after lapse of the two-year creditor nonclaim period set forth in RSA 556:29. See Appellant's Br. at 5–6, 23–27. Each of these claims must fail under the standard for plain error review. The probate court's grant of ancillary administration was not error. Even if it

[5] The Appellant also argues that his and/or the Trust's substantial rights are affected because the grant of administration would "arguably" negate the application of RSA 556:29 and "potentially" reopen the decedent's estate to creditor claims that would be otherwise barred. Appellant's Br. at 16, 27. However, the Appellant cites no authority to support this position and, in any event, the opening of administration would not reopen the estate to creditor claims where it has been more than two years since the decedent's death. See RSA 556:29 (barring action by creditor "if no administration shall have been granted upon the estate of a deceased person within two years from the date of death").

were, such error was not plain, and affects neither the Appellant's substantial rights, nor the fairness, integrity, or public reputation of judicial proceedings. See Batista-Salva, 171 N.H. at 824 (setting forth the standard for plain error review).

Because the Appellant's first two arguments are interrelated, the Appellee addresses them together, and thereafter addresses the Appellant's argument regarding RSA 556:29.

A. The Ancillary Administrator demonstrated a sufficient interest in the decedent's New Hampshire real property to institute ancillary administration proceedings.

As discussed in Section I above, under New Hampshire law, insolvency is not a prerequisite to the probate court's jurisdiction over the ancillary administration of a nondomiciliary decedent's New Hampshire estate, even where the estate consists solely of real property. In order to sell a decedent's real property, an administrator must establish that personal property is insufficient to pay the just demands against the estate, see RSA 559:1,[6] and in order to take possession of the premises, an administrator must obtain a decree of insolvency, see Lane, 43 N.H. at 325 ("Until the decree of insolvency, the heirs are to be considered as in the rightful possession of the premises." (emphasis added)). However, in the present case, the probate court has neither granted the Ancillary Administrator a

[6] Alternatively, an administrator can establish that the sale was expressly authorized by the decedent's will. See RSA 559:17; 10 Charles A. DeGrandpre and William V.A. Zorn, New Hampshire Practice: Probate and Administration of Estates, Trusts & Guardianships § 35.8 (4th ed. 2019) ("Another method of sale during administration of an estate is where the will of a decedent provides for sale.").

license to sell the decedent's New Hampshire real estate, nor decreed that he is entitled to possess it. See Robinson, 87 N.H. at 114.

All that is required at the time of appointment is the existence of an "estate." See id. at 115 ("For both resident and nonresident decedents, there must be estate within the legislative meaning of the word."). "[T]he prerequisite of proof of estate in an appointment is often satisfied by a claim of estate." Id. at 116 (emphasis added). There is no requirement that the estate consist of particular assets or have a particular value. See Power v. Plummer, 93 N.H. 37, 39 and preface to opinion (1943) (concluding car valued at $50 was sufficient basis for appointment of ancillary administrator); Robinson, 87 N.H. at 117 (concluding cause of action with statutory survival in favor of certain beneficiaries sufficient basis for appointment of ancillary administrator). This Court has recognized that:

Appointment or refusal to appoint does not depend upon the probable merits of the decedent's title or claim. It may be thought too doubtful to have appraisal value, but if anyone having a proper interest deems it worth while to be asserted, an appointment should be made.

Robinson, 87 N.H. at 116. Accordingly, there was no need for the Ancillary Administrator to prove the merits of the estate's underlying interest in the decedent's New Hampshire real property at the time he petitioned the probate court for appointment. The Appellant cites no authority to the contrary.

Here, the verified petition for estate administration filed with the probate court represented that the decedent's New Hampshire estate consists of real property valued at approximately 2,449,400. Trust Apx. at 010. Although title to a decedent's real property generally passes to the

devisees or heirs upon the decedent's death, as the Appellant recognizes in his brief, see Appellant's Br. at 20, the property is subject to divestment for payment of the just demands against the decedent's estate. See RSA 559:1; Lane, 43 N.H. at 325. The administrator, therefore, retains a residual right to sell the property; the grant of administration was proper and necessary to determine whether such sale would be warranted in the instant case. See also RSA 554:17 ("Every administrator shall apply for and procure license for the sale of so much of the real estate as may be necessary to pay debts . . . and neglect or refusal to obtain such license [or] to make such sale . . . shall be deemed maladministration and a breach of his bond."). Ultimately, the petition for estate administration exhibited a sufficient basis for initiating ancillary administration proceedings. See Robinson, 87 N.H. at 116.

In the alternative, even if the probate court's grant of administration had been error, any error was not plain. Cf. Hilario v. Reardon, 158 N.H. 56, 60 (2008) (finding error plain where trial court granted motion to dismiss "on the ground that an objection was not filed" where such ruling explicitly barred by controlling case law and applicable court rules). As noted above, the grant of administration did not affect a substantial right of the Appellant. See Cloutier v. City of Berlin, 154 N.H. 13, 26 (2006) ("Generally, for a plaintiff to satisfy the burden of proving that an error affected the substantial rights of the plaintiff, he or she must demonstrate that the error was prejudicial — that it affected the outcome of the proceeding."); Appellant's Br. at 27 (arguing only that the probate court's grant of administration "arguably deprives the Appellant" of the protections afforded by RSA 556:29 (emphasis added)). Moreover, it had no

detrimental effect on the fairness, integrity, or public reputation of judicial proceedings. See Batista-Salva, 171 N.H. at 824 (setting forth the standard for plain error review); cf. Randall, 164 N.H. at 510 (concluding fourth prong of plain error analysis triggered where trial court's damages award was "contrary to the express language of the pertinent statute"). The Appellant has failed to meet his burden to demonstrate plain error. He will be afforded an opportunity to object to the inclusion of the subject properties in the decedent's estate after submission of the inventory, and object to the sale of the decedent's New Hampshire properties after submission of a motion for license to sell. See RSA 554:1; RSA 559:1; Prob. Div. R. 58 (providing parties ten days to object to motions filed in the probate court).

B. RSA 556:29 does not govern the recovery of estate administration expenses.

Contrary to the Appellant's contention, see Appellant's Br. at 5–6, 15–17, 24–25, 27–28, the probate court did not err by granting ancillary administration after lapse of the two-year creditor nonclaim period set forth in RSA 556:29. The Ancillary Administrator did not claim or otherwise represent to the probate court that the purpose of initiating administration proceedings was to satisfy the claim of a creditor subject to RSA 556:29. See Trust Apx. at 004–014. Rather, the record demonstrates that the basis of any motion for license to sell real estate to be filed in this case would be for outstanding expenses of administration. Admin. App. at 3–4, 8 (arguing that the "known costs of administration exceed the Estate's assets, and the New Hampshire real estate will likely need to be sold" (footnote omitted)).

RSA 556:29, by its plain language, does not operate to bar the recovery of administration expenses. See In re Athena D., 162 N.H. at 234 (The court "first look[s] to the language of the statute itself."). This statute prohibits "creditor[s] of the deceased" from instituting claims against a decedent's real property more than two years after a decedent's death, if no administration was opened during that time period. RSA 556:29. The term "creditor" commonly means "[o]ne to whom another is pecuniarily indebted." Webster's Third New International Dictionary 304 (unabridged ed. 2002); In re Athena D., 162 N.H. at 234 (The court construes the language of a statute "according to its plain and ordinary meaning."). The "deceased" was not pecuniarily indebted to her estate at the time of her death. See RSA 554:19, I (a), (e) (2019) (distinguishing between administration expenses and "[j]ust debts of the deceased"). Rather, the costs and expenses of administration arose after the decedent's death and, therefore, should not be subject to the same limitations period as creditors. See Debra A. Falender, Notice to Creditors in Estate Proceedings: What Process Is Due?, 63 N.C. L. REV. 659, 670 (1985) (Nonclaim statutes "usually do not apply to obligations incurred after the decedent's death, such as . . . administration costs . . . ."); In re Nonnast's Estate 21 N.E.2d 796, 808 (Ill. App. Ct. 1939), modified sub nom. Nonnast v. N. Tr. Co., 29 N.E.2d 251 (1940) ("We are not inclined to place a narrow construction upon the requirements set forth in the statute of limitations relative to not allowing fees to an executor or administrator in the event such claim for fees is not filed within a year. . . ."); In re Kenney's Estate, 72 P.2d 27, 30 (N.M. 1937) (concluding that "[e]xpenses of administration are not 'claims against an estate'").

A contrary interpretation would not serve the statute's purpose, see Coffey v. Bresnahan, 127 N.H. 687, 693 (1986) (explaining that the purpose of nonclaim statutes is "to secure the speedy settlement of estates"), and would be incongruous with the legislature's placement of administration expenses in the highest priority of payment, see RSA 554:19, I(a) ("The administrator of an estate shall make payment of the claims in the following order: (a) Costs and expenses of administration of the estate."); MASS. GEN. LAWS ANN. ch. 190B, § 3-805(a)(1) (West 2020) ("If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order: (1) costs and expenses of administration[.]"). Moreover, it would have the practical effect of depriving administrators of reasonable compensation for costs and expenses incurred more than two years after the decedent's death, even when administration proceedings remain open beyond this timeframe. See Tuttle v. Robinson, 33 N.H. 104, 104 (1856) ("The time and expenses of an administrator in attending probate court, and the fees of counsel necessarily employed there, are part of the just expenses of administration, for which a reasonable compensation is to be allowed the administrator."). This makes little sense, particularly in cases such as this, where the principal estate remains open almost five years after the decedent's death and the estate is still pursuing the Massachusetts Equity Action and, therefore, still incurring administration expenses. See Trust Apx. at 004; Admin. App. at 4–6, 13–36.

The Appellant does not cite, nor could the Appellee find, any controlling authority suggesting that just administration costs and expenses should be treated as "creditor" claims simply because they were incurred as

part of the domiciliary administration. See Appellant's Br. at 24. Indeed, this Court has previously suggested that a representation of insolvency under the domiciliary administration may be sufficient to warrant the sale of real estate in ancillary proceedings in New Hampshire. See Goodall, 11 N.H. at 96 ("[I]f there is sufficient personal estate here to pay all the demands against the estate which may be prosecuted or allowed here, it may admit of question whether license can be granted, on a representation that the estate is insolvent under the administration of the place of the domicil.").

The Appellant appears to cite Goodall to support his argument that, because the principal estate and the ancillary estate are separate, the expenses of the principal administration should be treated differently than ancillary administration expenses (i.e., that RSA 556:29 should apply to the expenses of principal administration). See Appellant's Br. at 15. However, this Court in Goodall explained that there was "no good reason . . . why any regard should be had to the place of residence of . . . creditors, in the allowance of [their] claims," and held that out-of-state creditors are entitled to prove their claims in New Hampshire ancillary proceedings in the same manner as in-state creditors. Goodall, 11 N.H. at 95–96. By this same reasoning, New Hampshire Courts should treat out-of-state administration expenses the same as in-state administration expenses.

In any event, even if the probate court's grant of administration had been error, any error was not plain where there was no clear, directly contrary controlling authority. Cf. Hilario, 158 N.H. at 60. Because the Appellant cannot demonstrate prejudice, the grant of administration did not affect his and/or the Trust's substantial rights. See Cloutier, 154 N.H. at 26

(2006). Moreover, the grant of administration had no detrimental effect on the fairness, integrity, or public reputation of judicial proceedings. See Batista-Salva, 171 N.H. at 824; cf. Randall, 164 N.H. at 510. Ultimately, the Appellant has failed to meet his burden to demonstrate plain error in the instant case.

CONCLUSION

For the foregoing reasons, the Appellee respectfully requests that this Court affirm the probate court's grant of administration, and remand the case for further proceeding in the normal course.

REQUEST FOR ARGUMENT

The Appellee requests oral argument. Ms. Cote will argue.

CERTIFICATE OF COMPLIANCE

This brief complies with the word limitation set out in Supreme Court Rule 16(11), and contains 7,524 words.

/s/ Alexandra S. Cote
Alexandra S. Cote

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief and accompanying Appendix shall be served on counsel for Paul T. O'Neill, Alec L. McEachern, Esq., through the New Hampshire Supreme Court's electronic filing system, and a copy of same has been this date sent via First-Class U.S. Mail to Robert O'Neill, Jr., John O'Neill, and Patricia O'Neill.

/s/ Alexandra S. Cote
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Respectfully submitted,
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