THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2022 TERM

NO. 2022-0268

DAVID LOIK

V.

GLORIA LOIK

APPELLEE, GLORIA LOIK'S MEMORANDUM OF LAW PURSUANT TO RULE 16 (4)(b)

NOW COMES Appellee, Gloria Loik, (hereinafter "Ms. Loik") by and through her attorney, Pamela J. Khoury, Esquire and respectfully submits this Memorandum of Law pursuant to Rule 16 (4)(b) of the Supreme Court Rules.

I. INTRODUCTION/RELEVANT PROCEDURAL BACKGROUND

Appellant David Loik ("Mr. Loik") filed a Petition to Partition with the Rockingham Superior Court requesting the parties' marital home be sold, and temporary relief entered. Mr. Loik's Partition action was filed after an unsuccessful effort in the Brentwood Family Division to obtain post divorce relief to modify the Parties' April 2018 Decree of Divorce ("Divorce Decree") to force the sale of the marital home, despite the Divorce Decree's express written provisions which provide for the parties to maintain joint ownership with rights of survivorship, "until such time as they agree to sell", with Mr. Loik responsible for the payment of the mortgage, taxes and insurance.

By way of background, the parties were divorced on April 2, 2018 in the New Hampshire 10th Circuit Court Brentwood Family Division : In the Matter of David Loik & Gloria Loik, Docket No. 618-2018-DM-0084. The divorce was resolved by a written agreement between the parties the terms of which included that the marital home remain jointly owned by the parties, with rights of survivorship, with Mr. Loik continuing to pay the mortgage, insurance and taxes associated with the property and Ms. Loik entitled to the use and possession of the property. Specifically, Paragraph 15 of the Parties' Divorce Decree provides that:

> "The parties shall continue to own the property until such time as they agree to sell it as joint tenants with rights of survivorship. **If the parties agree to sell the house**, they shall equally divide any net proceeds from the sale of the house. **Gloria shall remain in the home**. David shall be responsible for the mortgage, taxes and insurance however Gloria shall be responsible for maintenance and upkeep." (App. P. 61)
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> (bold added)

On or about December 2019, Mr. Loik requested in the Brentwood Family Court, a Modification of the Parenting Plan and for Other relief, and also sought at some point during the proceedings to force a sale of the real estate. As the 2021 Modification order did not provide for a specific order as to modification of the Decree to provide for the sale of the property, Mr. Loik, on or around October 5, 2029, subsequently filed in the Family Court an Emergency Motion to Sell the Real Estate and Appoint Commissioner. In response, Ms. Loik filed a Motion to Dismiss, arguing inter alia that Mr. Loik's efforts to

force a sale of the property was in essence, an effort to improperly seek a modification of the Final Decree's express provision on the real estate, without any legally recognizable cause to do so.

On December 21, 2021, the Family Court (J. Hall) denied the Motion to Force the Sale of the Real Estate, entering an order which inter alia provides as follows:

> "A property settlement in a divorce is not subject to modification on account of changed circumstances. In the Matter of Birmingham & Birmingham, 154 N.H. 51, 57 (2006). A party seeking to set aside a property settlement in a divorce decree must show that 'the distribution is invalid due to fraud, undue influence, deceit, misrepresentation or mutual mistake." Id. (quotation omitted). (App. P. 62)
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> ". . . On the evidence presented, Mr. Loik has failed to show that the property division was invalid for any of the foregoing reasons…As such, Mr. Loik's motion to sell the former marital home, and the additional relief requested therein, is respectfully denied." Id.

No appeal or motion to reconsider of the Family Court's December 2021 were undertaken by Mr. Loik. (Tr. p. 24, line 4-5)

Subsequently, by the filing of a new action, i.e. the Partition action, in a different forum, the Superior Court, Mr. Loik renewed efforts to force the sale of the marital home,

In response, Ms. Loik filed a Motion to Dismiss Mr. Loik's Partition action.

On February 22, 2022, The Superior Court held a hearing via offers of proof.

By Order dated May 3, 2022, the Superior Court granted Ms. Loik's Motion to Dismiss, denying Mr. Loik's Petition to Partition, as the court concluded that: " . . . Because the court concludes that the plaintiff waived his right to seek partition under RSA 547-C by agreeing to the wording of his stipulated Divorce Decree and related property settlement." (App. P. 139). The Court also found "[e]qually important, in the court's view is the fact [Mr. Loik] agreed to the language set forth [in Paragraph 15 of the Divorce Decree] . . . Thereby, he waived any right to seek relief under RSA 547-C which clearly would be at odds with the expressed language of the Decree." (App. P. 140).

II. Procedural Irregularities in Mr. Loik's Appeal

At the February, 2022 hearing, the Court marked three exhibits for ID (Tr., p. 2): Defendant's A Photographs; and Plaintiff's 1 and 2 Documents (over Ms. Loik's Objections, (Tr. p. 9, line 4 and Tr. p. 12, lines 14-23) which included a purported home inspection conducted approximately two and one half years prior to the event and other hearsay of claimed comparable rental expense/miscellaneous for the area/community within the Sandown area, wherein the subject matter property is.

In his brief, Mr. Loik has appended numerous documents/orders from the parties' family division case in an apparent effort to confuse/distract the court from the legal issue presented before this court. Ms. Loik contends that same should be stricken not only as they were not amongst the documents proffered/included in the February, 2022 Hearing, and as such are inadmissible per se, or, alternatively, that they are prejudicial and confusing to the court.

Further, although Mr. Loik attempts to claim in the brief, that Ms. Loik did not "maintain the property," the Trial Court specifically found that: "To the extent that the Plaintiff argues that the property is being "spoiled" and the sale must occur to protect his interest in the property, the evidence at the hearing does not support the claim. The court viewed evidence and heard testimony from the defendant that was fairly convincing. There is no spoiling of the estate or the plaintiff's equitable interest that warrants the requested relief. Nor does the evidence support his claim that the defendant is somehow unjustly enriched." (App. P. 140). As this court has stated, when reviewing discretionary rulings, "we do not decide if we would have ruled differently than the trial court, but rather, whether a reasonable person could have reached the same decision as the trial court based upon the same evidence." See Loon Valley Homeowner's Ass'n v. Pollock, 171 N.H. 75, 78 (2018).

Lastly, Mr. Loik's brief has numerous references to the original USO from the Parties' Divorce Decree, which USO was modified in August, 2021 (App. P. 61-62); the modification of the USO did not modify in any way the express provisions of Paragraph 15 of the Decree, and was modified with full awareness/finding of changes to the parenting schedule and the like. (Tr. p. 28, lines 10-17). Accordingly, Ms. Loik contends that any argument raised raised about the import of the original USO is an effort to confuse/distract the court from the present issues, and is not relevant to the waiver of partition issue.

III. Argument

The Trial Court's Order dismissing the Partition action constitutes a proper exercise of discretion. The disposition of jointly owned real estate during the marriage by the Decree of Divorce was agreed to by both parties and in unambiguous terms as incorporated

into the Decree is controlling and serves as a waiver of the right to seek partition. Claims of "substantial change" or the like properly did not provide a basis for relief in the Family Court in an effort to modify the provision and do not provide a basis for relief in the existing case. That the parties intended to waive their right to partition the real estate, the disposition of which in their stipulated Decree of Divorce provides for the parties to remain as joint tenants and allow Ms. Loik to continue to reside in the residence does constitute a waiver and the finding of same by the court is not inequitable.

Ultimately, Mr. Loik's filing of the Partition Action is simply a veiled attempt to "forum shop" after his efforts to modify the Divorce Decree to force the sale of the real estate was properly denied by the Family Division.

A. The Trial Court Properly Dismissed Mr. Loik's Partition Action

1. The Family Court, not the Superior Court, is the Proper forum for any dispute over the terms of the Decree

The Court's finding that Mr. Loik waived his right to seek partition is proper. The disposition of the jointly held real estate was properly divided pursuant to the Family Court' sole jurisdiction. The family division has exclusive jurisdiction over divorce. Id. at 517. "The law is well settled that jurisdiction in divorce proceedings is a continuing one with respect to all subsequent proceedings which arise out of the original cause of action." Daine v. Daine, 157 N.H. 426, 427 (2008). "Where exclusive jurisdiction is expressly conferred upon a court, no other tribunal may exercise such jurisdiction." Id.

The court recently vacated a superior court's decision and remanded for entry of an order of dismissal for lack of jurisdiction in Maldini v. Maldini, 168 N.H. 191 (2015),

citing that "the side agreement at issue concerned marital property, **over which the family court has exclusive jurisdiction, that court – and not the superior court – remains the proper forum** for addressing issues arising from the agreement." (bold added)

Further, as properly found within the discretion of the Trial court, " . . . there is a valid, binding court order [Family Court Order], that controls ownership and sale of that property. Thus, this is not a typical case under RSA 547-C in which the parties are merely disagreeing joint tenants. Here there is a court order that states **the parties must agree to any sale**." (App. P. 140) (bold added).

2. The parties' waiver of partition cannot be construed as temporary, given the facts of this case, and claimed change in circumstances is not a basis for relief

" It has long been the law of this State that "[t]he power of compelling Partition is incident to all estates held by tenants in common," Spaulding v. Woodward, 53 N.H. 573, 575 (1873), an is thus, a matter of right." [as cited in Northern New Hampshire Mental Health and Developmental Services v. Cannell, 134 N.H. 519, 522 (1991). . . This right, nonetheless is subject to waiver, which may be evidenced by an express condition or proviso or by an implied contract." See e.g. Miller v. Miller, 133 N.H. 587, 592, 578A. 2d 872, 875, as cited in Northern New Hampshire, cited supra, citations omitted.

In Miller, [the court] held that "when a divorcing couple, in a divorce stipulation, agrees to maintain their marital home as joint tenants and allow one of the parties to continue residing in the home, **the non residing party has implicitly waived his or her**

right to partition the property." Miller, cited supra at 592, 578 [as cited in Northern New Hampshire, cited supra, citations omitted.

It is apparent from the express language in Paragraph 15 of the Divorce Decree between the parties in this case, which is on point with the Miller case, that the parties agreed to maintain the property as joint tenants: "The parties shall continue to own the property until such time as they agree to sell it as joint tenants with rights of survivorship. . . . "And it is unequivocal that one of the parties [Ms. Loik] would have the continued use and possession of the home: " . . . [Ms. Loik] shall remain in the home." (See e.g. Miller, cited supra.)

Further, in contrast to Mr. Loik's posture that Miller is distinguishable from this case, the rationale in Miller is directly applicable as there are similar factual circumstances. For example, the Plaintiff in Miller wished to partition/ force the sale of jointly owned property subject to the terms of a Decree . . . because [t]he parties' children were "no longer minors" and "no longer reside in the premises in question." Similarly, here, Mr. Loik argues that the property be sold as there is a change in parenting schedule/responsibilities which have resulted with the children not residing primarily in the marital home.

As the Miller court, citing Parkhurst v. Gibson, 133 NH 57 (1990) opined: "absent fraud, mutual mistake, or ambiguity, the parties' intention will be gleaned from the face of the agreement." Parkhurst, at 62, as cited in Miller, cited supra. As noted earlier, the Family Court found that Mr. Loik failed to show the property division was invalid for any of those reasons.

Also, as in Miller, the language of Paragraph 15 of the Divorce Decree in this case clearly and unambiguously reflects the intent of the parties. As the Family Court also found: " ... the terms of the agreement are not ambiguous." (App. P. 62) As in Miller, "nothing in [the language about Ms. Loik's occupancy] indicates that the "parties intended" [Paragraph 15] to tie [Ms. Loik's] right to occupy the property to the age of the children." Further, as in Miller, the parties' express written agreement provides for the parties to own the property as "joint tenants" "with the rights of survivorship."

3. A change in circumstances does not constitute a grounds for partition in this action, nor does the express language of the Decree suggest that the intent of the real estate provision is to maintain the home for minor children

Although Mr. Loik attempts to argue that the change in parenting schedule/responsibilities provides a basis for changed circumstances, and that it was the parties' "intent" to maintain the real estate for the minor children, such argument properly did not provide a basis for relief for modification in the Family Court, which specifically found that Mr. Loik "failed to show that the property division was invalid for any of the foregoing reasons." [fraud, undue influence, deceit, misrepresentation or mutual mistake], and also fails in the context of Mr. Loik's efforts to seek relief through a Partition action.

Mr. Loik's arguments that a "change of circumstances, " i.e. the change in parenting schedule/residential responsibilities is also not a basis for relief.

First, as noted earlier, the express language of Paragraph 15 of the Decree does not include any "triggering language" that Ms. Loik's continued use/possession of the property was conditioned upon the children living with her. Indeed, as described supra, the parties agreed to hold the property as joint tenants with rights of survivorship and the condition for the division of equity would occur "parties agree to sell."

Moreover, Mr. Loik's efforts to try and tie the parties' intent to the 2018 USO are not relevant and are otherwise moot, as the 2018 USO now modified in the 2021 Order did not modify the express provisions of Paragraph 15 nor mandate immediate sale. (See App. P. 60-61).

Although Mr. Loik attempts to argue that Northern New Hampshire Mental Health and Developmental Services v. Cannell, 134 N.H. 519, 522, 593 A. 2d 1161, 1163 (1991) provides support for Mr. Loik's position that the action should not be dismissed due to change in circumstances, that case is clearly distinguishable from the facts in the instant case. In Northern New Hampshire, cited supra, the Appellant, appealed an order granting Summary Judgment in a case which involved a post divorce action in which a third party had become the successor of the ex-Wife's interest in a motel jointly owned by the parties at the time of their divorce, from which income was received and paid to the ex-Husband appellant distinct from this case in which one of the parties [Ms. Loik] continues to reside in the home and the parties continue to own the property as joint tenants, with rights of survivorship and the Divorce Decree contemplates a sale one when the parties agree to sell.

4. As the parties' stipulated terms in the Divorce Decree constitute a basis as a matter of law for a waiver of Partition, such that (unsubstantiated) claims of the parties' intent on the waiver of issue are not persuasive

As argued previously, Paragraph 15 of the Divorce Decree, which includes a provision for the parties to maintain the property as joint tenants . . . " with rights of survivorship" . . ."until such time as they agree to sell the home" with one party being entitled to the use and possession forms the basis for the waiver of Partition. No further finding of "intent" is needed.

"[w]here a divorce decree or separation agreement allows one spouse to live in the family home rent free or requires the consent of both for the house to be sold, **courts almost universally find an implied an enforceable agreement not to sue for partition**." Restatement (Second) of Property, citations omitted, as cited in Northern New Hampshire Mental Health, cited supra, citations omitted. (bold added)

Accordingly, Mr. Loik's arguments about intent fail as a matter of law and are not substantiated by the unambiguous terms of the Divorce Decree.

That Mr. Loik continues to pay for the real estate in accordance with the terms of the Divorce Decree was agreed upon; entirely foreseeable; and does not provide a basis for relief pursuant to RSA 547-C.

As the Superior Court/Trial Court properly found: " . . . not only are the parties joint tenants of the property, but there is a valid, binding court order that controls ownership and sale of that property. Thus, this is not a typical case under RSA 547-C in which the parties are merely disagreeing joint tenants. Here there is a court order that states the parties must

agree to any sale." As the Court properly found within a proper exercise of its discretion: "There is no spoiling of the estate or the plaintiff's equitable interest aht warrants the requested relief. Nor does the evidence support his claim that the defendant is somehow being unjustly enriched." Ultimately, there is no basis to find that Mr. Loik and Paragraph 15 of the Decree establish the waiver of partition as a matter of law, or that "equitable relief" or the "equities" give rise for a cause of action pursuant to RSA 547-C.

IV. CONCLUSION

For the reasons stated above, the decision of the trial court should be summarily affirmed in all respects and this appeal dismissed.

Respectfully submitted,

Gloria Loik, by her Attorney

/s/ Pamela J. Khoury

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CERTIFICATE OF SERVICE

I, Pamela J. Khoury, Esquire do hereby certify that I have made due service of a conformed copy of the foregoing Defendant's Memorandum of Law Pursuant to Rule 16 (4)(b) upon John F. Gallant, Esquire/NancyMorency, Esquire, Gallant & Ervin, through the efile system on this 23rd day of October, 2022.

/s/ Pamela J. Khoury

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Pamela J. Khoury,
Attorney for Gloria Loik

I, Pamela J. Khoury, Esquire do hereby certify that this Appellee's Memorandum of Law Pursuant to Rule 16 (4)(b) does not exceed 4000 words.

/s/ Pamela J. Khoury

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Pamela J. Khoury, Esq.