

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2022-0268

David Loik

v.

Gloria Loik

**ON APPEAL FROM ROCKINGHAM COUNTY SUPERIOR
COURT OF ORDER GRANTING DISMISSAL OF PETITION TO
PARTITION REAL ESTATE**

BRIEF FOR APPELLANT, DAVID LOIK

**John F. Gallant, Esq., Bar No. 6569
Nancy A. Morency, Esq., Bar No. 266859
Gallant & Ervin, LLC
One Olde North Road, Ste 103
Chelmsford, MA 01824
(978) 256-6041
ATTORNEYS FOR APPELLANT**

Date: June 6, 2022

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Boissonnault v. Savage</u> , 137 N.H. 229, 625 A.2d 454, (1993)	17
<u>Brooks v. Allen</u> , 168 N.H. 707, 711, 137 A.3d 404, 408-409 (2016)...	13,14
<u>Deutsche Bank Nat'l Trust Co. v. Pike</u> , 916 F.3d 60 (1 st Cir. 2019).....	22
<u>Foley v. Wheelock</u> , 157 N.H. 329, 950 A.2d 178 (2008).....	17-18
<u>In re Birmingham & Birmingham</u> 154 NH 51 (2006).....	22
<u>Miller v. Miller</u> , 133, N.H. 587 (1990)	15, 18, 20,22,23
<u>Northern New Hampshire Mental Health & Developmental Servs. v. Cannell</u> , 134 N.H. 519, 593 A.2d 1161 (1991)	15, 18, 23
<u>Tarnawa v. Goode</u> , 172 N.H. 321, 213 A.3d 867 (2019).....	12
 <u>STATUTES AND OTHER AUTHORITIES</u>	
<u>RSA 547-C</u>	6, 11, 13, 17, 22

TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

QUESTION PRESENTED 5

STATEMENT OF THE CASE 5

STATEMENT OF FACTS 6

SUMMARY OF THE ARGUMENT 11

STANDARD OF REVIEW 12

ARGUMENT 13

 I. THE SUPERIOR COURT ERRED AS A MATTER OF LAW
 IN FAILING TO CONSIDER THE WAIVER OF PARTITION
 AS TEMPORARY AND THE SUPERIOR COURT IS THE
 PROPER FORUM TO FASHION EQUITABLE RELIEF
 BASED UPON CIRCUMSTANCES NOT PRESENT AT THE
 TIME OF DIVORCE.....13

 II. THE SUPERIOR COURT ERRED AS A MATTER OF LAW
 IN FINDING THAT THE APPELLANT WAIVED HIS RIGHT
 TO SEEK PARTITION UNDER RSA 547-C AS IT IS CLEAR
 THAT THE INTENT OF THE PARTIES AT THE TIME OF
 THE DIVORCE WAS TO MAINTAIN THE RESIDENCE FOR
 THE MINOR CHILDREN AND THE CIRCUMSTANCES
 HAVE SINCE SUBSTANTIALLY AND MATERIALLY
 CHANGED..... 17

III. THE SUPERIOR COURT ERRED IN FINDING THAT THE APPELLANT WAIVED HIS RIGHT TO SEEK PARTITION UNDER RSA 547-C AS THAT WAS NOT THE PARTIES' INTENT.....	21
CONCLUSION	26
ORAL ARGUMENT	26
CERTIFICATION OF COUNSEL	26, 27

QUESTIONS PRESENTED

1. Whether the Court erred in granting the Appellee's Motion to Dismiss the Appellant's Petition for Partition? *Ap.-Pet. App. 139.*
2. Whether the Appellant waived his right to seek partition under RSA 547-C by agreeing to the wording of his stipulated Divorce Decree and related property settlement especially in consideration of the substantial and material changes of circumstances since the divorce? *Ap.-Pet. App. 139.*

STATEMENT OF THE CASE

The Appellant-Petitioner in this action is David Loik (hereinafter "Appellant"). The Appellant contends that the Rockingham Superior Court erred in granting the Appellee, Gloria Loik's (hereinafter "Appellee") Motion to Dismiss the Appellant's Petition for Partition. The Appellant contends that he has an equitable right to partition the property held in joint ownership with the Appellee.

* References to the Appellant-Petitioner's Appendix shall be designated as follows: "Ap.-Pet.'s App."

This action was originally filed pursuant to RSA 547-C on January 12, 2022 in Rockingham County Superior Court. On February 22, 2022, a temporary hearing and a hearing on the Appellee's motion to dismiss were conducted in this matter. The Court issued its order allowing Appellee's motion to dismiss and thereby dismissed the Appellant's Petition to Partition. On May 10, 2022, Appellant filed his Notice of Appeal. On or about May 16, 2022, the Court informed the Appellant the Appeal had been accepted.

STATEMENT OF FACTS¹

The Appellant and Appellee were married on June 16, 2007. Ap.-Pet.'s App. 63. On or about April 26, 2010, the Appellant and Appellee purchased 225 Main Street, Sandown, New Hampshire (hereinafter, the "Property") as joint tenants with rights of survivorship pursuant to deed recorded in Rockingham County Registry of Deeds in Book 5105, Page 1603. Ap.-Pet.'s App. 63. The Appellant and Appellee were then divorced by Decree of Divorce dated April 3, 2018. Ap.-Pet.'s App. 3. The Parties' Decree of Divorce incorporated and approved the Parties' Stipulated final property agreement in regard to the Property that provides, inter alia, that: "The

¹ References to the Appellant-Petitioner's Appendix shall be designated as follows: "Ap.-Pet.'s App."

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.” Ap.-Pet.’s App. 10. The Uniform Support Order filed with the Decree provided in relevant part that the Appellant shall pay the mortgage, taxes and insurance on the property in lieu of full child support while the Appellee lived with the minor children in the Property. the Ap.-Pet.’s App. 20-22. After the divorce decree entered, circumstances substantially and materially changed relating to the custody of the children and parenting obligations. Ap.-Pet.’s App. 26-59, 70-79.

At the time of the divorce, the Appellee had primary parenting time with the Parties’ children (current ages 15, 12, and 10). Ap.-Pet.’s App. 12, 19. The Appellee’s address at the Property was used for the children’s legal residence for school. Ap.-Pet.’s App. 15. Since, on August 24, 2021, the children’s primary residence has changed from residing with the Appellee at the Property to primarily live with the Appellant as a result of the family court’s modification to the parenting plan, which found that the Appellee

ignored the court's orders of not consuming alcohol around the children, that she continued to involve a toxic "bad news" romantic partner in the children's lives and otherwise did not exercise good judgment. Ap.-Pet.'s App. 27-38. As a result, the children's legal residence was modified to the Appellant's residence. Ap.-Pet.'s App. 45. After the change in primary residential responsibility, the Appellant was forced to seek further relief in the Family Court from continued parent alienation and other harmful behavior from the Appellee. Ap.-Pet.'s App. 56-59, 70-79. Following the Court's approval of requested Ex-Parte orders and a subsequent hearing, additional relief was granted in the form of temporary orders that provided a visitation schedule with the Appellee and the two (2) younger daughters, to be held at a supervised visitation center on a biweekly basis. Ap.-Pet.'s App. 72-79. None of the three (3) minor children have had unsupervised contact or returned to the Property since the inception of said orders. Ap.Pet.'s App. 72-79. However, the Appellee still continues to reside at the Property and does not pay anything toward the mortgage, taxes and insurance while the Appellant continues to pay the Property mortgage, taxes and insurance for a Property neither him nor the children reside in despite the change in residential responsibility, the children's legal

residence for the children and child support. Ap.-Pet.'s App. 27, 37-40, 49-52, 132.

In addition, the Appellee has blatantly disregarded the Final Decree, as she has unequivocally failed to maintain the Property and to perform necessary repairs and upkeep in order to maintain the Property in a suitable and safe condition. Ap.-Pet.'s App. 99. According to the home inspection, the Property is in need of the following repairs and/or replacements, among other things: exterior and interior doors, steps, railings and balconies, garage door operators, deteriorated garage door panel, the exterior deck is unsafe as it is sagging several inches and rotting, cleaning of exterior siding, gutters in need of cleaning, bathroom and kitchen fixtures require repair and/or replacement, the well pump wiring box and conduit are in need of repair, electrical work and servicing needed, smoke detectors needed in the home as the smoke detectors were observed to be damaged and/or missing, heating equipment/propane furnace in need of repair and/or replacement; Holes in walls and doors are visible in the home, flooring is heavily worn and in need of replacement, as well as the carpeting that is stained and in need of replacement. Ap.-Pet.'s App. 99-131. Additionally, on November 21, 2019, the Appellant had the septic system inspected on

the Property. Ap.-Pet.'s App. 65. According to the inspection report, the septic tank needs to be pumped, as there is risk of severe damage to the systems if the services are not completed in a timely fashion. Ap.-Pet.'s App. 65.

The Appellant has notified the Appellee of the above-stated conditions and requested, in writing, that she repair the conditions that are in need of immediate repair. Ap.-Pet.'s App. 65. These issues pose a threat not only to the safety of all inhabitants and visitors, but additionally to the value to the home in its current state. Ap.-Pet.'s App. 99-131. As recently as November 22nd and November 24, 2019, the Appellee has informed Appellant, in writing, that she will not be repairing the conditions. Ap.-Pet.'s App. 65. Subsequently, the Appellant urged Appellee to repair minor issues such as numerous switch cover replacements and smoke detectors to be installed, to which the Appellee denied. Ap.-Pet.'s App. 65. The Appellee has made no apparent effort to remedy any of the issues cited in the inspection report, and no effort to maintain the household in a safe and compliant manner. Ap.-Pet.'s App. 65. Following the inspection, the Appellant was denied any further access to the Property. Ap.-Pet.'s App. 65.

The Appellant filed a Motion to Sell Property and to Appoint Real Estate Commission with the Family Court, which the Court denied on the grounds a property settlement in a divorce decree is not subject to modification on account of changed circumstances. Ap.-Pet.'s App. 60-62. In the December 21, 2021 Notice of Decision, the Court opined that the Appellant's proper remedy was to file a Petition to Partition. Ap.-Pet.'s App. 62. On January 12, 2022, Appellant filed the present Equity Petition to Partition the Property with the Rockingham Superior Court. Ap.-Pet.'s App. 63-69. The Appellee filed a Motion to Dismiss the Petition, which was granted finding that the Appellant waived his right to partition. Ap.-Pet.'s App. 63-69, 139-140.

SUMMARY OF THE ARGUMENT

The Appellant filed a request to partition the Property he owned with his ex-wife pursuant to the stipulated divorce agreement. In this case, the Parties were divorced and the property settlement in the divorce action is final and binding. As a result, the Parties each own an undivided legal interest in the Property. By statute and applicable law, the Petitioner is entitled by right to file a petition to partition. However, the Rockingham Superior Court denied the Appellant's Petition to Partition on the grounds

the Appellant waived his right to seek partition under RSA 547-C. The Appellant is entitled to equitable relief of a partition based on the circumstances in this matter. The Parties' divorce agreement provided for the Appellee to reside in the Property with the children and was required to maintain it. The Decree of Divorce and Uniform Support Order require the Appellee to pay the mortgage, taxes and insurance on the Property in lieu of paying full child support as the children resided in the Property as their principal residence. Since the divorce, there has been a substantial change in circumstances where primary parenting has changed to the Appellant and the children are now residing with the Appellant, not at the Property, and the Appellee is not maintaining the Property nor is she paying anything for her use and occupancy. These are special circumstances warranting a partition. Equity supports the Appellant maintaining a partition action.

STANDARD OF REVIEW

The issue on appeal to this Court involves a review of the Superior court's dismissal of a partition action. This Court will "uphold a trial court's equitable order unless it constitutes an unsustainable exercise of discretion." Tarnawa v. Goode, 172 N.H. 321, 324, 213 A.3d 867, 871 (2019). "In doing so, the question is whether the record establishes an

objective basis sufficient to sustain the discretionary judgment made.” Id.
“The party asserting that a trial court order is unsustainable must
demonstrate that the ruling was unreasonable or untenable to the prejudice
of his case.” Id.

ARGUMENT

I. THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN FAILING TO CONSIDER THE WAIVER OF PARTITION AS TEMPORARY AND THE SUPERIOR COURT IS THE PROPER FORUM TO FASHION EQUITABLE RELIEF BASED UPON CIRCUMSTANCES NOT PRESENT AT THE TIME OF DIVORCE.

In the circumstances of this case where the Parties entered into an Agreement and a Uniform Support Order which allowed the Appellee to reside in the Property until such time as the Parties agreed, and which obligated the Appellant to pay the mortgage, taxes and insurance in lieu of paying full child support to the Appellee, the Superior Court erred in ruling that the Appellant forever waived his right to file an equitable action to partition the Property. Due to substantial and material changes in circumstances, residential responsibility for parenting time with the children was changed from the Appellee to the Appellant. To not be able to seek equitable relief in the court to partition the Property and to request the

Appellee pay for her use and occupancy of the Property and maintain it is inequitable. The Court erred in failing to consider that any waiver in the Divorce Decree was temporary and the Superior Court or Probate Court is the proper forum to fashion an equitable relief based upon circumstances not present at the time of the Divorce Decree.

“Partition actions are governed by RSA chapter 547-C, which vests the trial court with broad power to determine the rights of those with an interest in real property.” Brooks v. Allen, 168 N.H. 707, 711, 137 A.3d 404, 408-409 (2016) citing DeLucca v. DeLucca, 152 N.H. 100, 102, 871 A.2d 72 (2005) (“An action for partition calls upon the court to exercise its equity powers and consider the special circumstances of the case, in order to achieve complete justice.”). “Partition is equitable in nature, and the jurisdiction of the court extends to adjustment of conflicting claims in a fair division of the proceeds in the light of the attendant circumstances.” Id.

At the time of the Parties’ divorce, the children were young and the Parties fashioned a divorce settlement with the intent to allow the children the remain in the marital Property during the time they were unemancipated. This was evident in that the Appellee had primary residential responsibility and the child support that the Appellant paid the

Appellee was in the form of paying the Property mortgage, taxes and insurance. However, as was not contemplated at the time of divorce, the Appellee began to not act in the children's best interests by consuming excess alcohol in their presence, involved a toxic romantic relationship in the children's lives and overall made bad judgments involving the children. In addition, the Appellee did not maintain the Property. The Appellee's actions resulted in the Court entering an order that the Appellant shall have primary residential responsibility for the children and the children's residence was changed to the Appellant's residence instead of the Property. Additionally, the Appellee was to now pay the Appellant child support, but the Appellant was still required to pay the mortgage, taxes and insurance for the Property the children were no longer living at under the property settlement portion of the decree, which could not be modified.

It was in error to dismiss the Appellant's equitable action for partition when the circumstances substantially and materially changed. Any waiver was temporary and based on the circumstances of the divorce. *See Northern New Hampshire Mental Health & Developmental Servs. v. Cannell*, 134 N.H. 519, 522, 593 A.2d 1161, 1163 (1991) stating that "the defendant has the opportunity in the partition action to have the court consider any such

special circumstances created by the divorce decree or which may have subsequently arisen and allocate interests based thereon.” The minor children resided at the Property with the Appellee and the Appellant paid the mortgage, taxes and insurance as child support. The Superior Court has broad discretion in formulating equitable relief in circumstances like this. Assuming, *in arguendo*, the Appellant waived his right to partition the Property, this was only temporary as the circumstances changed. In *Miller*, the Court found that the parties waived their right to seek a partition because there was nothing in the agreement that indicated the parties’ intent to tie the occupancy of the property to the children’s age. See Miller v. Miller, 133, N.H. 587, 591 (1990). This is distinguishable to the present facts as the Parties in this matter did tie the children’s age to the Property in that the Uniform Support Order required the Appellant to pay child support in the form of paying the mortgage, taxes and insurance on the Property. The intent was that the Property would be sold prior to or at least by the time the Appellant would no longer pay the Appellee child support. The case law evidences that even if the right to partition was waived, it does not act as an absolute restriction. *Id.* at 592. The circumstances here warrant a partition at this time.

It is inequitable that the Appellant would continue to pay the mortgage, taxes and insurance on the Property when he has primary residential responsibility of the children who reside with him at his residence, not at the Property, and the Appellee is ordered to pay the Appellant child support with no requirement to pay the mortgage, taxes and insurance on the Property. Moreover, it is inequitable that the Appellant be liable for the hazards at the Property and the depreciating value of the Property as a result of the Appellee's failure to maintain it. Accordingly, it was in error for the Superior Court to order that the Appellant absolutely waived his right in equity to partition the Property despite the changed circumstances.

II. THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE APPELLANT WAIVED HIS RIGHT TO SEEK PARTITION UNDER RSA 547-C AS IT IS CLEAR THAT THE INTENT OF THE PARTIES AT THE TIME OF THE DIVORCE WAS TO MAINTAIN THE RESIDENCE FOR THE MINOR CHILDREN AND THE CIRCUMSTANCES HAVE SINCE SUBSTANTIALLY AND MATERIALLY CHANGED.

The central issue on appeal is whether the Appellant is entitled to the equitable relief of an action to partition the Property he owns with the Appellee. Here, the equities were not weighed and the order granting the dismissal of the partition action was in error as a matter of law. The

Superior Court never weighed the equities and instead dismissed the partition action on the grounds the Appellant waived this right. It was in error for the lower court to not weigh the equities. If it had done so, it would be evident that the Appellant is entitled to a partition of the Property.

“An action for partition calls upon the court to exercise its equity powers and consider the special circumstances of the case, in order to achieve complete justice.” Boissonnault v. Savage, 137 N.H. 229, 232, 625 A.2d 454, 456 (1993).

RSA 547-C:29 (2007) provides:

In entering its decree [on a petition to partition] the court may, in its discretion, award or assign the property or its proceeds on sale as a whole or in such portions as may be fair and equitable. In exercising its discretion in determining what is fair and equitable in a case before it, the court may consider: the direct or indirect actions and contributions of the parties to the acquisition, maintenance, repair, [and] preservation ... of the property; the duration of the occupancy and nature of the use made of the property by the parties; ... waste or other detriment caused to the property by the actions or inactions of the parties; ... and any other factors the court deems relevant. Foley v. Wheelock, 157 N.H. 329, 333, 950 A.2d 178, 182 (2008)

On February 22, 2022, the Court conducted a hearing on the Appellee’s Motion to Dismiss the Petition for Partition. The Appellee relied on the *Miller* case citing that the Appellant implicitly waived his rights to partition. However, while the *Miller* case does find that divorcing parties can implicitly waive their right to partition if they enter a stipulation to

maintain title to the marital home as joint tenants and allow one of parties to reside in the home, there is further case law that expands on this that was overlooked by the Court. *Id.* “An action to partition property is one that calls upon the court's equity powers, so that complete justice may be done by such means as are appropriate to the special circumstances and situation of each particular case.” Northern New Hampshire Mental Health at 522. “Thus, the defendant has the opportunity in the partition action to have the court consider any such special circumstances created by the divorce decree or which may have subsequently arisen and allocate interests based thereon.” *Id.*

The Superior Court never considered the special circumstances created by the Divorce Decree or the circumstances that arose thereafter nor did it weigh the equities before dismissing the partition case. The May 3, 2022 Order makes a cursory reference to the fact there is no spoilation of the Property, however it does not point to any evidence in support thereof or that the equities were weighed. There is no mention in the Order of the change in residential responsibility.

The Appellant set forth sufficient facts to show these special circumstances in the partition action. One circumstance was that the

Appellee was no longer residing in the Property with the children. Instead, the Appellant now had primary parenting time with the children at his residence, which was not the marital home Property. The intent of the parties in the divorce decree intended for the children to remain in the marital home to lessen the disruption in their lives that the divorce caused. As aforementioned, this is evinced by the tying of child support to the Property. However, since the children were no longer residing there, the intent of the Appellee residing in the marital home with the children has changed. This differs from the *Miller* case in that the intent of the parties in this matter were to allow the children to continue residing at the Property. Since the intent of the Parties does not include the Appellee residing at the Property without having primary residential responsibility, it was in error to dismiss the Partition action.

In addition, the Appellant set forth circumstances that the Appellee was not maintaining the Property as the divorce decree required. The Appellant produced inspection reports to show that the Appellee was reducing the value and opening the Appellant to liability by failing to maintain the Property. There were known hazards that the Appellee was refusing to repair. If an individual was injured by one of these hazards, then the

Appellant could be liable. The Court's May 3, 2022 Order states there was no evidence of spoliation. However, the inspection report shows there is. The Appellee did not produce any evidence that the Property is being maintained. The Appellee only produced pictures of a cleaned property without addressing the repairs necessary and code violations. It was stated outright in the parties' agreement that the Appellee was to maintain the Property as a condition of residing there. It was in error to not provide equitable relief of a partition when there was substantiated evidence the Property was not being maintained.

The foregoing circumstances of the change in the children not residing at the Property, as was intended by the Parties as well as the Property not being maintained by the Appellee as was intended, should have been considered by the Court in the partition action, but were not. It was in error to order that the Appellant waived his partition rights in the divorce decree without consideration of these changed circumstances and weighing the equities.

III. THE SUPERIOR COURT ERRED IN FINDING THAT THE APPELLANT WAIVED HIS RIGHT TO SEEK PARTITION UNDER RSA 547-C AS THAT WAS NOT THE PARTIES' INTENT.

In the Petition to Partition matter, the Appellant is looking to sever and sell his interest in the Property that he owns jointly with the Appellee. It is no longer marital property, so the Petition was not requesting to divide marital property. The result of the Divorce Decree is that the Appellant and Appellee own the Property jointly, and as a joint owner, the Appellant is entitled to a partition. It was not the parties' intent to waive the rights of partition for the parties' lifetimes, which is evinced from the divorce decree.

A property settlement in a divorce decree is not subject to modification on account of change of circumstances and the decree is a final binding decree between the parties. In re Birmingham & Birmingham 154 NH 51,57 (2006). "When property rights are transferred in a stipulated agreement, such as in the form of a stipulated divorce decree, absent fraud, duress, mutual mistake, or ambiguity, the parties' intentions will be gleaned from the face of the agreement." Deutsche Bank Nat'l Trust Co. v. Pike, 916 F.3d 60, 69, (1st Circuit 2019) citing Miller v. Miller, 133 N.H. 587, 578 A.2d 872, 873 (N.H. 1990). Courts consider the plain meaning of the language viewed in the context of the entire decree and construe subsidiary clauses . . . so as not to conflict with the primary purpose of the decree," Id. "Any person owning a

present undivided legal or equitable interest or estate in real or personal property...not subject to redemption, or the holder of an equity of redemption shall be entitled to have partition or division in the manner hereinafter provided.” NH RSA 547-C:1.

The Property division in the divorce action was final and binding and it is evident on the face of the Divorce Decree that the parties did not intend to waive their rights to partition. The only relief is an equitable action in this court or the probate court. There is nothing contained in the divorce decree that implicitly waived the Appellant’s right to partition. The *Miller* case held that “when a divorcing couple, in a divorce stipulation, agrees to maintain title to their marital home as joint tenants and to 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.” *Northern New Hampshire Mental Health* at 521 citing *Miller, supra* at 592, 578 A.2d at 875. Here, the Appellant did not implicitly waive his right to partition the Property. “When a dispute arises concerning the nature of provisions within a stipulation, we must consider the intent of the parties and in ascertaining the intent of the parties, we will consider the situation of the parties at the time of their

agreement and the object that was intended thereby, together with all the provisions of their agreement taken as a whole. Miller at 590.

The parties' Divorce Decree clearly shows that the intent of the parties was to allow for their children to remain in the marital Property with the Appellee. The Appellant was responsible to pay the mortgage, taxes and insurance in lieu of his child support obligations. However, after the children were no longer residing there as a result of the Appellee's actions, this intent is no longer being served as the decree provides for. This is evinced by the fact that the Parties fashioned the Uniform Support Order to take into account the Appellant paying the mortgage, taxes and insurance in lieu of paying the Appellee child support. This shows that the Appellant would not otherwise be paying the Property expenses except during the time he would be paying child support. The Uniform Support Order only provides a condition for when the Property is sold and child support is still required to be due. This shows intent that the Property is to be sold when the children no longer reside there. Further, it is the intent of the parties as is explicitly written that the Property will be maintained by the Appellee, which she has not been. However, there was no relief for the Appellant in the event the Appellee does not maintain the Property. Although there is a definite time period that the

Property will not be owned longer than a party's lifetime, it is directly in contravention to the intent expressed in the Decree to sever the marital relationship and provide support and the same housing for the parties' children. There was no intent to waive a right to partition. Although the Parties did enter into an unartfully drafted stipulation regarding the Property, it did not amount to implicitly waiving the right to partition.

Without this partition relief, the Appellant could potentially own the Property and be responsible for the costs for life with no motivation for the Appellee to ever sell or maintain it. This is an inequitable result that the Superior Court has jurisdiction to remedy. It was clearly the intent of the Parties that the Appellee reside in the Property with the children while maintaining it. However, that is not what occurred and the Superior Court has equity jurisdiction to remedy this through a partition. Granting the Appellee's Motion to Dismiss the Partition action on the grounds the Appellant waived this right in the divorce decree does not provide consideration for the intent of the parties in the divorce decree. Accordingly, it was in error to dismiss the partition action.

CONCLUSION

For the reasons outlined herein, the Appellant is entitled to a partition of the Property. The Appellant did not waive his rights to seek a partition in the divorce settlement and has no other remedy at law.

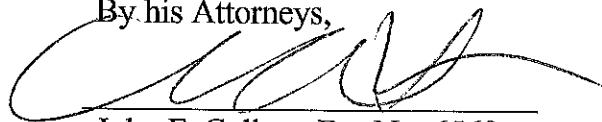
ORAL ARGUMENT

The Appellant requests the Court schedule an Oral Argument in this matter.

CERTIFICATION

Each appealed decision that is in writing is being submitted at the time of brief filing and is included in the Appendix.

Respectfully submitted,
DAVID LOIK,
By his Attorneys,



John F. Gallant, Bar No. 6569
Nancy Morency, Bar No. 266859
GALLANT & ERVIN, LLC
One Olde North Road, Suite 103
Chelmsford, MA 01824
T: (978) 256-6041
F: (978) 256-7977
John@gallant-ervin.com
Nancy@gallant-ervin.com

Date: June 6, 2022

CERTIFICATION OF COUNSEL

I, Nancy A. Morency, hereby certify that on this 6th day of June 2022, I have served two true copies of the foregoing documents on all counsel of record by causing two (2) copies of the same to be delivered by first class mail to:

Pamela J. Khoury, Esq.
Law Office of Pamela J. Khoury
PO Box 795
Salem, NH 03079

A handwritten signature in black ink, appearing to read 'Nancy A. Morency', written over a horizontal line.

Nancy A. Morency, Esq.