

State of New Hampshire
Supreme Court

NO. 2008-0756

2009 TERM

APRIL SESSION

In re Estate of Kathleen Antonia Porter

RULE 7 APPEAL OF FINAL DECISION OF
ROCKINGHAM COUNTY PROBATE COURT

BRIEF OF APPELLEE ESTATE AND ADMINISTRATOR

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

Claim of Putative Spouse and Approval of Settlement

Charles Balok and Kathleen Porter had a relationship which, after Ms. Porter's death, Mr. Balok claimed was a common-law marriage. PETITION FOR COMMON LAW SPOUSE (May 3, 2006), *appx.* at 17. In addition, there were other potential claims involving money Mr. Balok allegedly contributed toward the maintenance or improvement of the small property and mobile-home where they allegedly cohabited. Ms. Porter's estate (three young sons) and Mr. Balok, through his attorney, entered negotiations, and the parties settled the matter. SETTLEMENT AGREEMENT (July 14, 2006), *appx.* at 19.

The terms of the settlement were that Mr. Balok – although at the time only 42 years old – would get a life estate in the property. Under the agreement Mr. Balok was responsible for mortgage, insurance, taxes, and other expenses associated with it. The agreement stated that “Mr. Balok will withdraw his claim as common law husband of Kathleen A. Porter, and any and all other claims which he now has or may have made against the Estate.” *Id.* at ¶ 3. The agreement specified it would terminate upon “[t]he failure by Mr. Balok to pay when due any of the amounts specified.” *Id.* at ¶ 1.d.2.

The Rockingham County Probate Court approved the settlement. NOTICE OF DECISION (Aug. 7, 2006), *appx.* at 23 (“Settlement Agreement ... approved and ordered”).

Termination of Life Estate and Order to Vacate

About six months later, after payments were repeatedly missed, the Estate requested termination of the settlement and an order that Mr. Balok vacate the Estate's property. PETITION

TO TERMINATE LIFE ESTATE SETTLEMENT AGREEMENT (Dec. 5, 2006), *appx.* at 24. There was no objection, and the Probate Court granted the request to terminate and vacate. NOTICE OF DECISION (Jan. 25, 2007), *appx.* at 27.

Several weeks later, Mr. Balok, *pro se*, filed a “Petition of Torts to Maintain Life Estate Settlement.” PETITION OF TORTS TO MAINTAIN LIFE ESTATE SETTLEMENT (Feb. 13, 2007), *appx.* at 28. Thereafter Attorney Loraine Hansen became involved in the case, a *Guardian Ad Litem* was appointed at her request, the GAL filed a report, and the court held a hearing in November 2007.

In its order, the Probate Court (*Peter G. Hurd, J.*) found that Mr. Balok’s oddly captioned pleading was a motion for reconsideration of its January 2007 order terminating the life estate. ORDER (Nov. 2, 2007), *appx.* at 31. It found that Mr. Balok was not mentally handicapped, that he was competently represented, and that he understood the actions taken by himself and the Estate. It also found that the agreement he entered was not unconscionable, onerous, nor impossible to comply with. The court further found that Mr. Balok did not make the variety of payments required by the agreement. *Id.* Accordingly, the court denied Mr. Balok’s request for relief, and his life estate was thus terminated.

This November 2, 2007 order, terminating the life estate and requiring Mr. Balok to vacate the premises, forms the backdrop for subsequent events.

Mr. Balok filed a second motion for reconsideration, to which the Estate objected, and which was denied. MOTION FOR REHEARING WITH REQUEST FOR STAY (Nov. 20, 2007), *appx.* at 37; OBJECTION TO PETITION FOR REHEARING WITH REQUEST FOR STAY (Nov. 26, 2007), *appx.* at 39; NOTICE OF DECISION (Dec. 10, 2007) (“denied”), *appx.* at 41.

Enforcement of Probate Court Order

Mr. Balok then commenced numerous appeals to the superior and supreme courts on many issues, although it now appears that most of them have variously been dismissed, abandoned, or waived. BALOK'S BRF. at 3.

During the pendency of those appeals Mr. Balok continues to live on the property, even though it repeatedly has been adjudicated as belonging to the Estate, and even though he has been ordered to vacate. Consequently the Estate requested that the probate court enforce its orders, to which Mr. Balok objected. MOTION TO ENFORCE COURT ORDERS (May 30, 2008), *appx.* at 42; OBJECTION TO MOTION TO ENFORCE (June 10, 2008), *appx.* at 46.

After a hearing, the Probate Court (*Peter G. Hurd, J.*) allowed a stay of the November 2007 order, which had terminated the life estate and required Mr. Balok to vacate. The court also required, however, that Mr. Balok post a \$15,000 bond pending the stay. ORDER ON MOTION TO ENFORCE COURT ORDERS (Aug. 29, 2008), *appx.* at 48.

Rather than post the bond, Mr. Balok filed a pleading alleging that the court had misunderstood his intent, and that it had no subject matter jurisdiction to issue the stay-and-bond. The Estate objected, noting that the court had ordered essentially the relief Mr. Balok requested. MOTION TO VACATE ORDERS (Sept. 5, 2008), *appx.* at 49; OBJECTION TO MOTION TO VACATE ORDERS (Sept. 16, 2008), *appx.* at 53.

The court responded by amending its November 2007 order which, as noted, formed the basis for these subsequent events. It granted Mr. Balok's original "Petition of Torts to Maintain Life Estate Settlement," affirmed the approval of the parties original stipulation, and vacated its

earlier order terminating the life estate.¹ The court also extended the date for Mr. Balok to post a bond. ORDER ON CHARLES M. BALOK'S MOTION TO VACATE ORDERS DATED SEPTEMBER 5, 2008 (Sept. 19, 2008), *appx.* at 56.

The result of this appears to be that the parties' original settlement stands, but that the court essentially gave Mr. Balok another chance – two years later – to comply with it.

When the date for the bond passed with none posted, the court ordered Mr. Balok's life estate terminated. ORDER (Dec. 31, 2008), *appx.* at 57. Mr. Balok filed a pleading expressing his disagreement, to which the Porter Estate objected. MOTION TO RECONSIDER, VACATE AND STAY (Jan. 11, 2009), *appx.* at 58; OBJECTION TO MOTION TO RECONSIDER, VACATE AND STAY (Jan. 20, 2009), *appx.* at 62. The court denied the motion, noting that the case had been settled. ORDER ON CHARLES BALOK'S MOTION TO RECONSIDER, VACATE AND STAY (Jan. 20, 2009), *appx.* at 63. Mr. Balok then appealed.

¹In its September 19, 2008 order, the Probate Court declared: "The Court's order of August 1, 2006, approving the stipulation filed by the parties on July 21, 2006 is affirmed and the Court's order of January 17, 2007, is vacated." There is no known order issued on January 17, 2007, but there was the January 25, 2007 order which granted the Estate's request to terminate the life estate and have Mr. Balok vacate the premises. Neither party below attempted to resolve this ambiguity. Accordingly, the Estate's understanding of its legal situation regarding Mr. Balok is reported here with the assumption that court made a scrivener's error regarding the exact date of its January 2007 order.

SUMMARY OF ARGUMENT

The Estate of Kathleen Porter – three young sons – first acknowledges the long lack of certainty regarding the probate court’s jurisdiction over real estate, but then notes the issue was resolved by statute in 1992. With citation to the statute, the Estate delineates the extent of that jurisdiction and also points to the law regarding the inherent power of courts of equity to enforce their own orders.

The Estate then examines the portion of the statute which Mr. Balok cites, and shows that it has no possible relevance to his current situation or the purported dispute between them. The Estate also shows that courts may require supersedeas bonds to maintain the status quo pending appeal, and concludes by alleging that Mr. Balok’s litigation actions are merely an attempt to forum-shop or to delay the inevitable.

ARGUMENT

I. Mr. Balok Asserts that the Court which Approved his Settlement Does Not Have Jurisdiction to Enforce it

This case comprises many pleadings, but collapses to a simple situation. Mr. Balok believed he was a putative spouse. He settled his claims in exchange for a life interest, provided he pays the going-forward carrying costs of the small property and mobile home. He here asserts that the court in which he sued does not have authority to enforce the settlement it approved.²

II. Probate Court has Expansive Jurisdiction over Real Estate

Mr. Balok correctly points out that probate court's jurisdiction over real estate has long been in dispute and somewhat fluid. *See e.g., Rockwell v. Dow*, 85 N.H. 58 (1931). Within its area, however, the jurisdiction of the probate courts has always been regarded as very broad:

They exercise many powers solely by virtue of the provisions of our statutes; but they have a very extensive jurisdiction not conferred by statute, but by a general reference to the existing law of the land, that is, to that branch of the common law known and acted upon for ages, the probate or ecclesiastical law. An unusual number of the most necessary and useful rules of the common law in relation to the estates of persons deceased, have been embodied in our statutes; but by no means the main body of the common law on this subject. And the courts of probate have an extensive jurisdiction of which the statutes take no particular notice. This jurisdiction is conferred and recognized by the Constitution (pt. 2, sec. 80), and by the Revised Statutes ... which provide that every judge of probate within his county has jurisdiction of the probate of wills and of granting administration, and of all matters and things of probate jurisdiction relating to the sale, settlement, and final distribution of the estates of deceased persons.

Morgan v. Dodge, 44 N.H. 255 (1862), citing *Kimball v. Fisk*, 39 N.H. 110, 120 (1859).

²Although Mr. Balok pressed a variety of issues below and in his notice of appeal, the only issue he addressed in his brief is: "Whether the Rockingham County Probate Court erred as a matter of law by exceeding its subject matter jurisdiction when it entered orders regarding real estate of the decedent where the real estate was not subject to licensure to sell." BALOK'S BRF. at *iii*. Accordingly, all other issues are waived. *Nicolaou v. Vermont Mut. Ins. Co.*, 155 N.H. 724, 732 (2007) ("Because [appellant] did not brief that issue, we deem it to have been waived."); *American Express Travel v. Moskoff*, 148 N.H. 446, 453 (2002) ("Any arguments the [appellant] raised in his notice of appeal but did not brief are deemed waived."); *Whelton v. Daly*, 93 N.H. 150, 156 (1944) (in probate appeal: "Other exceptions raising questions of evidence are taken to have been waived by failure to brief or argue them.").

Nonetheless, in a 1992 case involving whether a marital domicile was a probate asset, this Court pointed out the shortcomings in the jurisdiction statute, and wrote that “[u]nless and until the legislature chooses to enlarge the probate court’s jurisdiction to encompass disputes over the title to real estate, we hold that the probate court has neither ... statutory authority, nor ... common law jurisdiction” to determine the issue. *In re Estate of O’Dwyer*, 135 N.H. 323, 325 (1992) (citations omitted).

Shortly after *O’Dwyer*, the Legislature heeded the invitation, repealed the old statute, enacted an entirely new jurisdiction law, and in the process vastly expanded the probate court’s jurisdiction. 1992 N.H. LAWS Ch. 284 (eff. Jan. 1 1993); 1993 N.H. LAWS Ch. 190 (eff. Jan 1, 1994); *see also* 10 *Charles DeGrandpre*, NEW HAMPSHIRE PRACTICE, PROBATE LAW AND PROCEDURE § 5.12.

The current statute, codified largely in RSA 547:3, now explicitly provides for jurisdiction over real estate in numerous contexts.

Most generally, among the exclusive powers of the probate court are the “administration and *all matters* ... relating to the composition, administration, sale, settlement, and final distribution of estates of deceased persons.” RSA 547:3, I(b) (emphasis added).

The probate court since 2002 has exclusive jurisdiction over quieting title to real estate. RSA 547:3, I(1); RSA 547:11-c; 1992 N.H. LAWS Ch. 47 (eff. Apr. 26, 2002). This includes the power to determine title to real estate when there are conflicting claims – which had Mr. Balok not settled his putative spouse suit he might have been able to claim. *See also* RSA 547:3, II(e) (probate court concurrent jurisdiction over partitioning real estate).

The post-*Dwyer* statute gave the probate court several new vehicles for enforcement of orders involving real estate. The probate court, for instance, may “issue, modify, vacate, release, or dissolve attachments and levies of execution on . . . real estate in affording redress for causes within its jurisdiction.” RSA 547:3-j. Such encumbrances on real estate are necessary for the “redress” of real property orders.

Perhaps most notably (clearing up what appears to be a significant split of authority, *Rockwell v. Dow*, 85 N.H. 58 (1931)), the post-*Dwyer* statute gave the probate court “broadly expanded equity jurisdiction.” *DeGrandpre* at § 5.3.1. The statute provides that probate courts “shall have the powers of a court of equity in all cases within its subject matter jurisdiction in which there is not a plain, adequate, and complete remedy at law”; that probate courts “may hear and determine such cases according to the course of equity”; and that probate courts “may grant writs of injunction whenever the same are necessary to prevent fraud or injustice.” RSA 547:3-b.

This broad equity power is relevant here because enforcement of orders has traditionally been within courts’ equitable powers. *See e.g., New Hampshire Donuts, Inc. v. Skipitaris*, 129 N.H. 774, 783 (1987) (“Indeed, since it is the historic purpose of equity to secure complete justice, the courts are able to adjust the remedies so as to grant the necessary relief and a court sitting in equity may even devise a remedy which extends or exceeds the terms of a prior agreement between the parties, if it is necessary to make the injured party whole.”). The expanded equity powers of the probate court include the authority to enforce orders. *See e.g., In re Guardianship of Dorson*, 156 N.H. 382 (2007) (enforcement of trust arising in probate court). Likewise, the authority to issue injunctions – a traditional equity power – “was considered by the framers of the [probate jurisdiction] legislation necessary to enable the probate courts to fully

determine and *conclude* cases properly before them.” *DeGrandpre* at § 5.3.1 (emphasis added).

Regardless of the probate court’s expanded powers, however, any court by its nature has “inherent judicial power to enforce its own decrees effectively.” *Keenan v. Fearon*, 130 N.H. 494, 501 (1988). This may be by contempt, or other appropriate measures. *See, e.g., In re Kosek*, 151 N.H. 722 (2005) (child visitation); *McGrady v. Mahon*, 117 N.H. 762 (1977) (child support); *Stokes v. Sanborn* 45 N.H. 274 (1864) (maintenance of bastard child). “To hold otherwise would be to diminish unnecessarily the court’s authority and to render many of its lawful orders an empty act.” *Saucier v. Saucier*, 121 N.H. 330, 332 (1981). *See also, Rockwell v. Dow*, 85 N.H. 58 (1931) (probate court has powers “incident to the business of conducting the administration” of its authority); *Town of Raymond v. Goodrich*, 80 N.H. 215 (1921) (“[C]ourts have power to set aside, vacate, modify, or amend their judgments for good cause shown. ... This power is possessed by the probate courts as well as by courts of general jurisdiction.”); *Knight v. Hollings*, 73 N.H. 495 (1906) (probate courts “are to be regarded as courts of general jurisdiction on the subjects to which they relate, and are entitled to all the presumptions in favor of their proceedings which are allowed in the case of other tribunals”); *Kimball v. Fisk*, 39 N.H. 110 (1859) (probate courts “are not to be regarded as courts of special and limited jurisdiction, but as courts of general jurisdiction on [its] subjects, and entitled to all the presumptions in favor of their proceedings which are allowed in the case of other tribunals of general jurisdiction, more especially as they are now made, by statute, courts of record”).

III. Mr. Balok Relies on Statute Irrelevant to this Case

In the face of this enormous jurisdiction of the probate court over real property, Mr. Balok advances a statutory provision which has no facial relation to this case.

A. Context of RSA 559:1 – Judicial Oversight of Real Estate Sales

The statute he cites provides that the probate court may, upon “application of the administrator” of an estate, “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.” RSA 559:1.

Real property immediately vests in heirs upon the death of the decedent. But administrators of estates have a simultaneous duty to sell assets of the estate to pay its debts, if necessary, by selling the real estate. *Sawyer v. Jefits*, 70 N.H. 393 (1900) (duty to sell); RSA 561:1 (“The real estate and personal estate of every person deceased, not devised or bequeathed, subject to any homestead right, and liable to be sold by license from the court of probate in cases provided by law, and personally remaining in the hands of the administrator on settlement of his or her account, shall descend or be distributed by decree of the probate court.”); 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; and neglect or refusal to obtain such license, to make such sale, to account for the proceeds thereof, or fraudulent conduct therein, shall be deemed maladministration and a breach of his bond.”);

To resolve this conflict – and to protect heirs from improvident actions of estate executors and administrators, who traditionally are family or friends with no experience administering estates – an executor or administrator must gain a “license” from the probate court

to sell real estate. RSA 559:1. The law thus requires judicial oversight before an administrator invades the *res* of a decedent's estate.

This is the statute Mr. Balok cites. What it has to with the present case, however, cannot be discerned.

B. Application of RSA 599:1 – Irrelevant to this Case

The statute Mr. Balok cites applies when there is a “sale” of real estate, and when “personal property shall be insufficient to pay the just demands by law chargeable to the estate.” RSA 559:1.

Here there has been no sale of real estate, nor any suggestion of any sale past or impending. There has been no allegation that personal property is insufficient to pay debts of the Ms. Porter's estate. There has been no application for a license to sell because nothing in this case suggests any circumstances where it might be necessary. The failure to apply for or get a license from the probate court cannot possibly constitute any error by the court or any party. The existence of the statute requiring a judicial licence to sell real estate sheds no light on any aspect of Mr. Balok's situation.

Here Mr. Balok asserted he was a putative spouse. He settled his claims for a life estate, and then failed to perform under the terms of the court-approved settlement. The probate court unsurprisingly found him in breach, and terminated his life estate. Nothing in RSA 559:1 addresses this situation.

Rather, citing the statute, he asserts that “the probate court has had no jurisdiction over real property where the estate is solvent.” BALOK'S BRF. at 6. Given the breadth of the probate court's jurisdiction over real property, not only is the statement flatly wrong, but it also has no

apparent connection with the statute cited.

Accordingly, the lower court did nothing unlawful or outside its jurisdiction, and its rulings should be affirmed.

IV. Jurisdiction to Maintain the Status Quo

If what Mr. Balok is attacking is the probate court's requirement of a bond, BALOK'S BRF. at 6, that claim is equally unsupported.

Courts have the power to maintain the status quo during the pendency of an appeal. *Rautenberg v. Munnis*, 107 N.H. 446 (1966); *In re Nyhan*, 151 N.H. 739 (2005); *Nicolazzi v. Nicolazzi*, 131 N.H. 694 (1989).

An appeal bond, or supersedeas bond, is a common method of maintaining the status quo. *See e.g.*, Fed. R. App. P. 8(b); Fed. R. Civ. P. 62(d).

The purpose of a supersedeas bond is to preserve the status quo while protecting the non-appealing party's rights pending appeal. A judgment debtor who wishes to appeal may use the bond to avoid the risk of satisfying the judgment only to find that restitution is impossible after reversal on appeal. At the same time, the bond secures the prevailing party against any loss sustained as a result of being forced to forgo execution on a judgment during the course of an ineffectual appeal.

Poplar Grove Planting & Ref. Co. v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1190-91 (5th Cir. 1979). This Court has noted that the lower "court may, on motion of the plaintiff and upon reasonable ground being shown, issue a supersedeas; in which case the plaintiff must give sufficient bond to the defendant to respond all damages and costs in case the judgment should be affirmed." *Tandy v. Rowell*, 54 N.H. 384 (1874).

The First Circuit recently held, "[t]here are some exceptions to the rule that only one court at a time has jurisdiction, such as for ... the posting of a supersedeas bond." *Global Naps, Inc. v. Verizon New England, Inc.*, 489 F.3d 13, 19 (1st Cir. 2007).

Requiring a bond pending appeal is not error.

V. Mr. Balok is Shopping for Another Court, Another Judge, Another Day

It must be recalled that the situation in which Mr. Balok finds himself is of his own creation. He did not marry Ms. Porter during her life, and thus cannot claim her property by intestate distribution. He claimed putative spouse status after she died, but determined to not press his case. Rather he settled his claims against the estate, ably represented by experienced counsel and with competent understanding of his action. The settlement was favorable to him. While only 42 years old, he would have had a life estate in the small lot and mobile home, had he merely paid its carrying costs such as mortgage, insurance, and taxes. Having failed to pay, the court terminated the agreement. That is the natural result of Mr. Balok's actions.

The legal proceedings should have ended there, but Mr. Balok persisted. He filed numerous pleadings over the course of two years and three courts. The parties are before this Court now on Mr. Balok's appeal – he is both the protagonist and the appellant. And he has been living rent-free during all of this. The court nonetheless gave him several chances to redeem, which he repeatedly forsook.

Even now he does not contest any of these basic facts and issues. He is not asserting that the property is his, that it was somehow unjustly taken, or that he shouldn't have to pay for its use. He appears to have dropped or waived all claims, including that he is Ms. Porter's putative spouse.

His assertion, rather, is that very same court which he asked to approve his agreement, now does not jurisdiction to enforce it. By doing so, he is merely shopping for another court, another judge, and another day in his girlfriend's house.

Mr. Balok's appeal is bordering on the frivolous, and the modest Porter estate should not have had to bear the costs of this litigation.

CONCLUSION

Based on the foregoing, the Estate of Kathleen Porter, and its Administrator, Jared Porter, respectfully request this honorable Court to uphold the ruling of the probate court terminating Mr. Balok's life estate and requiring that he vacate the premises.

Respectfully submitted,

The Estate of Kathleen Porter, and
Jared Porter, Administrator,
By their Attorney,

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Dated: April 28, 2009

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

The Estate of Kathleen Porter, and its Administrator, Jared Porter, will be happy to have their lawyer, Attorney Joshua L. Gordon appear for oral argument, but believe that an oral argument is not necessary to resolve the single and straight-forward issue in this case.

I hereby certify that on April 28, 2009, copies of the foregoing will be forwarded to Lorraine L. Hansen, Esq., and to Joseph J. Tropiano, Esq., GAL.

Dated: April 28, 2009

Joshua L. Gordon, Esq.

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