

LEX LOCI: Recent New Hampshire Supreme Court Decisions

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The recent decisions of the Supreme Court include the last by former Chief Justice John King, who brought to the Supreme Court those unique qualities found in a former private practitioner in a small successful plaintiff's law firm, a legislator who served several terms in the New Hampshire Legislature, Governor of the State *for* three terms and, finally, a superior court trial justice. This breadth of experience, unparalleled by any other previous Justice *or* Chief Justice of the New Hampshire Supreme Court, is reflected in some of Chief Justice King's last opinions. In tribute to his many accomplishments, this column will be devoted to a review of some of these opinions.

In *State v. Kilgus*, decided October 3, 1986, Chief Justice King, writing for a unanimous Supreme Court carefully reviewed the trial court conviction of the defendant who was charged with hiring another to commit murder. King's longstanding concern *for* the constitutional rights of criminal defendants is evident in this lengthy opinion which explores in great detail the defendant's claim that a tape-recorded conversation between the defendant and a police informant were improperly admitted at the trial. The Court upheld the defendant's conviction, finding no merit in the defendant's claim that a tape recording taken from a recording device hidden on a witness who was "wired" during a conversation between the defendant and the witness was improperly admitted. The defendant claimed that the use of the recorded conversation was improper because it was unlawful to record a conversation in this situation, citing RSA 570-A:2, II(d). This statute prohibits a law enforcement officer from using wiretaps unless the person whose conversation is eavesdropped upon has consented or there is a court order permitting the wiretap or tape recording. The Court concluded that the consent of the wired person was sufficient under the statute and that the legislature in 1979 had altered the Court's prior rulings in this area and had "clearly intended recordings made pursuant to RSA 570-A:2, II(d) to be exempt from exclusion" under the wiretap statute.

In re Estate of Infant Fontaine, decided October 3, 1986 is a unanimous decision of the Supreme Court authored by Chief Justice King which addresses the issue of "how to distribute a wrongful death award to the estate of a viable fetus, when one of the estate's two beneficiaries was found to be 50 percent negligent in causing the death of the fetus." The case arose from an automobile collision in which the decedent's mother was the operator of one of the two vehicles involved. As a result of the accident, the plaintiff's decedent died *in utero* as an eight-month-old fetus. An uninsured motorist claim for the wrongful death of the decedent fetus was made under the policy of the decedent's mother (the driver of the car) and the arbitrator found the mother 50 percent negligent.

The Supreme Court first found that liability *of* the insurance company was *not* reduced by the beneficiary's (the driver mother's) comparative negligence. Thus, the entire award was distributable to the estate of the unborn fetus. Since the fetus obviously had

no will, the Court looked to the laws of intestacy and found that the fetus's intestate heirs at law were her mother (the driver) and her father. The insurance company then raised the issue whether the mother's inheritance should be forfeited because of her negligence, but the *Court* rejected that argument stating that there was no unjust enrichment or undue profit to the mother in this situation.

In *Cilley v. New Hampshire Ball Bearings, Inc.*, decided August 7, 1986, the Supreme Court had before it for consideration a wrongful discharge suit. Chief Justice King, writing for a unanimous Court, reversed the action of the trial court that granted the defendant's motion for summary judgment. The Court first found that the trial court had the power *to grant, sua sponte*, a motion for summary judgment where the same trial court had earlier denied the same motion. The Court held that a trial court indeed has the power to reverse, *sua sponte*, an earlier denial for a motion for summary judgment since vesting such a power in a trial court is in keeping with the purposes of summary judgment which is to save time, effort and expense by allowing an immediate final judgment in those cases where there is no genuine issue of material fact requiring a formal trial. However, the Court held that the plaintiff had alleged a sufficiently specific public policy in his forced resignation where the plaintiff alleged that his dismissal was caused by his superior's desire *to get revenge* against him as a refusal of the plaintiff's refusal to lie to the company's president on the superior's behalf. The Court held that this was a sufficient allegation because it is against public policy to lie. This appears, to this observer, to be a very tenuous thread upon which many wrongful discharge cases may be spun.

Another opinion by Chief Justice King is found in *State v. Castle*, decided October 3, 1986. The Court had before it the convicted defendant's claim that a trial judge had improperly engaged in an *ex parte* conversation with a juror. Chief Justice King's unanimous opinion for the Supreme Court reversed the defendant's conviction, setting forth new standards in our State applicable to these not infrequent situations. The facts indicated that after the jury was impaneled but before jury deliberations had begun, one of the jurors asked *to speak* to the judge. The judge held an *ex parte off-the-record* discussion with the juror regarding the juror's realization that he had belatedly recognized and knew the victim's father. The judge interrogated the juror and found that he would be able to impartially perform his duties. The judge did not excuse the juror, and, subsequently dismissed two alternate jurors who had not yet been excused. The trial judge informed counsel for both sides of the colloquy that had occurred between the judge and the juror and denied the defendant attorney's *voir dire* examination request. The unanimous Supreme Court opinion makes new law in this area and found that the court "ought to have notified counsel before speaking with the juror or arranged *for* a stenographer to record the discussion." This decision continues the recent trend of the Supreme Court to regulate more strictly relationships between the jurors and the court.

Wearing his administrative hat as Chief Justice of the Supreme Court, Chief Justice King in *In re Estate of Henry Dionne*, * decided October 3, 1986, overturned as unconstitutional the statutorily authorized practice of the probate courts to charge "special session" fees. The decision, which was not unanimous, (Justice Souter found the

practice of charging special fees constitutionally permissible based on an historical analysis) was surprising to students of the Court only because the Supreme Court made the decision immediately effective, leaving the probate judges understandably angry and confused. It has been apparent for some time that the Supreme Court was unhappy with the statutory designed compensation system of the probate courts by which the part-time judges of those courts supplement their judicial salaries by charging special fees for certain contested matters or matters in which a party requests a hearing other than on one of the statutorily prescribed hearing days. The Court's decision was presaged by its 1985 decision in *Christy & Tessier v. Witte*, 126 N.H. 702. The Court's majority found that "in an ear of heightened sensitivity to appearances of impropriety, the spectacle of a citizen or attorney giving cash in one hand and receiving a judicial hearing and decision on the other is one that can no longer be tolerated."

Although the Court's conclusion is not surprising, the Court's ruling that the decision was to become immediately effective in all cases was unexpected. Since the legislature will not be in session for some months after the decision, it left the probate judges with the unpalatable choice of foregoing special sessions and the fees associated with them or undertaking to continue on as before but without getting paid for their labors.

Although the Court pointed out that "[a]ny diminution in remuneration sustained by the probate judges during the intervening period from the date of this decision to legislative action is properly a matter for consideration by the legislature in making any salary adjustment," it is not surprising that the probate judges are reluctant to place full faith in a legislature which has proven, time and time again, to be unreceptive to pleas by the judiciary for fair and equitable salary treatment.

As any probate practitioner knows, there is a paucity of law in the trust area in New Hampshire. That void was partially filled by the Court's opinion in *Bartlett v. Dumaine*,* authored by Chief Justice King and decided October 2, 1986. This opinion will demonstrate Chief Justice King's breadth of experience in many diverse areas of the law. The case involved an interpretation of the rights of beneficiaries under the celebrated New Hampshire trust established by Frederic C. Dumaine, Sr., the Boston industrialist who knit together at the turn of the century the various textile mills located in Manchester, New Hampshire into the awesome giant that became the Amoskeag Manufacturing Company. This unique New Hampshire trust is known as "Dumaines" and is the key trust in a whole group of trusts, the others being Massachusetts' trusts. The chief trustee of Dumaines is Frederic C. Dumaines' favored son, Buck Dumaine. This was a real intrafamily feud, the issues being raised by the beneficiaries of the trusts who were several of Buck Dumaine's brothers and sisters. The beneficiaries complained of unfair treatment in several respects by Buck Dumaine in his role as trustee of "Dumaines."

Chief Justice King's opinion, for a unanimous Supreme Court, is a primer in trust law. The Court upheld the master's opinion that had rejected the claims of the beneficiaries. The opinion relies heavily upon the peculiar and unique nature of "Dumaines" trust and emphasizes the senior Dumaines' general intent to give his son and other co-trustees absolute control of the trust property and the related trust businesses. The Court interpreted this intention as not requiring the trustees to follow the "prudent rule" of in-

vestment but rather authorized the trustees in administering the trust "to take business risks with trust funds. The Court's opinion left undecided certain issues and it seems clear that these trusts, which have been in litigation in other courts previously, will be in litigation again in the future. Perhaps the ultimate legacy of Frederic C. Dumaine, Sr. is the gift of an ongoing and everlasting source of litigation for which the probate attorneys involved should be everlastingly grateful.

In summation, it can be fairly said, upon his retirement, that Chief Justice King's many and varied contributions to our State bring to mind Harry Truman's observation that "I studied the lives of great men and famous women, and I found that the men and women who got to the top were those who did the jobs they had in hand, with everything they had of energy and enthusiasm and hard work."

*The Author is a member of the firm that represented a party in this case.