

## **Lex Loci: A Survey of New Hampshire Supreme Court Decisions**

by Charles A. DeGrandpre

To paraphrase John Hancock's warning to the American colonists, *Simpson v. Calivas*, decided November 23, 1993 is a wake-up call to probate attorneys that "the malpractice lawyers are coming, the malpractice lawyers are coming!" Surprisingly, the New Hampshire Supreme Court had never before been confronted with the issue of the duty of an attorney to an intended beneficiary when the attorney is found to be negligent in the manner in which the will is prepared as a result of which the beneficiary fails to receive the intended bequest. **Not** surprisingly, the supreme court gave a resounding affirmation of the maintenance of such an action by the frustrated beneficiary directly against the attorney, even though no privity existed between the attorney and beneficiary. The court allowed the suit to be maintained on the basis that "a duty runs from a drafting attorney to an intended beneficiary, and that an intended beneficiary has third-party beneficiary status" and as such may sue the attorney for malpractice.

**Probate attorneys caveat: it gets worse.** The court specifically ruled that the frustrated beneficiary was not limited "to those cases where the testator's intent as expressed in the will - not as shown by relevant extrinsic evidence - was frustrated by attorney error." The court used as an example the limiting rule urged by the defendant that "a beneficiary whose interest violated the rule against perpetuities would have a cause of action against the drafting attorney, but a beneficiary whose interest was omitted by a drafting error would not." The court refused to accept the suggested limiting rule because it would "produce such inconsistent results for equally foreseeable harms" and went on to hold "that an intended beneficiary states a cause of action simply by pleading sufficient facts to establish that an attorney has negligently failed to effectuate the testator's intent as expressed to the attorney." In such an action, the frustrated beneficiary may introduce extrinsic evidence, such as the notes of the drafting attorney, statements made by the decedent to the beneficiary and to others, etc., as to his intent.

**It gets much worse.** In the present case, the intended beneficiary first sought in the probate court to have the matter remedied in his favor by a decree of the probate court but lost. He was then confronted in the malpractice action by a collateral estoppel claim by the defendant, but the supreme court blew away that defense by pointing out that:

[t]he task of the probate court is a limited one: to determine the intent of the testator as *expressed in the language of the will*. Obviously, the hope is that the application of rules of construction and consideration of extrinsic evidence (where authorized) will produce a finding of expressed intent that corresponds to actual intent. Further, the likelihood of such conversions presumably increases as the probate court considers more extrinsic evidence; however, even with access to all extrinsic evidence, there is no requirement or guarantee that the testator's intent as construed will match the testator's actual intent.

**Can it get even worse?** Yes. The court finally held that on the issue of damages, the beneficiary has the benefit of the broad evidentiary rules applicable to most New Hampshire actions, allowing the plaintiff beneficiary to testify as to the value of the property lost to him by the attorney's mistake and further, allowing him to introduce evidence of what it had cost him to make a settlement with the actual beneficiary of the will, his stepmother. **Oh, woe is me!**

In *State v. Cigic*, decided March 18, 1994, the court had before it the enigma created when appointed appellate counsel for a criminal defendant has reviewed the record and finds that the appeal has no merit. What is the duty of the appellate counsel at this juncture? Under the Anders Rule of the United States Supreme Court (*Anders v. California*) 386 US 738 (1967), a two-step procedure requires appellate counsel first to make a conscientious examination of the record and if the appeal is wholly frivolous, move to withdraw. That motion should be accompanied by a brief referring to anything in the record that might arguably support the appeal. The defendant is then provided a copy of the motion with its supporting information (the "Anders brief") and allowed to submit a *pro se* brief. Whereupon, the appellate court will make an independent examination of the record and if it finds that the appeal is wholly frivolous, the court grants the appellate counsel's motion to withdraw. If the court finds that there are arguable legal points, new counsel must be appointed. The New Hampshire Supreme Court found that **Anders** presented only a minimal level of protection and instead adopted a modified Idaho Rule under which appointed appellate counsel is never allowed to withdraw. If the counsel finds that the client's appeal was frivolous, the counsel is still obligated to argue the strongest legal points that the counsel finds in the appeal. This procedure preserves the adversarial nature of the criminal process and avoids the deficiencies of the Anders process, where the appellate court actually acts as the attorney for the defendant and the appellate lawyer acts as a judge.

A case certified to the New Hampshire Supreme Court by the United States District Court for the District of New Hampshire, *Walls v. Oxford Management Company, Inc.*, decided November 4, 1993, raised the issue of the duty of a landlord to protect a tenant from criminal attacks of third persons. The Court, in a case of first impression, held that

[w]hile landlords have no general duty to protect tenants from criminal attack, such a duty may arise when a landlord has created, or is responsible for, a known defective condition on a premises that foreseeably enhances the risk of criminal attack. Moreover, a landlord who undertakes, either gratuitously or by contract, to provide security will thereafter have a duty to act with reasonable care. Where, however, a landlord has made no affirmative attempt to provide security, and is not responsible for the physical defect that enhances the risk of crime, we will not find such a duty. We reject liability based solely on the landlord-tenant relationship or on a doctrine of overriding foreseeability.

Furthermore, the court went on to find that a landlord's implied warranty of habitability to provide a reasonably safe premises "does not require landlords to take affirmative measures to provide security against criminal attack."

*Wood's Case*, decided November 23, 1993, involves the tension between the prior representation of a client by an attorney and the attorney's own personal interests. Here, a developer hired an attorney for his expertise in land use and zoning in connection with its plan to locate a shopping center in a local township. Later, after extensive work on behalf of the client by the attorney and an associate in his law office, the developer expanded its plans to include land in a neighboring town, which abutted the attorney's own land. The attorney resigned from representing the development company, and became a vocal opponent of the project, making exhortatory statements to the press and promising "to mount a serious campaign to defeat the project." The supreme court upheld the public censure of the attorney even though the attorney did not use information against the developer he had gathered while representing the developer. However, because he made misstatements to the press concerning his firm's relationship with the developer, specifically, that his firm had refused to represent the developer in connection with his shopping center proposal, the court upheld the attorney's censure. There is a fine line to walk when an attorney's own personal, property interests in a litigated matter clash with the interest of a client of the firm with whom the attorney is associated, not an uncommon situation in large firms. In the instant case, the attorney's inflammatory statements about the developer (that they were "greedy" and "materialistic") certainly worsened the situation. The rule to be learned here is that when an attorney's own personal interests collide with those of a client or former client, the attorney should step aside, hire his own lawyer to represent him, and let that lawyer do the talking.

In *McCollum v. D'Arcy*, decided March 15, 1994, the court had before it the question of whether the discovery rule regarding the statute of limitations applied to the so-called "memory repression" theories **au courant** in the recent spate of sexual abuse cases brought against parents, priests and others, decades after the alleged abuse occurred but only recently revealed to the victim by an event which freed-up the victim's repressed memory of it. The court courageously stuck to its earlier, precedent-setting discovery rule (*Shillady*, 114 NH 321 (1974)) in this most difficult test. The court did not necessarily adopt the plaintiff's allegations of memory repression, which, the court pointed out, would be subject to future discovery by the defendant and then tested in the fiery crucible of a court trial.

*State v. Weeks*, \* decided November 23, 1993, is a sad case about a public accountant who was a long-time member of the board of trustees and treasurer of a charitable organization and who misused his position for his own personal benefit. As a result of the accountant's actions, the home for the elderly run by the charitable organization was forced to close because of its financial difficulties and the elderly residents were forced to find new accommodations. The state's case was a very detailed one, covering dozens of different counts, including a multitude of allegations of theft or deprivation of property, including charges that the defendant used the charitable organization's funds to buy a van in his own name, to pay salaries and medical benefits to employees of his private accounting practice, to pay for his own golf club membership, to pay for gifts

\*The author's firm represented a party to the action and, therefore, the author's view may be colored.

made to third parties, to pay for the purchase of office equipment for use in his own accounting practice the title of which was in the name of the accounting practice, etc. Some funds were simply unaccounted for because of poor record keeping. The defendant had many claims in his defense, mainly centering around the prosecution's many amendments of the several indictments involved and the elimination of indictments at trial, etc. The supreme court upheld the defendant's convictions on all counts, concluding that the defendant had been given a fair trial by a jury who was ultimately the arbiter of the facts. The question left unanswered by the criminal case is where were the accountant's fellow members of the board of trustees during the many years that the defendant's misconduct and theft was going on? That apparently is to be decided in the civil proceeding still awaiting trial.

*First NH Bank v. Town of Windham*, decided March 22, 1994, is a New Hampshire bank's challenge to two long accepted principles of New Hampshire mortgage law: (1) that a subsequent real estate tax lien has priority over an antecedent mortgage and (2) a tax deed issued in foreclosure of the equity redemption under a tax lien extinguishes the mortgage. Involved was a town's use of the alternate tax lien procedure adopted in 1987 and found in RSA 80:20-a. There was a lot at stake since the assessed value of the properties exceeded \$1,000,000, while the amount of unpaid taxes was approximately \$60,000, and the bank stood to "lose its entire mortgage collateral. The court was unanimous in upholding the accepted real estate tax lien principles and denied the bank's claims on these issues. However, the bank snatched defeat from the jaws of victory when only a narrow majority of the court found

that fundamental fairness under the New Hampshire Constitution requires notice to the mortgagee of the following: the issue date of the tax lien deed; the expiration date of the exemption; and a warning that the mortgage will be eradicated by the tax lien if the property is not redeemed.

Because the town did not provide the bank all the notice required by the due process Constitutional requirements (although the town did comply with the less stringent statutory notice requirement) the court held that the tax lien deeds did not extinguish all of the bank's interest in the property.

The Kafka-esque atmosphere of a hearing before a New Hampshire professional governing board (here, the Board of Examiners of Psychologists) was before the Court in *Petition of Grimm*, decided December 17, 1993. The petitioner sought to overturn a decision of the Board revoking his psychologist certificate because he allegedly had engaged in sexual intercourse with a patient, the complainant. The petitioner unequivocally denied the charge. The petitioner was confronted in this case by a Board of seven members, one of whom could not participate because he was the complainant's ex-son-in law and another (who attempted to sit) shared office space and expenses with the independent psychologist appointed by the Board to investigate the case. Of the seven Board members, only five participated in the final decision of the Board, and the court found that "only one of the members was present for all of the parties' testimony." The supreme court was not very sympathetic to the petitioner's

claims of error. It rejected his argument that the standard of proof should be higher than the one adopted by the Board: a preponderance of the evidence. It also rejected his claim that the rules of evidence should apply to the proceedings, the court referring to its earlier rulings that the rules of evidence do not apply to administrative proceedings. Also rejected was the petitioner's attempt to *voir dire* the panel members, and the court held further that it was not necessary for the entire Board to sit, but only that a quorum of the Board participate. However, the court could not stomach the fact that only one of the five persons who made the decision against the petitioner actually heard all the evidence (especially where the petitioner squarely denied having sex with the complainant, and it was the word of one against the other), although all members of the panel had heard tapes of the proceedings. The court stated that the process

requires all panel members deciding a case to be in attendance for all of the parties' testimony, plus any other testimony on the issue of credibility, in order to effectively assess the issue of credibility.

Although recognizing that this rule imposed a burden on the Board in a lengthy case such as this, the court ordered that a board must suspend proceedings until all members acting in a fact-finding capacity are physically present to hear the testimony of the parties. The author can well remember the wails of anguish from a litigating partner after his first day in a New Hampshire administrative proceeding. Oh, for the safety of a jury trial where rules are rules and the jury and judge impartial.

*McCabe v. Arcidy*, decided December 15, 1993, involves the interpretation of a fee agreement for legal services that the appellant guaranteed. The fee agreement was unusual, combining aspects of both an hourly rate arrangement and a contingency fee agreement. The attorney was a well-known expert in lender liability cases, for which expertise he was hired, and his fees came high. The supreme court took a very liberal interpretation of the fee agreement, indicating that there was nothing wrong in a fee agreement containing both contingent and hourly components, citing to the eight factors established in the *Rolfe Case* 136 NH 294 (1992). The court held that the agreement met the eight-point test of that case. The court went on to uphold the trial court's reformation of that agreement, at the request of the attorney, the reformation being based upon evidence of what the parties intended, which was not correctly set forth in the writing incorporating the agreement of the parties. The case should be read by all who have occasion to be involved in a litigated attorney fee matter, since the court's explication of the issues is singularly clear and without rhetoric.

*Gray v. First NH Banks*, decided March 15, 1994, is a case of a real estate investor who is too smart by a half. The plaintiff developer sought to purchase a small shopping center development located on a lake, from a bank who had acquired title to the property by a deed in lieu of foreclosure. The plaintiff's negotiations failed in the first instance when his offer was rejected on the basis that it was far too low. Later he learned that the development had septic system problems and he stated to another that he would use the problem "as a negotiating tool... to lower the purchase price." He did just that, entering into a purchase and sale agreement to purchase the property at far

less than the bank had first offered. He never bothered to have the septic system checked out or to learn in any detail what the septic system problems were. However, the bank as seller failed to provide the septic system evaluation certificate now required for lakeside property under RSA 48S-A:39. The sale closed, the purchaser took possession of the shopping center development, and then, not surprising to most but apparently to the purchaser, immediately began having major septic system problems. Whereupon the purchaser sought rescission of the real estate contract based upon the seller's failure to provide him with the required septic system evaluation certificate. The supreme court would have none of it, leaving the purchaser deep, as George Bush would put it, in his own doo-doo. The court pointed to the purchaser's knowledge of the septic system problem prior to purchase and his statement that he would use the problem to obtain a lower purchase price, which he in fact did. The court denied the plaintiffs petition to rescind. This is surely a case where someone falls in a pile of "it" and comes out smelling-not like a rose, but like "it" itself.

The sin that was sweet in the sinning is foul in the ending thereof.<sup>1</sup>

**Endnote**

<sup>1</sup> Barry Pain, Swinburne, Oxford Dictionary of Quotations, 367 (3rd ed. 1979).