

Lex Loci: A Survey of New Hampshire Supreme Court Decisions

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The supreme court in its recent decisions slogged through a whole group of important cases in its usual skillful and proficient manner. This is a court that seems isolated from the pressures of the press and politics, a court unafraid of taking up the hard issues and rendering its decisions without assessing which way the wind is blowing. However one views the outcome of a particular case, it's an exhilarating court.

A good example of the court's approach is *Petition of Burling*, decided December 29, 1994, in which the petitioner, a member of the New Hampshire Bar and of the legislature of the State of New Hampshire, petitioned the court for the release of all professional conduct files regarding the late, infamous John Fairbanks, whether held by the court itself or by its Professional Conduct Committee. The petitioner argued that the provisions of the New Hampshire constitution relating to open government, free speech and separation of powers, as well as the supreme court's own rules, required the release of the information. The court stood firm and denied the petition. The court pointed out that "participants in committee investigations of a noncriminal nature, including attorneys, hold the expectation that... the proceedings will remain confidential." The court emphasized that the purpose of the rule also protected the identity of the complainants. The court held that "as a separate and coequal branch of government, the judiciary is constitutionally authorized to promulgate its own rules." The court took pains to point out that the allegations of the petitioner that the confidential nature of the committee's proceedings may shield unscrupulous members of the Bar and may engender suspicion and foster confidence raised "issues of utmost concern to this court," but held that the resolution of these issues did not lie through the petition but through the court's own rule making processes. Although changes in the confidentiality rules seem in the offing, the court was not moved to release confidential information in prior cases processed under the confidentiality rule, even though it might be the popular thing to do in a case as distressing as Fairbanks.

Another case evidencing our judiciary's independence from popular sentiment, is *Opinion of the Justices*, decided May 11, 1994, and discussed in the author's earlier column. Because of a typographical error in the publication, the author's comments were not correctly transcribed and the following is the correct exposition of the case. In this advisory opinion, the court torpedoed a proposed bill to limit SLAPP (Strategic Lawsuits Against Participation) suits. SLAPP suits "are civil lawsuits filed against non-governmental individuals in groups, usually for having communicated with a government body, official, or the electorate, on an issue of some public interest or concern." SLAPP suits are often filed in zoning cases, taxation cases, civil liabilities cases, etc. and "seek to retaliate against political opposition, attempt to prevent future opposition and intimidate political opponents, and are employed as a strategy to win an underlying economic battle, political fight, or both." Such suits are becoming increasingly frequent and many states have enacted SLAPP suit laws to limit or end quickly such lawsuits

and SLAPP suit legislation is pending in many states. The proposed New Hampshire statute would allow the judge, upon motion, to dismiss a SLAPP suit without a hearing unless the judge determines that this is a probability that the plaintiff would prevail on the merits. Relying upon our strong New Hampshire constitutional provision guaranteeing a right to jury trial found in part I, article 20 of the New Hampshire Constitution which speaks of the right to a jury trial as being "sacred," the court held that the proposed bill would violate this constitutional provision. The court did acknowledge the problems raised by such suits and expressed its "profound concern with abuse of the judicial system by lawsuits designed to intimidate citizens and exact a price for participation in the democratic process" but the court ringingly held that the proposed "solution cannot strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group." Ah, the benefits of an appointed, lifetime judiciary free from the pressure of politicians, the press and the electorate!

The court waded into, so to speak, the hot political issues created by the tension between the right of the public to use coastal beaches for recreational purposes versus the right of seaside property owners to restrict access to their beach front properties in *Opinion of the Justices (Public Use of Coastal Beaches)* decided October 27, 1994. The court responded to the request from the House for an advisory opinion on a pending bill by conducting a scholarly review of New Hampshire law regarding littoral rights to tidal waters. Without deciding where the high-water mark is located, the court held that New Hampshire law, going back to an 1889 case, had delineated the respective rights to intertidal lands with some specificity and the court held to its earlier ruling in the modern era. The court first rejected the Massachusetts rule that the private ownership extended to the low-water mark. Rather,

[I]t is settled ... that the public trust in tidewaters in this State extends landward to the high-water mark New Hampshire has long recognized that lands subject to the ebb and flow of the tide are held in public trust [Although] owners of property adjacent to lands held in public trust have common law rights which are 'more extensive than the public's generally' private shore front owners are entitled to exercise their property right in the tidelands so long as they do not unreasonably interfere with the rights of the public.

The court then turned to the issue presented by the proposed legislation which sought to recognize a public easement in the "dry sand area" of historically accessible beaches and held that the creation of such a public easement would be a compensable taking under Part I, Article 12 of the New Hampshire constitution and under the 5th Amendment of the United States Constitution.

It is one of the constant joys of practicing law to come across a new piece of legal lingo. *State v. VanDebogart*, decided December 9, 1994, contained one such gem. At issue in the case was the defendant's "right of allocution." If you didn't know it (and the author didn't), this harmonic phrasing refers to a criminal defendant's right to be personally heard before sentence is imposed. In the present case, the trial judge denied the defendant's request to be heard before sentence was imposed and the defendant appealed. The supreme court found that there is no constitutional right to "allocution"

and held that the trial court did not abuse its discretion in refusing the defendant the right to speak before imposing sentence.

McLaughlin v. Mullin, decided December 28, 1994, is an interesting case which presented a conflict between the probate and superior courts over jurisdiction to award custody of children. Also involved were the rights of grandparents to custody of grandchildren over the opposition of a father, the mother having died earlier. The grandparents filed a petition in the superior court seeking the custody of their grandchildren under the provisions of RSA 458-A, the uniform child custody jurisdiction act. The superior court awarded physical custody of the children to the grandparents, awarded joint custody to the father and the grandparents and ordered the father to pay child support. The father claimed that the superior court had no jurisdiction to entertain such an action and the supreme court agreed. "Absent divorce proceedings...the superior court has no jurisdiction to appoint a custodian of a minor." The right of custody "is a legal incident of guardianship, and the appointment of a guardian is a matter within the exclusive jurisdiction of the probate court."

Bronson v. The Hitchcock Clinic, Z decided September 21, 1994, involved a medical malpractice wrongful death action in which the supreme court reversed a plaintiffs verdict even though there was expert evidence offered by the plaintiff to show that the defendant was negligent. The case was admittedly a troublesome one. The defendant was negligent in diagnosing the plaintiffs cancer which led to a six months delay in treating her. However, the plaintiffs medical expert never testified that the defendant's negligence probably caused the plaintiffs death or that the plaintiff suffered injuries which would not otherwise have occurred except as a result of the defendant's negligence, as required by our strict medical malpractice statute, RSA 507 -E:2,I. It is not enough to show that the defendant was negligent in a medical malpractice case, you must show a causal relationship between the negligence and the injury sustained.

A question of the application of the New Hampshire pretermitted heir statute to the real and personal property located in New Hampshire of a decedent domiciled in another state was before the court in *In re Estate of Rubert, Jr.*, dated December 29, 1994. The court, relying on an ancient New Hampshire case, held that the law of the *situs* controls the succession to real property and the law of the decedent's domicile controls the passage of personal property. As a consequence, the plaintiffs pretermitted heir (who was domiciled here) was entitled to an intestate share of the decedent's real property located in New Hampshire but not the personal property located here.

The Guinness Book of Records was called into service by Justice Batchelder in his memorandum opinion in *Carnie v. Town of Richmond*, decided September 21, 1994. The issue is whether or not a builder's proposed structure was an "antenna" within the terms of a town's zoning ordinance. The builder wished to construct a 90 to 100-foot-high tower to support antennas and the local zoning board granted the plaintiff a special exception, basing its opinion that the zoning ordinance allowed an exception from the ordinance's 35-foot height limitation for antennas. However, it turns out that an "antenna" is not the entire portion of a tower that supports a telecommunications facility

but rather an antenna is something that is affixed to the tower and that is responsible for the actual broadcasting and receiving and telecommunications signals. The supreme court reversed the zoning board, pointing out that if the zoning board interpretation was used, a tower as high as the 2, 120-foot radio tower located in Konstantznow, Poland (the world's tallest ever structure, according to the Guinness Book of Records) would be allowed. The court held that "it is more likely that what was more likely contemplated by the term antenna was the ordinary, pre-cable television receiving antenna, albeit with a short supporting mast, mounted and affixed to many residences."

Southern New Hampshire Water Company, Inc. v. The Town of Hudson, decided November 7, 1994, contains a warning by the supreme court to appealing parties who violate the court's 50 page brief limit. Here, one party attempted to escape the 50 page brief limit by evading the court's corollary double-spacing rule by using a spacing of 1 and 1/3, which the court calculated converted a 59 page double-spaced brief into a brief of 48 pages. The court was particularly miffed because it had earlier denied the other party's motion for a longer brief. Hey, the court is serious about this rule!! Just think of the work it took to figure out that a 48 page brief, spaced 1 and 1/3, equals a 59 page brief, double-spaced? Appealing parties are warned again not to violate, intentionally or inadvertently, this hard and fast rule. One can well understand how the court, wading through overblown, overlong, legal prose, day after day, week after week, *ad nauseam*, would be p. o'd.

The significant difference between a default in a legal action and in an equity action was before the court in *Brady, Tee v. Mullen*, decided October 21, 1994. In this case the defendant failed to respond to a petition in equity for declaratory relief and the superior court issued a decree *pro confesso*. Later, the plaintiff sought to enforce the decree on the issue of liability but the supreme court held "that a decree *pro confesso*, admits only material and well-pleaded allegations of fact" unlike a default in a legal action, where a default admits liability.

The important question of the allocation of expenses vis-a-vis a workers' comp lien to a recovery in wrongful death action was before the court in *Gelinas v. Sterling Industrial Corporation*, decided December 21, 1994. In a question certified from the United States District Court for the District of New Hampshire, the court determined that under RSA 556:14 which allows the deduction of expenses of recovery and expenses of administration in a wrongful death action, a workers' compensation carrier's lien attaches only to the net recovery to an estate in a wrongful death action, after the deduction of attorney's fees in obtaining the recovery and expenses of administration. Next the court proceeded to the issue of whether or not, under these principles, the compensation carrier "may take a 'holiday' from compensation payments until the sum of all payments made and that would otherwise have been made but for the 'holiday,' exceeds the net value of the liability settled." The court held that a compensation carrier

may take a 'holiday' from compensation payments only so long as the net amount *recovered* in the liability action... exceeds the sum of (1) compensation payments made

(and thereby recoverable from the *res*), and (2) compensation payments avoided under the 'holiday.'

Cunningham v. Associated Grocers Supermarket d/b/a Vista Foods, decided December 14, 1994, could be called "The Case of the Equivocal Juror." In a personal injury action, a jury returned a defendant's verdict but, upon polling the jury, a juror answered the trial judge's inquiry with equivocation. The court then pursued the matter with the juror and although it appeared that the juror would personally have found for the plaintiff, he had gone along "with the majority" of the remaining jurors. The supreme court upheld the verdict as valid.

A difficult case involving the attempted termination of parental rights of a father over his daughter on the grounds of abandonment was before the court in *In re Sheena B.*, decided December 9, 1994. Prior decisions of the court have established the very high (and the author believes unreasonably high) standard of proof of beyond a reasonable doubt before a parent's parental rights can be terminated. In the instant case, the probate court had terminated the parental rights of the appellant father, relying upon RSA 170-C:5, I, which creates a rebuttable presumption that a parent intends to abandon a child if he has left the child in the care and custody of another without provision for the child's support and without communicating with the child for a period of at least six months. The petitioner, the mother of the child, offered evidence to show that the father had no contact with his child for a period of over six months but the supreme court held that "the probate court must consider events before, during, and after the triggering period." The court seized upon evidence that the mother had prevented the father from contact with her daughter. However, the evidence was undisputed that the father had a history of problems with the law and on several occasions had behaved in a violent manner toward the mother in the presence of his daughter and had had restraining orders imposed against him. He admitted to drug and alcohol abuse and had been incarcerated for several months. However, a unanimous court, speaking through Chief Justice Brock, held that the separation of the father and child was caused solely by the mother and ruled as follows:

Strictly speaking, there is no abandonment by a parent when a separation of parent and child is caused solely by the other parent or a third party and because of no fault on the part of the parent whose rights are sought to be terminated.

Since the father presented evidence that the mother had refused to allow the father to visit the child and had refused child support the court found that there was no abandonment even though the mother testified that she had restricted access to her daughter by the father from her concern for her daughter's safety. Every contested termination of parental rights case raises knotty issues but the court's super-high standard has meant that it is almost impossible to terminate a parent's parental rights even when it's in the best interest of the child, leaving many children unadopted and in foster homes.

It has been said that "marriage is a lottery in which if you lose you can't tear up the

ticket.³ The case of *Holliday v. Holliday*, decided December 14, 1994, is a good example of this adage. The good news for Donald Holliday was that in April, 1992, he won three quarters of a million dollars in the New Hampshire lottery. The bad news for Donald was that he was three years into divorce litigation with his wife. The parties had been married for five years and separated for three when the defendant won the New Hampshire Lottery. Roseann, Donald's wife, had filed for divorce three years earlier based on irreconcilable differences and the action had not been concluded by the time that Donald won the lottery. After hearing the good news, Roseann moved to have a portion of the lottery winnings made hers as a part of the property settlement and also requested alimony. Her two requests were denied by the marital master whose decision was approved by the superior court. The New Hampshire Supreme Court upheld the marital master's rulings. It found that the lottery winnings were marital property but accepted the marital master's findings that the parties had been separated for some thirty-seven months when the ticket was purchased, Roseann had not participated in purchasing the ticket nor had Donald had any contact with Roseann since the separation and, more specifically, the parties had no discussion about purchasing the ticket. The court recognized that the marital assets in a divorce that are to be divided between the parties includes all assets "acquired up to the date of decree of legal separation or divorce" but upheld the marital master's equitable distribution of the marital property in light of its findings concerning the purchase of the lottery ticket and the short term nature of the five year marriage. How does that old saying go, "Unlucky in love, lucky in
?"

Endnotes

1. The author's firm represented one of the parties in this appeal and, therefore, the author's view may be colored.
2. At press time, the author learned that this opinion has been withdrawn by the supreme court and a rehearing ordered.
3. Lawrence, Peter, *Peter's Quotations*, 320 (1977)