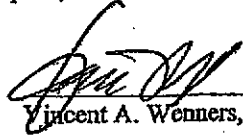


CERTIFICATION

I hereby certify that a copy of the within Memorandum of Law has this date been forwarded to James A. Normand, Esquire, Ovide Lamontagne, Esquire, Daniel Pacik, Esquire and Ruth Tolf Ansell, Esquire, opposing counsel.

  
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Vincent A. Weners, Jr., Esquire

COPY

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
NORTHERN DISTRICT

SUPERIOR COURT  
04-E-0251

Edward J. Burke

v.

Bunny's Superette, Inc., Thomas M. Burke,  
Marie I. Burke and Bernardine P. Donelson

CHRONOLOGY

- February, 1996 Slip found under the cash register regarding cash receipts.
- January 7, 1999 Marie Burke forms an Irrevocable Trust and a pour-over will, leaving the stock in Bunny's Superette, Inc. and the land and buildings on Pine Street to Thomas Burke; and the interest only on \$100,000.00 to the Plaintiff, Edward Burke; and the residue to Bernardine P. Donelson.
- March 22, 1999 Marie Burke conveys all of her real estate to the Trust.
- March 17, 2004 The Marie Burke Trust conveys the land and buildings on Pine Street on which Bunny's Superette, Inc. is situated to Thomas Burke.
- March, 2004 Thomas Burke, Bernardine Burke and Marie Burke discuss, at Marie Burke's home, the gift of their stock in Bunny's Superette, Inc. to Thomas Burke.
- April 1, 2004 Marie Burke and Bernardine Donelson sign gift letters of stock brought to them by Thomas Burke and addressed to David Dunn, Esquire.
- April 5, 2004 The First Amendment to the Marie Burke Trust is signed, leaving the stock in Bunny's Superette, Inc. only to Thomas Burke (the land having been conveyed to him); reducing the gift to the Plaintiff, Edward Burke to \$60,000.00; and the residue to Bernardine Donelson.

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- May, 2004 Thomas Burke sends Attorney David Dunn an undated letter requesting a special meeting to elect him as the sole officer and director of Bunny's Superette, Inc. and to amend the Bylaws to delete the June 28, 1971 Stock Purchase Agreement.
- May 6, 2004 Plaintiff, Edward Burke, receives a copy of the undated letter and proposed corporate changes.
- June 8, 2004 Plaintiff, Edward Burke, files a Petition for Injunction.
- June 29, 2004 Marie Burke executes the Second Amendment to her Trust intentionally making no provision for the Plaintiff, Edward Burke.
- September 3, 2004 The Third Amendment to the Marie Burke Trust is signed appointing Thomas Burke as alternate Trustee, and providing that Bernardine's residual stock be in trust to be distributed in Thomas' sole discretion.

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THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS

SUPERIOR COURT

NORTHERN DISTRICT

Docket No. 04-E-0251

Edward J. Burke

vs.

Bunny's Superette, Inc., Thomas M. Burke, Marie I. Burke  
and Bernardine P. Donelson

**POST-TRIAL MEMORANDUM SUBMITTED BY**  
**MARIE I. BURKE AND BERNARDINE P. DONELSON**

NOW COME Respondents, Marie I. Burke and Bernardine P. Donelson, by and through their attorneys, Ansell & Anderson, P.A., and respectfully submit the following Post-Trial Memorandum:

**INTRODUCTION**

This case arises from a dispute between the shareholders of Bunny's Superette, Inc. (hereinafter referred to as "Bunny's Superette"). The plaintiff, Edward J. Burke, seeks permanent injunctive relief to enjoin Marie I. Burke and Bernardine P. Donelson from transferring their shares in Bunny's Superette to Thomas M. Burke. The plaintiff alleges that the parties had entered into an agreement in 1971 to transfer the unincorporated grocery store owned by them (and known as Bunny's Superette) to a corporation organized in such a manner that the three children would be equally treated with respect to their parent's estates, including, but not limited to, the business, the land and building on which it was situate. The plaintiff further alleges that the parties had entered into a stock restriction agreement which gave him the right to purchase certain shares which were being sold, and that on April 1, 2004 both Marie Burke and

Bernardine Donelson transferred their shares to Thomas Burke without affording the plaintiff the opportunity to purchase these shares.

The defendants deny that any agreement existed in which the parties agreed that the three children would be equally treated with respect to their parents' estates, including but not limited to the business, land and building on which it was situate. The defendants also deny that the transfer of stock violates the stock restriction. Bunny's Superette has filed a counterclaim against the plaintiff for payment of \$36,566.00 plus interest, which is owed for prior advances made to the plaintiff.

#### **STATEMENT OF FACTS**

##### **A. Bunny's Superette Prior to 1971**

Marie and Bernard Burke first established a grocery store called Bunny's Superette in approximately 1952. At the time it was formed, the Burkes had three young children: Bernardine Burke (aka "Bunny") who was twelve years old, Edward Burke who was 10 years old and Thomas Burke who was 6 years old. Although Bunny's Superette was considered a family business, there was never any dispute that Marie and Bernard Burke were the legal owners of the business. Marie and Bernard Burke made all of the financial decisions about the business and received all of the profits.

During their childhood, each of the Burke children worked at the business, without pay, but Marie Burke and Bernard Burke provided their children with all of their necessities (food, shelter, clothing), as well as spending money and use of family vehicles. There was no obligation or requirement for the children to work at the store. The children were encouraged to play sports, to spend time with their friends and to do other extracurricular activities. Edward

Burke was actively involved in youth baseball, and Bernard Burke formed an organized baseball team for Edward to join.

All of the Burke children continued to work at the business on a full time and/or part time basis for some period of time after graduating from high school. There was also never any obligation and/or expectation that they would continue working at the store during their adulthood. Marie and Bernard Burke encouraged all of their children to go to college, and also encouraged their children to pursue careers outside of Bunny's Superette.

Bernardine Donelson and Thomas Burke took advantage of these opportunities. Marie and Bernard Burke paid for Bernardine Donelson to attend college at Notre Dame College. After college, Bernardine Donelson was a teacher for several years and received her Masters Degree from the University of Illinois. Bernardine Donelson eventually returned to New Hampshire, where she became a real estate agent. Bernardine Donelson continued to work at Bunny's Superette on an infrequent basis to assist when necessary. However she never returned to the store on a full-time basis.

Marie and Bernard Burke also paid for Thomas Burke to attend college at New Hampshire College. After college, Thomas Burke joined the National Guard Officer Program. Thomas Burke was on active duty for several years, and ultimately returned to work in New Hampshire. Marie and Bernard Burke encouraged Thomas Burke to interview for jobs outside Bunny's Superette in New Hampshire, although Thomas Burke ultimately decided to work at Bunny's Superette. After returning to Bunny's Superette, he received a salary.

Edward Burke was also encouraged to go to college and/or to pursue a career outside of Bunny's Superette, but he chose to continue to live at home and to work at the business after high school. During that time period, Marie and Bernard Burke continued to pay for all of

Edward Burke's living expenses, provided him spending money and gave him use of the family vehicle. Edward Burke married in 1966, and moved out of his parent's home. After that date, he received a salary for his work at the store.

Prior to the incorporation of Bunny's Superette in 1971, Edward Burke, Bernardine Donelson and Thomas Burke were not owners of Bunny's Superette. All of the financial decisions were made by Marie and Bernard Burke, and they received all of the profits (and paid all of the expenses) of the store. Edward Burke, Bernardine Donelson and Thomas Burke were never promised an ownership interest and/or future inheritance if they continued to work at Bunny's Superette.<sup>1</sup> There was also never an agreement with respect to who would ultimately own and/or inherit the store.

B. Bernard Burke's Death in 1971 and the Incorporation of Bunny's Superette, Inc.

In 1970, Bernard Burke suddenly became ill, and he ultimately died on May 12, 1971. See T. Burke Exhibit A (certified copy of the estate of Bernard P. Burke). Bernard Burke's will provided that one dollar would be given to each of his children, and that Marie Burke would receive the remainder of his estate. See id. As the surviving joint tenant, Marie Burke also became the sole owner of the properties which had been purchased during her marriage, including 121 Arah Street, 18 Rockland Avenue, 68 Webster Street, 77 Webster Street and 753 Pine Street. See id.

According to Edward Burke, soon after Bernard Burke passed away, Edward Burke approached his mother and informed her that Bernard Burke had promised him the store. Marie Burke was surprised by this proclamation, and informed Edward Burke that the store belonged

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<sup>1</sup> In fact, although Edward Burke alleges that he was told that he had an ownership interest (or right to future inheritance) in Bunny's Superette, he admitted at trial that this alleged ownership interest and/or future inheritance was not contingent upon his continued work at the store.

exclusively to her. Marie Burke also asked Edward Burke for some documentation of Bernard Burke's alleged statement that Edward Burke was a co-owner and/or would receive the store through inheritance. Edward Burke informed Marie Burke that he did not have any documentation, and Marie Burke refused to acknowledge any ownership interest that Edward Burke claimed in the store and/or the properties. Edward Burke never brought a lawsuit in probate or superior court to enforce the alleged promise made by his father, Bernard Burke.

In 1971, Bunny's Superette was incorporated for the purpose of buying, selling, trading and dealing (at wholesale and retail) produces which are incidental to a general food supply and provision business. See Petition for Injunction at Exhibit A (State of New Hampshire Incorporation Documents). Land and buildings were not included in the incorporation of the business assets. Id.

At that time, Edward Burke approached Attorney Charlie Dunn and provided him with all of the necessary information to incorporate Bunny's Superette. Although Marie Burke was under no obligation to give her children an interest in Bunny's Superette, at the suggestion of Bernardine Donelson, she decided to gift a 25% interest in the business to each of her children. Shares were issued to all of the parties at the organizational meeting on June 28, 1971. See Petition for Injunction at Exhibit B (record of organization).

All of the parties were in attendance at the organizational meeting of the corporation, although none of them specifically recall it. This meeting provided an opportunity for the parties to discuss the various provisions of the incorporation documents, including the stock restriction which limited sale of the stock. There has never been any dispute that the sole purpose of this stock restriction was to limit the ability of an outsider (i.e., individuals outside the family) from

buying an ownership interest in the store. Each of the parties testified that they never considered a gift of the property within the family.

At the incorporation meeting, the parties entered into an agreement to adopt a written stock restriction which provides that:

In the event that any stockholder during his lifetime desires to sell any of his stock, he shall first offer it or such part of it as he wishes to sell, to the corporation at the 'agreed price' . . . and the corporation shall have sixty (60) days to accept or reject the offer. If the corporation rejects the offer, the offer shall be repeated to the other stockholders in proportion to their holdings and said stockholders shall have sixty (60) days to accept or reject the offer. If the other stockholders reject the offer, then the holder shall be free to sell said stock to any other party, which party shall take subject to this restriction.

Id.

The corporate documents do not provide any support for Edward Burke's claim that he, Bernardine Donelson and Thomas Burke became owners and/or would ultimately inherit Marie Burke's estate. At trial, Edward Burke nonetheless testified that there was an agreement that all of the properties owned by Marie Burke at the time of her husband's death and/or purchased by her after her husband died were left in Marie Burke's name during her lifetime to enable her to receive income from the rental properties (and for tax purposes), and that after her death, these properties would be owned by her children. Not only do the defendants steadfastly deny that any such agreement was ever made, but all of the facts and circumstances indicate that Marie Burke was the sole owner of these properties after 1971, without restriction.

There is no evidence that Marie Burke intended to give any interest in her real property to her children in 1971.<sup>2</sup> Marie Burke retained all of these properties for her exclusive benefit. All

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<sup>2</sup> In order to have a valid gift, the donor must have a "manifest intention" to give. See DeGrandpre, 7 New Hampshire Practice: Wills, Trusts and Gifts, 3d Ed., § 37-4 (citing Humiston v. Bushnell, 118 N.H. 759, 761 (1978)); 38 Am. Jur. 2d Gifts § 18 (1999) (a "clear, unmistakable, and unequivocal intention" of the donor is

of the income and expenses resulting from these properties were administered through Marie Burke's personal checking account which was maintained at Bunny's Superette. See T. Burke Exhibit F (check registers).

Marie Burke also purchased properties at 108 Liberty Street and 100 Webster Street after Bernard Burke passed away. Despite Edward Burke's testimony that Bunny's Superette made the down payments (and paid expenses associated with maintaining these properties), the loan settlement statements reveal that payment for these properties was made exclusively by Marie Burke. See T. Burke Exhibits at C and D (loan settlement statements). Marie Burke provided a \$9,112.50 deposit on the property at 100 Webster Street, which was obtained on March 21, 1974 from the refinancing of her property at 68 Webster Street. See T. Burke Exhibit C. Marie Burke also provided an \$8,880.00 deposit on the property at 108 Liberty Street, which was obtained on September 22, 1977 from an additional refinancing of her property at 68 Webster Street. See T. Burke Exhibit D. There is no evidence that any funds were provided by Bunny's Superette.

In 1987, Marie Burke decided to sell the properties located at 100 Webster Street and 18 Rockland Avenue. The proceeds from these sales were ultimately deposited into Marie Burke's investment account. None of these proceeds were given to any of her children and/or to Bunny's Superette. Edward Burke's request for a portion of the sales proceeds was denied.

C. Edward Burke and Thomas Burke's Continued Employment At Bunny's Superette After 1971

After Bernard Burke passed away, Edward and Thomas Burke managed Bunny's Superette for many years. Edward Burke was mainly involved in the financial aspects of the

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required to make a gift). "The donor must intend to relinquish the right of dominion over the property and to create such a right in the donee." 38 Am. Jur. 2d Gifts § 18 (1999); DeGrandpre, 7 New Hampshire Practice: Wills, Trusts and Gifts, 3d Ed., § 37-4 (citing Harriman v. Bunker, 79 N.H. 127, 128 (1919)). The most relevant evidence of donative intent is the donor's own testimony. 38 Am. Jur. 2d Gifts, § 19 (1999). Here, there is no evidence that Marie Burke ever intended to gift all of the properties that she owned.

business and Thomas Burke was involved in the operation of the stores. Edward and Thomas Burke set their salaries each year, and the uncontroverted testimony was that both Edward and Thomas received the same salary. The profitability of the business fluctuated every year, and any profits that remained in the business at the end of the year were shared equally by Edward and Thomas (to avoid corporate taxation). For several years, the business was extremely successful. Between the years 1980 and 1985, the parties earned an annual income that ranged from \$61,000 to \$77,000. See T. Burke Exhibit B. There were also years, however, that were less successful. For example, between the years 1993 and 1995, the parties earned an annual income that ranged between 30,000 and \$39,000. See id. The assets of the store did not have much value. The real value in Bunny's Superette was in year to year operation of store. Although Marie Burke and Bernardine Donelson each received a small distribution for several years, these distributions were inconsequential in comparison to the amounts received by Edward Burke and Thomas Burke.

Over the years, Edward Burke's relationship with his family deteriorated. Marie Burke, Bernardine Donelson and Thomas Burke were never close to Nancy Burke, Edward Burke's wife. Although Marie Burke spent time with Edward Burke's children during their youth, the children also grew distant as they reached adulthood. By the 1990s, Edward Burke only rarely saw the other members of his family.

In 1996, Edward Burke left the business. Prior to that time, he had started another grocery business called "Jon O's Market, Inc." in Manchester, New Hampshire. Thomas Burke testified that Edward Burke had been taking items out of the store to stock his new grocery store, and Thomas Burke became concerned that the business would fail. In January or February of 1996, Edward Burke accused Thomas Burke of stealing from Bunny's Superette. Edward Burke