

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

**2006 Term
March Session**

No. 04-E-251

2005-0753

**EDWARD J. BURKE
Plaintiff-Appellant**

v.

**BUNNY'S SUPERETTE, INC.,
THOMAS M. BURKE, MARIE I. BURKE,
AND BERNADINE P. DONELSON
Defendants-Appellees**

Appeal Pursuant to Supreme Court Rule 7

BRIEF FOR THE APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

TEXT OF RELEVANT STATUTORY PROVISIONSiv

QUESTION PRESENTED..... 1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS.....3

SUMMARY OF THE ARGUMENT.....5

ARGUMENT.....6

I. INTRODUCTION.....6

II. THE CURRENT STATUES REGARDING JURISDICTION.....8

III. JURISDICTION OVER TRUSTS.....9

IV. JURISDICTION OVER PROPERTY.....10

V. CONCLUSION.....11

CONCLUSION.....14

CERTIFICATE OF SERVICE14

TABLE OF AUTHORITIES

CASES

<i>In re Estate of McIntosh</i> , 773 A.2d 649 (2001).....	11, 14
<i>In re Estate of O'Dwyer</i> , 605 A.2d 216 (1992).....	10, 11
<i>Gray v. Seidel</i> , 726 A.2d 1283 (1999).....	10, 11
<i>Rockwell v. Dow</i> , 85 N.H. 58 (1931).....	11
<i>Tebbets v. Tilton</i> , 24 N.H. 120 (1851).....	9

SECONDARY SOURCES OF LAW

Charles DeGrandpre, <i>Probate Law and Procedure</i> (Michie).....	9, 10, 11
Matthew Bender & Company, Inc., <i>Wills, Trust and Gifts</i> (LexisNexis Group).....	10

STATUTORY PROVISIONS

RSA § 491:7.....	8, 10, 11
RSA § 498:1.....	10
RSA § 547:1.....	9
RSA § 547:3.....	9, 10, 11
RSA § 564-A:1.....	9, 10, 11
RSA § 564-B:2-201.....	9

TEXT OF RELEVANT STATUTORY PROVISIONS

STATUTORY PROVISIONS

RSA § 491:7 (2005): Jurisdiction

The superior court shall take cognizance of civil actions and pleas, real, personal and mixed, according to the course of the common law, except such actions as are required to be brought in the district courts under RSA 502-A or the probate courts under RSA 547; of writs of mandamus and quo warranto and of proceedings in relation thereto; of actions for support of children of unwed parents; of petition and appeals relating to highways and property taken therefore and for other public use; of actions commenced in the probate or district courts where a right to jury trial is guaranteed by the constitution; of actions commenced in a district court which are transferable by statute to the superior court; of suits in equity under RSA 498:1; of petitions of divorce, nullity of marriage, alimony, custody of children and allowance to wife from husband's property for support of herself and children; of petitions for new trials; of petitions for the redemption and foreclosure of mortgages; of all other proceedings and matters to be entered in, or heard at, said court by special provisions of law; and of all other proceedings and matters cognizable therein for which other special provision is not made.

RSA § 498:1 (2005): Jurisdiction

The superior court shall have the powers of a court of equity in the following cases: Charitable uses; trusts other than express trusts as that term is defined in RSA 564-A:1; fraud, accident and mistake; the affairs of partners, joint tenants or owners and tenants in common; the redemption and foreclosure of mortgages; contribution; waste and nuisance; the specific performance of contracts; discovery; cases in which there is not a plain, adequate and complete remedy at law; and in all other cases cognizable in a court of equity, except that the court of probate shall have exclusive jurisdiction over equitable matters arising under its subject matter jurisdiction authority in RSA 547, RSA 547-C and RSA 552:7.

RSA § 547:1 (2005): Court of Record

The court of probate is a court of record for all purposes.

RSA § 547:3(I)(a)(b)(c) (2005): Jurisdiction

- I. The probate court shall have exclusive jurisdiction over the following:
 - (a) The probate of wills.
 - (b) the granting of administration and all matters and things of probate jurisdiction relating to the composition, administration, sale, settlement, and final distribution of estates of deceased persons, including the assignment of homestead

and claims against the executor or administrator for those services related to the prior care and maintenance of the decedent and the administration of insolvent estates and appeals therefrom.

(c) the interpretation and construction of wills and the interpretation, construction, modification, and termination of trusts as that term is defined in RSA 564-A:1, I.

RSA § 564-A (I) (2005): Definitions

As used in this chapter:

I: "Trust" means an express trust created by a trust instrument, including a will, whereby a trustee has the duty to administer a trust asset for the benefit of a named or otherwise described income or principal beneficiary, or both; "trust" does not include a resulting or constructive trust, a business trust which provides for certificates to be issued to the beneficiary, an investment trust, a voting trust, a security instrument, a trust created by the judgment or decree of a court, a liquidation trust, or a trust for the primary purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, or employee benefits of any kind, an instrument wherein a person is nominee or escrowee for another, a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration.

QUESTION PRESENTED

I. Whether the Superior Court has jurisdiction over a claim of fraud, duress, and undue influence in the creation and modification of a revocable inter vivos trust and transfers of property to and from that trust.

STATEMENT OF THE CASE

Edward J. Burke filed a complaint against the defendants, Marie I. Burke, Thomas M. Burke, and Bernadine P. Donelson, and Bunny's Superette, Inc. seeking relief in connection with rights and interests resulting from an oral agreement or understanding that was formed among the family members, that all members would equally own the family business and accumulated property. Edward claimed fraud, duress, and undue influence in the creation of and amendments to an inter vivos trust and transfers of property to the trust by Marie Burke and from the trust to Thomas. The Trial Court ruled that it lacked jurisdiction to deal with Marie's revocable inter vivos trust and, therefore, would decline to deal with Edward's allegations of fraud, duress and undue influence.

A Motion to Reconsider was filed by Edward on the grounds that the Trial Court was in error in its ruling. The Trial Court denied the Motion and ruled that Marie's trust was an express trust under the jurisdiction of the Probate Court.

Edward then brought a petition in Probate Court as a "protective filing" and filed this appeal to the New Hampshire Supreme Court. Edward's petition in the Probate Court stated that he believed that the Superior Court had jurisdiction of the transfer of property to the trust and that he did not want to waive any rights he might have in Probate Court.

Edward respectfully asks this Court to remand this matter to the Trial Court with instructions to further remand to the Probate Court for trial on the issue of whether or not the creation and modifications of Marie Burke's Revocable Trust and the transfers of property by Marie Burke into and out of the trust were the result of fraud, duress, and/or undue influence and, if so, what the remedy shall be.

STATEMENT OF THE FACTS

Marie Burke (hereinafter Marie) testified that she may have, although she wasn't sure, had a will before January 7, 1999. (Transcript, Day Two (hereinafter called T), p.4, Exhibit (hereinafter called E) 4F). Marie stated that she wasn't sure when the will was drawn, or who drafted the will, saying that she "thought Ruth did (referring to Attorney Ansell)." (T. p.5-6). She also did not know if she signed the quitclaim deed from herself to the trust in 1999. (T. p.8, E. 5F). Marie did not recognize the revocable trust agreement when it was placed in front of her. (T. p.30-32, E. 1F). Marie stated that she didn't know why her attorney, Mr. Lamontagne, referred her to Attorney Ansell, who drafted her will. (T. p.10). Thomas accompanied her to the meeting where she met Ms. Ansell, who drafted her will, at Mr. Lamontagne's office. (T. p.11). Marie did not recall sending a letter to David Dunn (a previous officer of the corporation of Bunny's Superette) requesting that the stock from Bunny's Superette go to Thomas, nor does she remember who wrote it. (T. p.11-12, E. 7F). Marie stated that she had a meeting with Thomas and Bernadine to discuss the gift of the stock to Thomas. (T. p.14). Marie did not remember receiving a preliminary draft of the will and reviewing it with Thomas before signing it. (T. p.20). She did verify, however, that she reviewed all her legal documents with Thomas before signing them, that she relied upon him, upon his advice, and would not sign anything unless he said it was "okay"; that he took care of "everything." (T. p.20, 28, 31). Thomas paid all of Marie's expenses and wrote all of her checks from her account (since 1986, every check for all of Marie's expenses have been paid by Thomas); "he is always there when I need him." (T. p.20-24). Thomas paid the bill to Attorney Ansell for drafting the will and trust. (T. p.21). Marie testified that

Thomas took care of the properties, the tenants, and the expenses through her real estate account. (T. p.28). The purchases of both properties on Liberty Street and Webster Street were handled by Thomas, as well as the sale of the property on Rockland Avenue. (T. p.27, 29, E. 31F, 32F). Marie's estate consisted of real property, stocks, bonds, cash, and the stock of the corporation. (T. p.39) Marie's entire estate was transferred to the trust (E. 1F) which originally favored Tom and Bernadine, was modified (E. 2F, 3F) in ways to exclude Edward and, thereafter, certain of the assets of the trust were transferred (E. 15F) from the trust to Thomas including the real estate on which Bunny's Superette was situated and twenty-five percent (25%) stock interest in Bunny's Superette, Inc. that was owned originally by Marie and then by the trust. Thomas confirmed that he was aware of the deed from Marie Burke's Revocable Trust that conveyed to him the land and building on which Bunny's Market is situated. (T. p.88). He also confirmed that less than two weeks before the deed was executed, Bernadine and the trust gifted him a total of fifty percent (50%) of the stock of the corporation. (T. p.88). Attorney Ansell confirmed this. Marie, as trustee, gave her stock in the company to Tom, and she also deeded the land on which Bunny's Superette was sited to Tom... approximately the same time, or exactly on the same date, Bunny gave her stock to her brother, Tom, as well... so at that point in time, Tom owned seventy-five percent of the stock in Bunny's Superette and also the land on which its sited, land and buildings. (Transcript, Day One, p.11).

When asked if she had revealed her activities to her son, Edward, regarding the drafting of the will, the trust, the amendments to the trust, and the preparation and execution of at least two deeds, Marie stated she didn't have to disclose this information to Edward. (T. p.13).

SUMMARY OF THE ARGUMENT

To the extent the Plaintiff's appeal challenges the correctness of the ruling of the Trial Court, it is hereby modified as follows:

The Plaintiff is concerned that the Trial Court did not raise the jurisdictional issue prior to trial and opposing counsel did not raise the issue either prior to the Trial Court's order. The evidence set forth in the Statement of Facts was introduced at trial without objection, and no counsel for the Defendants either objected to the introduction of the evidence or raised the jurisdictional issue, and the Trial Court raised the issue of jurisdiction, sua sponte, for the first time, in its decision. Accordingly, the precise parameters of the jurisdiction of the Superior Court and the Probate Court were not litigated.

It is now agreed by the Plaintiff that the Trial Court's decision on jurisdiction is partially correct. The Trial Court has authority to question its own jurisdiction at any time. If the decision had been made prior to trial, however, or the issue raised during trial, the Plaintiff would have had the opportunity to initiate his action in the Probate Court at that time. Instead, the Plaintiff filed his Probate Court action subsequent to the Trial Court's ruling. Both this action and the Probate Court action remain pending.

Accordingly, the Plaintiff requests the Court to remand this matter to the Trial Court with appropriate instructions to further remand the same to the Probate Court for trial on the issue of whether or not the creation and modifications of the Marie Burke Revocable Trust and the transfers of property to the trust by Marie Burke and from the trust to Thomas Burke were the result of fraud, duress, and/or undue influence.

ARGUMENT

I. Introduction

The Trial Court, in its Order dated August 23, 2005, ruled:

“In addition, Edward accuses Thomas of wrongdoing as to the 2004 conveyances, and of exerting undue improper influence over Marie. The Court first observes that it lacks jurisdiction to directly deal with trusts such as Marie’s revocable trust, and with wills. See RSA 547:3 I. (a) and (c)(Supp. 2004); RSA 498:1 (1997 & Supp. 2004). The Court thus declines to directly deal with Edward’s challenges to Marie’s trust and will-related actions, including his contentions that Thomas has wrongfully acted in connection therewith, or has exerted undue influence.”

Thereafter, the Plaintiff filed a Motion to Reconsider alleging that the Trial Court was in error with respect to its ruling and the Trial Court, on September 26, 2005, ruled:

“In so doing, the Court first observes that the trust of Marie I. Burke is plainly an “express trust” within the meaning of RSA § 564-A:1, I. Second, the Probate Court has “exclusive jurisdiction over equitable matters arising under its subject matter jurisdiction authority in RSA § 547...”RSA § 498:1; See also RSA 547:3-b, and RSA 547:3, I (a), (c), and (d). The petitioner misstates the law when he asserts that “the law in New Hampshire is settled that the Superior Court has jurisdiction of inter vivos transfers and trusts until the transferor dies.” See Pl.’s Response to Resp., Thomas M. Burke’s Supplemental Objection to Plaintiff’s Motion to Set Aside, Modify, and/or Reconsider Decree, dated September 21, 2005 at 1. Third, the Superior Court subject matter jurisdiction restraints require that this Court not pass on those issues that directly pertain to the trust of Marie I. Burke. The Court clarifies that it makes no rulings as to, for example, the petitioner’s challenge to the transfer of stock (through the trust) to Thomas M. Burke from Marie I. Burke as trustee, or as to his challenge to the deeding through the trust to Thomas M. Burke of certain real property associated with Bunny’s Superette.¹ Fourth, the parties’ failure to raise the subject matter jurisdiction limitation of this Court during the trial does not somehow provide this Court with proper subject matter jurisdiction. Finally, any party here remains able to initiate appropriate proceedings in the Probate Court as to matters or issues within that Court’s subject matter jurisdiction.”

¹ The Court notes that its findings relative to Marie I. Burke’s will and trust, as set forth on pages 9-10 of its Order dated August 23, 2005, do no more than track the undisputed chronology of the will/trust executions Marie I. Burke entered. Further, the Court withdraws the finding that “Thomas gave no money or other consideration for these conveyances either to Marie (or her trust) or Bernadine.” This specific finding goes beyond the Court’s subject matter jurisdiction insofar as it directly deals with Marie I. Burke’s trust-related actions, and is unnecessary in connection with the Court’s treatment of Bernadine P. Donelson’s stock conveyance.

Thereafter, the Plaintiff filed his Notice of Appeal on October 20, 2005, stating the issue as follows:

“Whether or not the Superior Court has jurisdiction to hear Edward J. Burke’s claims related to the fraud, duress, and/or undue influence of Thomas M. Burke in the creation of and amendments to Marie I. Burke’s revocable, inter vivos, “pour over” trust, deeds of real estate to the trust, transfers of other property to the trust, and a deed from the trust of the land and buildings on which Bunny’s Superette, Inc. is situated to Thomas Burke pursuant to RSA 498:1.

The Trial Court ruled it had no jurisdiction pursuant to RSA 547:3, I(a) and (c) to deal with “trusts such as Marie’s revocable trust, and with wills.”

The Appellant claims that the Superior Court has jurisdiction over trusts other than “express trusts” as that term is defined in RSA 564-A:1 (i.e. inter vivos “pour over” trusts) and that the Probate court has no such jurisdiction unless an interested party files a motion to invoke the same pursuant to RSA 564-B:2-201. Marie Burke’s trust is not an express trust subject to the exclusive jurisdiction of the Probate Court. It has nothing to do with the administration of the estate of a deceased person and, read together with her will, is intended to be a “pour over” trust specifically designed not to be “subject to the administration or jurisdiction of the Probate Court.” See RSA 563-A:1 and II; and Wills, Trusts, and Gifts, DeGrandpre (1997), section 27-2.”

After the decision of the Trial Court, the Plaintiff brought the petition in Probate Court as a “protective filing.” The petition stated that the Superior Court ruled that it did not have jurisdiction to rule on the Plaintiff’s claims related to fraud, duress, and/or undue influence of Thomas M. Burke in the creation of and amendments to Marie I. Burke’s revocable, inter vivos, “pour over” trust, deeds of real estate to the trust, transfers of other property to the trust, and a deed from the trust of the land and buildings on which Bunny’s Superette is situated and transfer of stock in Bunny’s Superette, Inc., from the trust to Thomas. While the Trial Court ruled that the Probate Court has exclusive jurisdiction over this matter, the Plaintiff believes that the Superior Court has jurisdiction because of the bifurcated issues of the creation and modifications of the trust (conceded