



VINCENT A.  
WENNERS, JR.

ATTORNEY AT LAW

NEW HAMPSHIRE  
SUPREME COURT  
RECEIVED

October 20, 2005

2005 OCT 24 A 10:14

GENERAL PRACTICE  
TRIAL PRACTICE

603-669-3970  
800-439-3970 (NH ONLY)  
FAX 603-296-2289

84 BAY STREET  
MANCHESTER, NH 03104

VWENN@AOL.COM

Eileen Fox, Clerk  
New Hampshire Supreme Court  
One Noble Drive  
Concord, NH 03301

05 - 0753

Re: Mandatory Notice of Appeal

Dear Ms. Fox:

Enclosed please find one original and three copies of my  
Mandatory Notice of Appeal for filing with the Court.

If you have any further questions or concerns, please do not  
hesitate to contact my office.

Thank you.

Very truly yours,

Vincent A. Wenners, Jr., Esquire

VAW/mjz

Enclosure

cc: James A. Normand, Esq.  
cc: Ovide M. Lamontagne, Esq.  
cc: Ruth Tolf Ansell, Esq.  
cc: John M. Safford, Clerk  
Hillsborough County, Northern District Superior Court

**NEW HAMPSHIRE SUPREME COURT  
RULE 7 NOTICE OF MANDATORY APPEAL**

This form should be used for an appeal from a final decision on the merits issued by a superior court, district court, probate court or family division court except for a decision from: (1) a post-conviction review proceeding; (2) a proceeding involving the collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; or (6) a probation revocation proceeding.

**1. COMPLETE CASE TITLE AND DOCKET NUMBERS IN TRIAL COURT**

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

Docket No. 04-E-0251

**2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)**

Hillsborough County, Northern District Superior Court  
Judge John M. Lewis

**3A. NAME AND ADDRESS OF APPEALING PARTY. IF REPRESENTING SELF, PROVIDE TELEPHONE NUMBER**

Edward J. Burke  
13 Meadowcrest Road  
Hooksett, NH 03106

**3B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF APPEALING PARTY'S COUNSEL**

Vincent A. Weners, Jr.  
Attorney at Law  
84 Bay Street  
Manchester, NH 03104  
(603) 669-3970

**4A. NAME AND ADDRESS OF OPPOSING PARTY**

Bunny's Superette  
75 Webster Street  
Manchester, NH 03104

**4B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF OPPOSING PARTY'S COUNSEL**

James A. Normand, Esquire  
Normand & Associates  
15 High Street  
Manchester, NH 03101-1628  
(603) 624-6655

(11/03)

NEW HAMPSHIRE  
SUPREME COURT  
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5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT

Thomas M. Burke

Ovide M. Lamontagne, Esquire  
Devine, Millimet & Branch  
PO Box 719  
Manchester, NH 03105

Marie L. Burke

Ruth Tolf Ansell, Esquire  
Ansell, Barradale, Newkirk, Anderson & Dwyer, PA  
40 South River Road  
Bedford Place - Unit 32  
Bedford, NH 03110  
(603) 644-8211

Bernardine P. Donelson

Ruth Tolf Ansell, Esquire  
Ansell, Barradale, Newkirk, Anderson & Dwyer, PA  
40 South River Road  
Bedford Place - Unit 32  
Bedford, NH 03110  
(603) 644-8211

6. DATE OF CLERK'S NOTICE OF DECISION  
OR SENTENCING. ATTACH COPY OF  
NOTICE AND DECISION.

08/23/2005

DATE OF CLERK'S NOTICE OF DECISION ON  
POST-TRIAL MOTION, IF ANY. ATTACH  
COPY OF NOTICE AND DECISION.

09/27/2005

7. CRIMINAL CASES: DEFENDANT'S  
SENTENCE AND BAIL STATUS

N/A

8. APPELLATE DEFENDER REQUESTED? NO

IF SO, CITE STATUTE OR OTHER LEGAL AUTHORITY UPON WHICH CRIMINAL LIABILITY WAS  
BASED AND ATTACH FINANCIAL AFFIDAVIT (OCC FORM 4) N/A

9. IS ANY PART OF CASE CONFIDENTIAL? IF SO, IDENTIFY WHICH PART AND CITE AUTHORITY  
FOR CONFIDENTIALITY. SEE SUPREME COURT RULE 12.

NONE

10. IF ANY PARTY IS A CORPORATION, LIST THE NAMES OF PARENTS, SUBSIDIARIES AND AFFILIATES.

The Defendant is a corporation but the names of its parents, subsidiaries, and affiliates is not known to the Appellant.

11. DO YOU KNOW OF ANY REASON WHY ONE OR MORE OF THE SUPREME COURT JUSTICES WOULD BE DISQUALIFIED FROM THIS CASE? \_\_\_YES \_\_\_X\_\_\_NO  
IF YOUR ANSWER IS YES, YOU MUST FILE A MOTION FOR RECUSAL IN ACCORDANCE WITH SUPREME COURT RULE 21A.

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY FOR THIS APPEAL?  
\_\_\_YES \_\_\_X\_\_\_NO  
IF YOUR ANSWER IS YES, YOU MUST COMPLETE THE TRANSCRIPT ORDER FORM ON PAGE 4 OF THIS FORM.

13. LIST SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE SUPREME COURT RULE 16(3)(b).

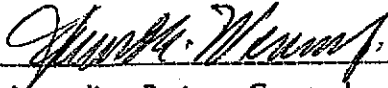
1. Whether or not the Superior Court has jurisdiction to hear Edward J. Burke's claims related to the fraud, duress, and/or undue influence of Thomas M. Burke in the creation of and amendments to Marie I. Burke's revocable, inter vivos, "pour over" trust, deeds of real estate to the trust, transfers 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.

**T4. CERTIFICATIONS**

I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

  
\_\_\_\_\_  
Appealing Party or Counsel

I hereby certify that on or before the date below, copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Appealing Party or Counsel

## TRANSCRIPT ORDER FORM

### INSTRUCTIONS:

1. If a transcript is necessary for your appeal, you must complete this form.
2. List each portion of the proceedings that must be transcribed for appeal, e.g., entire trial (see Superior Court Administrative Rule 3-1), motion to suppress hearing, jury charge, etc., and provide information requested.
3. Determine the amount of deposit required for each portion of the proceedings and the total deposit required for all portions listed. Do not send the deposit to the Supreme Court. You will receive an order from the Supreme Court notifying you of the deadline for paying the deposit amount to the trial court. Failure to pay the deposit by the deadline may result in the dismissal of your appeal.

LIST EACH PORTION OF CASE PROCEEDINGS TO BE TRANSCRIBED.						
DATE OF PROCEEDING	TYPE OF PROCEEDING	LENGTH OF PROCEEDING	NAME OF JUDGE(S)	NAME OF COURT REPORTER (IF PROCEEDING WAS RECORDED SO INDICATE)	PORTIONS PREVIOUSLY PREPARED **	DEPOSIT (SEE SCHEDULE BELOW)
						\$
						\$
						\$
						\$
						\$
						\$
						\$
DO NOT SEND DEPOSIT AT THIS TIME						TOTAL DEPOSIT: \$

### SCHEDULE OF DEPOSITS

Length of Proceeding

- Hearing or trial of one hour or less
- Hearing or trial up to ½ day
- Hearing or trial of more than ½ day
- Previously prepared portions

Deposit Amount

- \$ 175
- \$ 450
- \$ 900/day
- Number of pages x \$.50 per page per copy if additional copies are needed

NOTE: The deposit is an estimate of the transcript cost. After the transcript has been completed, you may be required to pay an additional amount if the final cost of the transcript exceeds the deposit. Any amount paid as a deposit in excess of the final cost will be refunded. The transcript will not be released to the parties until the final cost of the transcript is paid in full.

\*\* For portions of the transcript that have been previously prepared, indicate number of copies that were prepared.

8/23/05

**THE STATE OF NEW HAMPSHIRE**  
**Northern District of Hillsborough County**

300 Chestnut Street  
Manchester, NH 03101 2490  
603 669-7410

**NOTICE OF DECISION**

VINCENT A WENNERS JR ESQ  
CRAIG WENNERS CRAIG & CAPUCHINO  
84 BAY ST  
MANCHESTER NH 03104

04-E-0251 Edward J. Burke, et al v. Bunny's Superette, Inc., et al

Enclosed please find a copy of the Court's Order dated 8/23/2005  
relative to:

**Final Order**

08/23/2005

John Safford  
Clerk of Court

cc: James A Normand, Esq.  
Ovide M Lamontagne, Esq.  
Ruth Ansell, Esq.  
Danielle L. Pacik, Esq.

THE STATE OF NEW HAMPSHIRE  
SUPERIOR COURT

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

DOCKET NO. 04-E-251

EDWARD J. BURKE

v.

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

ORDER

The Petitioner, Edward J. Burke ("Edward"), brings this action against his mother, Marie I. Burke ("Marie"), his two siblings, Thomas M. Burke ("Thomas") and Bernadine P. Donelson ("Bernadine"), and Bunny's Superette, Inc. ("Bunny's"), seeking broad relief in connection with rights and interests he claims under a purported oral agreement. Edward avers that many years ago, when he and his siblings still lived with their parents, a verbal agreement or understanding was reached among all concerned family members that all family members would equally own the family business and other accumulated property. In this regard, Edward asserts that, under this agreement, with the death of the two parents, the siblings would come to equally own said assets. Edward further avers that this original oral agreement or understanding was reaffirmed by the individual respondents upon the death of his father, Bernard Burke ("Bernard"), in

1971, that he fulfilled his obligations under the agreement and fully relied on it, and that the individual respondents have taken actions since about 1999 to wrongfully deprive him of his contract-based rights. In this regard, Edward particularly challenges: (1) Marie's creation of a will and revocable trust in 1999 and her conveyance of certain property into the trust; (2) Marie's later trust-related actions in 2004 to further limit his claimed property entitlements, including her conveyance, through the trust, of both stock in Bunny's and certain real properties to Thomas; and (3) Bernadine's conveyance of her stock in Bunny's to Thomas in 2004 at about the same time her mother conveyed hers through the trust. Edward also asserts that Thomas has been guilty of exerting undue influence over Marie to have her take action against him, that he has violated a claimed "fiduciary duty of a de facto attorney," and that he has violated the Uniform Fraudulent Transfer Act, RSA Chapter 545-A. Finally, he claims that Thomas is proceeding, or has proceeded, particularly through corporate special meetings relative to Bunny's, in ways which are contrary to, and violative of, his contract-based rights.

The individual respondents vigorously oppose Edward's contentions. They assert that no oral agreement, as suggested by Edward, was ever in place, and they contend, among other things, that they have acted properly and within their rights relative to pertinent inheritance and property interests herein.

The Respondent, Bunny's, also opposes Edward's case, and has also interposed a counterclaim, contending that Edward has failed to repay certain indebtedness due the corporation.

A trial occurred over two days -- June 15 and June 16, 2005. During the trial, the Court received testimony from several witnesses, either live or through videotaped deposition, and also received a number of exhibits into evidence. The Court, thereafter, was also provided post-trial memoranda.

Upon consideration of the pertinent evidence, and the arguments presented, the Court finds and rules as follows.

### **I Background**

Bernard, with his wife Marie, established a food business in the early 1950's. The principal food market, known as Bunny's Superette, came to be located on Webster Street, Manchester, New Hampshire. When the food business began, the three children, Bernadine, Edward and Thomas were, respectively, about 12, 10 and 6 years of age. The business was unquestionably considered a family business, and the Burke siblings worked in it throughout their childhood without pay. Nonetheless, their parents retained full control (legal and otherwise) of the business. They made all pertinent decisions, and retained full control of business finances and operations. The children were provided with all necessities and were given spending money and use of the family vehicle or vehicles. They had friends, engaged in sports and extracurricular activities, and were encouraged by their parents to go to college after high school.

After graduation from high school, all of the siblings continued, at least for a time, to work in the family food business, either part time or full time. However, only Edward continued without interruption to work in the business.

Both Bernadine and Thomas attended college, and received financial support from their parents. Bernadine went on to, among other things, teach for several years, and to marry. She did not return to work at the family food store except on a sporadic basis. Thomas, for his part, went into the military after college where he served for several years. He came to return to work in New Hampshire in the late 1960's, and came to return to work in the family food business. When he did this, he received from his parents a salary for his work.

As stated previously, Edward remained in the family business and did not go to college. He continued to work particularly with his father and continued to work for a time with no salary. During this period, however, his parents paid for his living expenses, provided him spending money, and gave him use of the family vehicle or vehicles. Moreover, when the Petitioner married in about 1966, he moved out of his parents' home and came to receive a salary for his work efforts.

There is no question that Edward worked hard and constructively in the family business. He was deeply attached to his father. Indeed, at trial he testified that the time working with his father were "the best years of his life." Certainly, as well, Edward considered himself to be an important contributor to the family business. Nevertheless, and whatever his subjective views were in this regard, Edward has here failed to show that any contract or understanding agreed to by all concerned (including his mother) was ever entered into so that he and his siblings were afforded some enforceable form of ownership interest in the family business and in the other properties owned by their parents. To the

contrary, the evidence shows that Bernard retained strong control over the family business and related properties so long as he lived, and particularly worked in partnership with his wife, Marie, in so doing. In this connection, it was Bernard, over some objection from Edward, that determined that Thomas should be allowed to return to the family business in the late 1960's when Thomas left the military.

It is true that Edward came to be very much involved in the business's financial affairs, even while his father was alive, and also played a significant role in business operations, expansion initiatives, and construction activities. It is also true that, as time went on, both Marie and Bernadine became increasingly less involved in actual business operations, and Edward (and also Thomas) took on increasing responsibility. Nonetheless, and particularly in the case of Edward, it has not been shown that he continued to work in the business because of any enforceable promise or guarantee of part ownership. Rather, the Court finds that Edward stayed in the business, worked therein, and dealt as well with other property owned by his parents, because he was attached to the business and to his father, and not because of any real or enforceable agreements or guarantees of ownership.

In or about 1970, Bernard became ill and died on May 12, 1971. He left a will that provided each of his children with only one dollar, and gave the rest of his estate fully to his wife, Marie. See T. Burke Ex. A. In addition, and as the surviving joint tenant, Marie became sole owner of certain real and other properties which had been purchased or obtained during the marriage and which