

Property Division & other issues for unmarried couples

Table 6
March 4, 2020

LAND

Disputed Partition of Real Estate

547-C:2. Petition.

A petition may be filed by such person in the superior or probate court in the county in which the property or any part of the property lies or is then located, particularly describing the property, the names of all owners or persons interested, if known, and the share or interest of the petitioner in the property and praying for partition or division of the property; provided, however, where there is a related pending matter in either court, jurisdiction for the related partition action shall lie with the court having jurisdiction over the underlying matter; and provided further that in any such case where the right to a trial by jury is guaranteed by the constitution and is claimed by any party, jurisdiction shall lie exclusively in the superior court. Upon petition or upon its own motion, the court may cause any property to be partitioned or divided and awarded or assigned in accordance with procedures described in this chapter. Nothing in this chapter is intended to abrogate common law or statutory authority of the superior and district courts to adjudicate issues of personal property between parties engaged in litigation before those courts.

547-C:22. Unequal Division and Sale.

Whenever property is so situated or is of such a nature that it cannot be divided so as to give each owner his or her share or interest without great prejudice or inconvenience, the whole or a part of the property may be assigned to one of them, the assignee paying to the others who have less than their share such sums as the court shall award or order.

547-C:29. Award. [Factors the Court considers]

In entering its decree the court may, in its discretion, award or assign the property or its proceeds on sale as a whole or in such portions as may be fair and equitable. In exercising its discretion in determining what is fair and equitable in a case before it, the court may consider: the direct or indirect actions and contributions of the parties to the acquisition, maintenance, repair, preservation, improvement, and appreciation of the property; the duration of the occupancy and nature of the use made of the property by the parties; disparities in the contributions of the parties to the property; any contractual agreements entered into between the parties in relation to sale or other disposition of the property; waste or other detriment caused to the property by the actions or inactions of the parties; tax consequences to the parties; the status of the legal title to the property; and any other factors the court deems relevant.

Right to a jury trial in partition actions, as held in *Gilman v. Lake Sunapee Props.*, 159 N.H. 26 (2009). If a party requests a jury trial, the partition must be originally heard in the superior court [rather than probate]. *Id.* at 36.

Title in one name; non-titleholder can still pursue equitable division through partition statute

An unmarried couple lived together for approximately twenty years and had a child together. The couple purchased multiple buildings together as both dwellings and investment properties. Both parties contributed financially, with one party providing the majority of the income. The trial court did not err in determining the equitable rights of this couple in a partition action under RSA 547-C, and did not award a “divorce-like” settlement, but considered the relevant factors as it was entitled to do under RSA 547-C:29. The trial court ordered a 60/40 split in favor of the party who provided the majority of the income because of his greater contribution. The NH Supreme Court affirmed. *Brooks v. Allen*, 168 N.H. 707 (2016). **If deed does not state otherwise then two or more grantees take as tenants in common**

477:18. Tenants in Common.

Every conveyance or devise of real estate made to 2 or more persons shall be construed to create an estate in common and not in joint tenancy, unless it shall be expressed therein that the estate is to be holden by the grantees or devisees as joint tenants, or to them and the survivor of them, or unless other words are used clearly expressing an intention to create a joint tenancy. The addition, following the names of the grantees in the granting clause of a deed or devise, of the words “as joint tenants with rights of survivorship” or “as tenants by the entirety” shall constitute a clear expression of intention to create a joint tenancy.

Use of the phrase “and to the survivors of them” in the clause of a deed reciting the consideration and names of the grantees is not a sufficient and clear expression under this section to create a joint tenancy where no other clause in the deed contains words indicative of any estate other than a tenancy in common. *Gagnon v. Pronovost*, 96 N.H. 154 (N.H. 1950).

Where a deed of real estate recited that consideration was paid by the named grantees, who were husband and wife, “as joint tenants, or survivor” and the names of both were used in all but one instance elsewhere in the instrument, the deed created an effective joint tenancy. *In re Allaire Estate*, 103 N.H. 318 (N.H. 1961).

Unilateral breaking of joint tenancy

Irrespective of the intent of the parties' reasoning for the creation of the joint tenancy, under New Hampshire law it appears clear that one joint tenant may alienate or convey her interest in the property thereby defeating the right of survivorship. See *Mulvanity v. Nute*, 95 N.H. 526, 528 (1949); *Land Am. Commonwealth Title Ins. Co. v. Kolozetski*, 159 N.H. 689, 692 (2010) [a Justice Hicks' decision]; and *Hayes v. S. New Hampshire Med. Ctr.*, 162 N.H. 756, 759 (2011) [a Justice Conboy decision].

Case below involves married couple, but addresses creditor severing joint tenancy: Creditor received a judgment against Husband. To satisfy the judgment, Husband's interest in marital home was auctioned at Sheriff's Sale, and was purchased by Creditor. After the statutory redemption period ran, Creditor brought a petition for partition, which the Superior Court denied. The NH Supreme Court reversed, stating that when the Sheriff's Sale occurred, it severed the joint tenancy, thereby converting it into a tenancy in common. Wife did not retain her right of

survivorship. As a tenant in common, Creditor could compel partition. The Court held that the statutory provisions regarding homestead rights merely established the duration of the right and did not entitle Wife to occupy the marital premises and preclude Creditor from seeking partition. NH Supreme Court reversed Superior Court's denial of petition to partition, and remanded to the Superior Court. *Boissonnault v. Savage*, 137 N.H. 229 (1993).

MONEY

383-B:4-405. Joint Accounts.

A person or persons may establish a deposit account at a state or foreign depository bank doing business in this state pursuant to a written agreement. The written agreement shall govern the rights of any person who is named as an owner of the account. In the absence of a written agreement, if 2 or more persons are named on a deposit account as owners, the account shall be payable to any owner, and in the event of death, to the survivor or survivors of them. The survivors shall be entitled to ownership of the account whether or not (i) the funds deposited were the property of only one or some of the owners, (ii) at the time of the making of such deposits there was any intention on the part of the owners making such deposit to vest the other owner or owners with a present interest therein, (iii) only one of the owners during their several lives had the right to withdraw such deposit, or (iv) there was any delivery of any bank book, account book, savings account book, certificate of deposit, or other evidence of such an account, by the owner or owners making such deposit to the other owner or owners. The receipt by an owner of the account of any payment from the account made by the depository bank on the owner's request shall discharge the depository bank from any liability for any payment so made. Nothing in this paragraph shall be construed to prohibit an owner making a deposit or deposits from withdrawing the deposit during his or her lifetime, nor shall the existence of the right to withdraw the deposit during his or her lifetime defeat the rights provided herein for the owner or his or her survivors.

383-B:4-404. Payable on Death Accounts.

(a) A "payable on death" deposit account is created by a deposit in a depository bank in the name of an owner or several joint owners with a designation that the account is payable on death to one or more payees, or is in trust for another, and no other or further notice of the existence and terms of a legal and valid trust is given in writing to the bank. Any person designated as an owner, account holder or words to similar effect is deemed to be an owner of the deposit account. Each owner retains the right during the owner's lifetime to withdraw, assign, or pledge the balance of the deposit account, in whole or in part, as though no survivor payee or beneficiary had been named, and to delete or change a survivor payee or beneficiary. No change in the designation of the survivor payee or beneficiary is valid unless executed on a form and in the manner prescribed by the depository bank. On the death of the sole owner or the last surviving joint owner, any remaining balance in a payable on death account, including interest, shall vest solely in the surviving payable on death payee, or the in trust for beneficiary, or equally and severally in the then surviving payees or beneficiaries. If no payee or beneficiary

survives, the deposit account shall remain in the estate of the last surviving owner. Ninety days after the death of the sole owner or the last surviving joint owner, the depository bank may pay the remaining balance in the deposit account to the new owner or owners or their legal representatives without further liability for the amount or amounts paid. If no payee or beneficiary is surviving 90 days after the last surviving owner dies, the balance of the account shall be payable to the personal representative of that owner. A depository bank which makes payment in accordance with this section shall, to the extent of each payment so made, be released from all claims of any of the deposit account owners, the named payees or beneficiaries, their respective legal representatives, and all others claiming through or under them. Each payee, beneficiary or legal representative claiming under this section shall provide the identification and other information as requested by the depository bank.

(b) Each owner of a payable on death deposit account retains the right during the owner's lifetime to withdraw, assign or pledge the balance of the deposit account, in whole or in part, as though no survivor payee or beneficiary had been named, and to delete or change a survivor payee or beneficiary. No change in the designation of the survivor payee or beneficiary is valid unless executed on a form and in the manner prescribed by the depository bank. Unless otherwise required in writing by all of the owners at the time the deposit account is created, the withdrawal, assignment or pledge of one owner shall be binding on the other owners. For purposes hereof, no payee or beneficiary shall be deemed to be an owner.

(c) The rights of a surviving payee or beneficiary to the funds in a payable on death deposit account shall not be denied, abridged or in any way affected because the rights have not been created by a writing executed in accordance with the laws of this state prescribing the requirements to effect a valid testamentary disposition of property or because of any absence of delivery or compliance with other requirements to effect a valid gift or transfer in trust.

COMMON-LAW SPOUSE

457:39. Cohabitation, etc.

Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and **until the decease of one of them**, shall thereafter be deemed to have been legally married.

New Hampshire does not recognize common law marriage except under the above circumstances. *See, e.g., In re Estate of Buttrick*, 134 N.H. 675 (1991); *Bisig v. Bisig*, 124 N.H. 372 (1983); *Joan S. v. John S.*, 121 N.H. 96 (1981).

Social Security survivor benefits may also be available if the unmarried widow or widower establishes she or he is a common law spouse under New Hampshire law so there may be a situation where there are no assets to be probated that are subject to a spousal share yet a court finding of common law spouse may result in Social Security survivor benefits. The couple needs to have been married for 9 months or longer if not common law spouses for the survivor to qualify for Social Security survivor benefits.

CONSTRUCTIVE TRUST

A constructive trust will arise when there has been a conveyance of an estate upon an oral promise to reconvey, and the conveyance was procured by fraud, duress or undue influence, made as security for a loan, or made between parties standing in a confidential or fiduciary relationship to each other. *Cornwell v. Cornwell*, 116 N.H. 205 (1976).

Evidence of an oral agreement, otherwise unenforceable because of the statute of frauds, can be shown for the purpose of preventing unjust enrichment and establishing a constructive trust, and a court will not enforce the oral agreement, but rather, will impose a constructive trust on the property in favor of the beneficiary of the promise. *Cornwell v. Cornwell*, 116 N.H. 205 (1976).

UNJUST ENRICHMENT

Unjust enrichment is an equitable remedy that is available when an individual receives "a benefit which would become unconscionable for him to retain." *Clapp v. Goffstown Sch. Dist.*, 159 N.H. 206, 210 (2009) (quotation omitted).

"One general limitation is that unjust enrichment may not supplant the terms of an agreement." *Axenics, Inc. v. Turner Const. Co.*, 62 A.3d 754 (N.H. 2013); see also *Clapp*, 159 N.H. at 210.

DOMESTIC VIOLENCE PETITION

Codified under NH RSA 173-B:

173-B:2. Jurisdiction and Venue.

I. The district division and the judicial branch family division of the circuit courts shall have concurrent jurisdiction over all proceedings under this chapter.

II. If the plaintiff has left the household or premises to avoid further abuse, the plaintiff shall have the option to commence proceedings pursuant to [RSA 173-B:3](#) in the county or district where the plaintiff temporarily resides.

III. Proceedings under this chapter may be transferred to another court upon the motion of any party or of the court as the interests of justice or the convenience of the parties may require.

IV. [Repealed.]

173-B:4. Temporary Relief.

I. Upon a showing of an **immediate and present danger of abuse**, the court may enter **temporary orders** to protect the plaintiff with or without actual notice to defendant. The court may issue such temporary orders by telephone or facsimile. Such telephonically issued orders shall be made by a circuit court judge to a law enforcement officer, shall be valid in any jurisdiction in the state, and shall be effective until the close of the next regular court business day. Such orders shall be returnable to the circuit court where the plaintiff resides or to which the plaintiff has fled, unless otherwise ordered by the issuing judge. If non-telephonic temporary orders are made ex parte, the party against whom such relief is issued may file a written request with the clerk of the court and request a hearing on such orders. Such hearing shall be held no less than 3 business days and no more than 5 business days after the request is received by the clerk. Such hearings may constitute the final hearing described in [RSA 173-B:3](#), VII. Such temporary relief may direct the defendant to relinquish to a peace officer any and all firearms and ammunition in the control, ownership, or possession of the defendant, or any other person on behalf of the defendant for the duration of the protective order. Other temporary relief may include:

(a) Protective orders:

- (1) Restraining the defendant from abusing the plaintiff.
- (2) Restraining the defendant from entering the premises and curtilage where the plaintiff resides, except when the defendant is accompanied by a peace officer and, upon reasonable notice to the plaintiff, is allowed entry by the plaintiff for the sole purpose of retrieving toiletries, medication, clothing, business equipment, and any other items as determined by the court.
- (3) Restraining the defendant from withholding items of the plaintiff's personal property which are specified in the order. A peace officer shall accompany the plaintiff in retrieving such property to protect the plaintiff.
- (4) Awarding custody of minor children to either party or, upon actual notice, to the department when it is in the best interest of a child.
- (5) Denying the defendant visitation, ordering that visitation shall take place only at a supervised visitation center that uses a metal detection device and has trained security personnel on-site, ordering that visitation shall be supervised, or ordering a specific visitation schedule. Visitation shall only be ordered on an ex parte basis

where such order can be entered consistent with the following requirements. In determining whether visitation can be safely ordered, the court shall consider the following factors:

(A) The degree to which visitation exposes the plaintiff or the children to physical or psychological harm.

(B) Whether the risk of physical or psychological harm can be removed by ordering supervised visitation or by ordering supervised visitation at a center that uses a metal detection device and has trained security personnel on-site.

(C) Whether visitation can be ordered without requiring the plaintiff and defendant to have contact regarding the exchange of children.

(6) Restraining the defendant from contacting the plaintiff or entering the plaintiff's place of employment, school, or any specified place frequented regularly by the plaintiff or by any family or household member.

(7) Restraining the defendant from abusing the plaintiff, plaintiff's relatives, regardless of their place of residence, or plaintiff's household members in any way.

(8) Restraining the defendant from taking, converting, or damaging property in which the plaintiff may have a legal or equitable interest.

(9) Directing the defendant to relinquish to the peace officer, in addition to the relief specified in [RSA 173-B:4](#), I, any and all deadly weapons specified in the protective order that are in the control, ownership, or possession of the defendant, or any other person on behalf of the defendant, for the duration of the protective order.

(10) Granting the petitioner exclusive care, custody, or control of any animal owned, possessed, leased, kept, or held by the petitioner, defendant, or a minor child in either household, and ordering the defendant to stay away from the animal and forbidding the defendant from taking, transferring, encumbering, concealing, committing an act of cruelty or neglect, or disposing of the animal.

(b) Other relief, including but not limited to:

(1) Awarding to the plaintiff the exclusive use and possession of an automobile, home, and household furniture, if the defendant has the legal duty to support the plaintiff or the plaintiff's minor children, or the plaintiff has contributed to the household expenses. The court shall consider the type and amount of contribution to be a factor.

(2) Restraining the defendant from taking any action which would lead to the disconnection of any and all utilities and services to the parties' household, or the discontinuance of existing business or service contracts, including, but not limited to, mortgage or rental agreements.

II. The defendant may be prohibited from purchasing, receiving, or possessing any deadly weapons and any and all firearms and ammunition for the duration of the order. The court may subsequently issue a search warrant authorizing the peace officer to seize any deadly weapons specified in the protective order and any and all firearms and ammunition, if there is probable cause to believe such firearms and ammunition and specified deadly weapons are kept on the

premises or curtilage of the defendant and if the court has reason to believe that all such firearms and ammunition and specified deadly weapons have not been relinquished by the defendant.