State of New Hampshire
Supreme Court

NO. 2015-0571

2016 TERM

MARCH SESSION

Doris Nelkens

v.

Daniel Kurz & Bethany Porter

RULE 7 APPEAL OF FINAL DECISION OF THE
CHESHIRE COUNTY SUPERIOR COURT

OPENING BRIEF OF APPELLANT DORIS NELKENS

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QUESTIONS PRESENTED

I. Did the court err in finding that $200,000, which Doris Nelkens loaned Daniel Kurz and Bethany Porter to buy their house in Alstead, was a gift rather than a loan?

Preserved: COMPLAINT (Oct. 6, 2014); OBJECTION TO MOTION TO DISMISS (Jan. 20, 2015); MOTION FOR RECONSIDERATION (June 28, 2015).

II. Given that the parties agreed on consideration of a specific interest rate of $3\frac{3}{8}$ percent and a particular monthly payment of $562.50, did the court err as a matter of law in holding that the loan was a gratuity?

Preserved: COMPLAINT (Oct. 6, 2014); OBJECTION TO MOTION TO DISMISS (Jan. 20, 2015); MOTION FOR RECONSIDERATION (June 28, 2015).

STATEMENT OF FACTS

I. Doris Lost Money in Massachusetts

At 70 years old, Doris Nelkens is guardian for her developmentally disabled adult son, who lives near her home in Antrim, New Hampshire. COMPLAINT ¶ 6 (Oct. 6, 2014), *Appx*. at 1; MOTION FOR RECONSIDERATION ¶ 1 (Dec. 15, 2014), *Appx*. at 10. Ms. Nelkens's more independent younger son, Daniel Kurz, along with his wife Bethany Porter,[1] operate a promising ceramic tile design/fabrication business from their home, studio and shop, located on Lake Warren, in Alstead, New Hampshire. *Trial*[2] at 40, 47; *see* <www.wetdogtile.com>.

Daniel met Bethany working at a tile company in Keene. They moved together to the Boston area, and then to Baltimore, Maryland, both for jobs in the tile industry. *Trial* at 5-8. With a gift from Daniel's grandmother, Ms. Nelkens's mother, Daniel and Bethany bought a house in Baltimore, and using their design and building skills, restored the house and profited on its sale. *Trial* at 8-10, 38-39.

By 2007 both had transferred their jobs back to New England, and found a house in need of restoration on Cape Cod Bay in Plymouth, Massachusetts, which they hoped to fix and flip. *Trial* at 21. While the couple had a bank mortgage to finance its purchase price, they needed help with a down payment, and Ms. Nelkens lent them $298,000. There was no written promissory note or mortgage, and no agreement as to interest rate, repayment

[1]Because they are generally mentioned collectively, and for convenience and brevity, Mr. Kurz and Ms. Porter are referred to herein by their first names; no disrespect is intended. In addition, while Doris Nelkens's name is sometimes misspelled in the record, it is spelled correctly herein without any indication of correction.

[2]The record includes several transcripts, two of which are cited herein. The November 26, 2014 hearing on maintaining an *ex parte* lien is cited as "*Hrg.* at ##." The May 12, 2015 bench trial is cited as "*Trial* at ##."

schedule, or other terms. Rather, as security Ms. Nelkens was made a joint tenant on the deed, and although she did not believe the house was a good investment, placed her faith in Daniel and Bethany's acumen.[3] *Trial* at 10-11, 13-15, 17, 19-21, 37, 42, 47, 66; *Hrg*. at 8, 15; MASSACHUSETTS QUITCLAIM DEED (Aug. 31, 2007), *Appx*. at 25.

While it was everyone's intent to profit from the Massachusetts property, shortly after the purchase the housing economy declined. *Trial* at 21, 40-42, 47. The house was later sold, but Ms. Nelkens did not recoup her investment.[4] Though being on the Massachusetts deed was intended as security and Ms. Nelkens maintains a hope she will eventually get repaid, she exerted no pressure on Daniel and Bethany. *Trial* at 41-43, 47; *Hrg*. at 15.

There was a history of open communication about money. *Trial* at 57. There was also a history of Bethany and Daniel accepting gifts from his family: they testified his grandmother gave them $10,000 to help buy the house in Baltimore and had given other gifts in this manner, and so had Ms. Nelkens, including $28,500 in 2012 and 2013 when their first daughter was born, such that Daniel discerned "there's a pattern of giving gifts … not structured as a loan." *Hrg*. at 13, 11; *Trial* at 8, 25-27, 38-39; FIVE CHECKS FROM NELKENS TO KURZ (totaling $28,500) (Jan. 2012 - Feb. 2013), Exh. 2, *Appx*. at 26.

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[3]Although Bethany testified that Ms. Nelkens was included on the Massachusetts deed "for tax purposes," *Trial* at 19, the purported tax benefit was not described, and none can be discerned.

[4]Bethany testified the couple lost money on the Massachusetts house, *Trial* at 29, but Daniel testified there was a $110,000 profit. *Trial* at 37. There is also a dispute whether Daniel and Bethany reimbursed Ms. Nelkens any money from the sale. *Trial* at 23, 25, 27-28, 37-38, 47; FOUR CHECKS FROM KURZ & PORTER TO NELKENS (totaling $27,500) (Aug. 2013 - Sept. 2013), Exh. 1, *Appx*. at 32.

II. A New Deal in New Hampshire

A. Daniel and Bethany Want to Move to New Hampshire to be Near Family

Having two young children, and finding "[w]e were doing a lot of traveling to Vermont, New Hampshire, to visit my husband's family and my own family," Daniel and Bethany felt "we wanted to be closer to our family." *Trial* at 12 (Bethany).

> [W]e wanted to move closer, but we understood we were going to have to stay down in Plymouth[, Massachusetts] for probably at least another two to three years in order for the market to rebound enough where we could afford to. And it was only because of the generosity of my mom that we even considered moving up here.

Trial at 40 (Daniel).

In their conversations, *Trial* at 51, Daniel and Bethany expressed they were uncertain financially, *Trial* at 38, and could not afford the move, *Trial* at 28; *Hrg*. at 11, or at least planned to delay it until the housing market was better, *Trial* at 36, 40, 51, or until they could qualify for a traditional bank loan. *Trial* at 58.

B. Doris Offers a Loan to Buy New Hampshire House

When Ms. Nelkens realized Daniel and Bethany needed a loan, yet low interest rates meant her own investments were earning little, *Hrg*. at 3, she offered they borrow from her instead of a bank. *Trial* at 42-43; *Hrg*. at 3. Although Daniel and Bethany said that they could not and would not have moved without Ms. Nelkens's help, *Trial* at 29, 40, 59, Ms. Nelkens testified she did not know that, believed Daniel and Bethany's business was profitable enough to secure a loan, and thought that for Daniel and Bethany a loan from her was equivalent to a loan from a bank. *Trial* at 42, 47; *Hrg.* at 12-13; ORDER (June 10, 2015) at 2, *Appx*. at 18.

Daniel and Bethany found a place in New Hampshire – the home/studio/shop in

Alstead, (which Ms. Nelkens says they have made beautiful, *Hrg*. at 16). To Ms. Nelkens's inquiry, Daniel suggested the amount necessary to facilitate the move would be $200,000, *Trial* at 36, and for that purpose, in July 2013 Ms. Nelkens wrote a check to the closing company in that amount.[5] *Trial* at 36, 44; CHECK FROM NELKENS TO CROWLEY & COMMINGS, LLC, (Exh. A-1 to Complaint) (July 31, 2013), *Appx*. at 31. Daniel and Bethany sold the Massachusetts house, then moved to Alstead, New Hampshire. ORDER (June 10, 2015) at 2.

Ms. Nelkens was willing to loan Daniel and Bethany money. She saw no need for formality "as I believe a verbal agreement between a mother and son should be sufficient." MOTION FOR RECONSIDERATION (Dec. 15, 2014), *Appx*. at 10. Apparently Daniel and Bethany did not disagree, and there is no writing evidencing the parties' intent. *Trial* at 44-45; *Hrg*. at 3, 6, 14; ORDER (June 10, 2015) at 3.

C. Agreed Interest Rate and Regular Monthly Payments

But, having been chagrined on the Massachusetts transaction, having learned that being named on the deed did not provide sufficient security, and keeping in mind her obligations to her older son, this time rather than being on the deed, *Trial* at 44, Ms. Nelkens insisted on the guarantee of an interest rate.

Ms. Nelkens understood her arrangement with Daniel and Bethany was a $3\frac{3}{8}$ percent interest rate, which works out to initial interest-only installments of $562.50 per month. She testified she was providing a flexible loan in which the principle would be paid as Daniel and Bethany's tile business became successful. Ms. Nelkens also noted a friend

[5]Daniel and Bethany briefly disputed that the amount was less than $200,000, claiming they had partially paid it back, but then abandoned the claim. *Hrg*. at 11-12.

helped her calculate that when principle payments began, it would take 46 years to pay back the loan. *Trial* at 43; *Hrg*. at 4, 7; COMPLAINT ¶¶ 5-6; MOTION FOR RECONSIDERATION (Dec. 15, 2014).

Daniel and Bethany allege the $200,000 was a gift, *Hrg*. at 14, and claim no memory of conversations regarding repayment. *Trial* at 13, 66; *Hrg*. at 10. They say there was no agreement on terms, and no structure of any kind. *Trial* at 38-39; *Hrg*. at 13. Moreover, they assert that Ms. Nelkens's unpretentious attitude – she was stoic about the loss in Massachusetts and recognized Daniel's and Bethany's "uncertain … financial situation" – led them to believe it was a gift. *Trial* at 24, 28, 38.

But they do not dispute the interest rate. Daniel and Bethany acknowledged they "felt uncomfortable" taking a gift, ANSWER ¶ 3 (Oct. 17, 2014), *Appx*. at 5, and thus acknowledged "they agreed to make interest payments to Ms. Nelkens at a rate of $3\frac{3}{8}$ percent." ORDER at 2.

This acknowledgment is corroborated by Daniel and Bethany having made payments in regular monthly installments of $562.50 for 14 months, beginning in September 2013 and ending in October 2014, shortly after this suit commenced. *Trial* at 49; *Hrg.* at 4; CHECK FROM KURZ & PORTER TO NELKENS, (Exh. A-2 to Complaint) (April 25, 2014), *Appx*. at 31 (single sample of $562.50 payment). Nonetheless, Daniel and Bethany claim the regular monthly $562.50 installments were merely "a goodwill gesture," ANSWER ¶ 3, to be paid only if they could, *Trial* at 39, "as long as we're able." *Hrg*. at 10.

D. How The Interest Rate Was Determined

Daniel confirmed the parties discussed and agreed to the $3\frac{3}{8}$ percent interest rate and the $562.50 monthly payment. *Trial* at 36.

Ms. Nelkens recalled that the rate (and other terms) was determined by an equivalent loan Daniel and Bethany investigated at the time they were buying the New Hampshire property. *Trial* at 43-44, 52; *Hrg.* at 3, 17. Daniel denied they inquired about a loan at that time, *Trial* at 53; *Hrg*. at 18, and claimed the only loan they applied for was after this dispute arose, *Trial* at 55, 57, 60, 62, for which they did not qualify. *Hrg*. at 13; LETTER FROM QUICKEN TO KURZ, (Exh. A) (Sept. 19, 2014), *Appx*. at 36. Ms. Nelkens indicated that the first she learned Daniel and Bethany could not get a loan at the time of purchase was during one of the hearings in this case. MOTION FOR RECONSIDERATION ¶ 2.

Daniel and Bethany did not offer any explanation for the choice of rate, saying it was Ms. Nelkens's idea, *Trial* at 37, 40, which she denied. *Trial* at 43. When directly asked where the $3\frac{3}{8}$ percent interest rate and $562.50 monthly amount came from, Daniel declined to answer and spoke of other matters. *Trial* at 36.

In any event, no party disputes that there was an agreement for a specific interest rate of $3\frac{3}{8}$ percent, and a specific monthly interest payment of $562.50.

E. Tax Ruse

Daniel and Bethany attempted to undermine the consistency and particularity of their record of payments by suggesting it was a tax ruse. Daniel testified:

> [I]t meant her not having to pay taxes and us being able to … benefit from … a tax write off for … mortgage interest[,] and she would avoid paying the gift tax.

Trial at 39. Daniel testified that "paying that amount each month was strictly a way for her to avoid unnecessary taxation." *Hrg*. at 12.

Indeed, Ms. Nelkens did claim the interest as taxable income on her tax forms. *Trial* at 44; *Hrg*. at 7. On her 2013 IRS form schedule B, "Interest and Ordinary Dividends," Ms.

Nelkens declared "Daniel Kurz" as payer of interest in the amount of "$2,250," which is an exact multiple of $562.50. NELKENS 2013 FORM 1040 SCH. B, PT. I (Dec. 31, 2013) (in court's exhibit file), *Appx*. at 35. It should be noted that a declaration of income would tend to increase, rather than decrease, taxation for Ms. Nelkens.

It appears also that Daniel and Bethany took a mortgage interest deduction from their tax obligation. *Trial* at 30, 39; *Hrg*. at 7. Daniel admitted that paying the monthly installment "did … allow us to write this amount … off on our tax return as an interest payment." ANSWER ¶ 3. *See also* KURZ-PORTER 2013 TAX RETURN, line 40 (itemized deductions) (Exh. B) (Dec. 31, 2013), *Appx*. at 32; KURZ-PORTER 2014 TAX RETURN, line 40 (itemized deductions) (Exh. B) (Dec. 31, 2013), *Appx*. at 38. It should be noted that a declaration of mortgage interest would tend to decrease taxation for Daniel and Bethany.

Daniel and Bethany also alleged that the monthly interest installments would create an advantage for Ms. Nelkens in estate and gift taxation, *Trial* at 36-37, 39; *Hrg*. at 7, 10; *see* ANSWER ¶ 3, but did not identify how, and no such advantage can be discerned.

Ms. Nelkens denied any tax ruse, at least on her part, because she declared the interest as income. She also suggested it might be fraudulent for Daniel and Bethany to claim the loan as mortgage interest for the tax deduction, but as a gift here. *Hrg.* at 7; *Trial* at 44.

III. How is This Time Different From Last Time?

In the trial court, Daniel asked Ms. Nelkens:

> [I]f she felt so unjust about the arrangement from the previous time, why would now she then have a[n] unstructured loan for a second time? … [W]hy not … memorialize and have it be structured?

Hrg. at 18; *Trial* at 48. Ms. Nelkens's answer was:

> I was still trusting that the original loan of $300,000 would eventually be repaid and if it wasn't, then I knew I would have to eat it and that's just the way it was. But then I wasn't willing to sacrifice another $200,000 and he was paying me the interest. I had no reason to think he wouldn't be – that it was going to be the same situation as the place in Plymouth[, Massachusetts].
> …
> I felt that the $300,000 eventually would get paid back and the $200,000 we had an agreement. It was not like in Plymouth where we really didn't, you know, it was a loan, when you sell the house you'll pay me back. But there was no set agreement, no interest amount, no timeframe like there was with this. This was an absolute loan.

Trial at 48-50.

IV. Falling Out With Doris

A. It's Not About the Kids

At some point after Daniel and Bethany moved to New Hampshire with their two young daughters, a quarrel arose about how Ms. Nelkens cared for them, the nature of which is not in the record. This led to angry phone calls among family members, accusations that Ms. Nelkens was not a fit babysitter, suggestions she get professional counseling, banishment from the children, and talk of an action (never commenced) to establish grandparent visitation rights. *Trial* at 57, 63, 67; *Hrg*. at 16; ANSWER ¶ 4.

The timing of this loan dispute prompted Daniel to allege they were related:

> I believe that the reason for this claim and the reason for wanting a lien on our home is that – is essentially for my mother to have some leverage over us and, you know, eventually try and, you know, leverage that to allow us to reinstate her visitation with our children is the reason why I, you know, brought that up.

Hrg. at 13, 12; *Trial* at 63-64; ANSWER ¶ 4.

When this suit commenced in October 2014 with an *ex parte* attachment on the Alstead property, Daniel and Bethany felt "threatened" that Ms. Nelkens "wanted to have control over our house which I felt was … directly related to wanting to force us for her to see the kids." *Trial* at 64. As a consequence, that month they ceased paying the $562.50 installment. *Trial* at 49, *Hrg.* at 4; COMPLAINT ¶ 4.

B. It's About the Brother

While the timing may be intertwined, *Trial* at 68-69, what motivated Ms. Nelkens was quite different.

Daniel was under the impression that, whatever assets are in Ms. Nelkens's estate, when she dies "it would eventually come back to us … in her will anyway." *Hrg.* at 12, 11.

Ms. Nelkens admits she may have inadvertently created that impression. *Trial* at 38; *Hrg.* at 3; MOTION FOR RECONSIDERATION ¶ 1.

While Ms. Nelkens was willing to be flexible, she nonetheless expected the loaned money would be returned, either to her, or to her estate after death. *Hrg*. at 4, 16. Ms. Nelkens expected that if she or her older son needed the money, Daniel would repay from earnings or borrow from elsewhere to ensure reimbursement. *Hrg*. at 3; MOTION FOR RECONSIDERATION ¶ 1. This was critical for Ms. Nelkens because of her obligations to her developmentally disabled other son, *Trial* at 44, 51, and because she was aware her estate is not big enough to afford both. MOTION FOR RECONSIDERATION ¶ 1.

At some point in the family quarrel, however, Daniel expressed his intention, at Ms. Nelkens's death, to either cease payment of the monthly amount (which indeed stopped), *Trial* at 44, 68-69; ORDER at 2, or to put the money in trust for his own children. *Trial* at 68; *Hrg*. at 4; COMPLAINT ¶ 6; PETITION/ MOTION FOR EX PARTE ATTACHMENT (Oct. 6, 2014), *Appx*. at 3; ANSWER ¶ 2.

Thus, it became clear to Ms. Nelkens that Daniel and Bethany intended to not repay. *Trial* at 69; *Hrg*. at 4. During trial, Daniel asked Ms. Nelkens:

> Q: [W]hy did you take us to court … when we were continuing to pay you that $562 a month that you're saying was agreement?
>
> A: Because you'd made it clear that I would probably never get the $200,000 principal back in the estate and I absolutely wanted to make sure it was coming back because as I said, I have to make arrangements for your older brother.

Trial at 51.

STATEMENT OF THE CASE

In October 2014 Doris Nelkens filed a complaint alleging she lent Daniel and Bethany $200,000 on a verbal contract to purchase their home in Alstead, that for 14 months they had been paying her the agreed $562.50 installments of $3\frac{3}{8}$ percent, and that Daniel "mentioned putting the monies in trust for his children if I … passed away prior to completion of payments." COMPLAINT ¶ 6 (Oct. 6, 2014), *Appx*. at 1.

The relief Ms. Nelkens requested in her complaint was "[a]n acknowledgment of the debt owed."[6] ANSWER ¶ A, *Appx*. at 5.

Ms. Nelkens simultaneously filed a petition for *ex parte* attachment to prevent Daniel and Bethany from placing the property out of her reach. PETITION/MOTION FOR *EX PARTE* ATTACHMENT (Oct. 6, 2014), *Appx*. at 3. Daniel and Bethany answered the complaint and objected to the attachment on the grounds that the money was a gift, the payments were "a goodwill gesture," this suit was for the purpose of "leverage in a family dispute," and there was no writing. ANSWER; OBJECTION (Oct. 28, 2014), *Appx*. at 7.

The court initially granted the *ex parte* attachment, ANSWER (margin order), but after a hearing in November 2014 dissolved it, finding unlikely that a judgment would exceed the amount of the attachment. ORDER (Dec. 1, 2014), *Appx*. at 9; RSA 511-A:3 ("[T]he burden shall be upon the plaintiff to show that there is a reasonable likelihood that the plaintiff will recover judgment including interest and costs on any amount equal to or greater than the amount of the attachment."). Ms. Nelkens's motion for reconsideration, to which Daniel and Bethany objected, was denied. MOTION FOR RECONSIDERATION (Dec. 15, 2014) (denied

[6]Ms. Nelkens also requested an "injunction preventing the property … from being placed in a trust vehicle [which] would make it unavailable for a lien while the parties try to reach a realistic repayment plan." COMPLAINT ¶ A.

in margin order, Jan. 5, 2015), *Appx*. at 10; OBJECTION MOTION FOR RECONSIDERATION (Dec. 29, 2014), *Appx*. at 23. Daniel and Bethany filed a cursory request to dismiss, which was also denied. MOTION TO DISMISS (Dec. 29, 2014) (denied in margin order, Feb. 5, 2015), *Appx*. at 12.

At a bench trial in May 2015, all parties, *pro se*, testified. The court issued a written order, in which it held the loan was a gift. ORDER at 4 (June 10, 2015), *Appx*. at 18. Ms. Nelkens requested reconsideration, which was denied. MOTION FOR RECONSIDERATION (June 28, 2015), *Appx*. at 23; NOTICE OF DECISION (Aug. 24, 2015), *Appx*. at 24.

SUMMARY OF ARGUMENT

Doris Nelkens first acknowledges that intra-family transactions are presumed to be gifts, but notes that payment of an interest rate shows the lender retains control of the property, and that therefore the transaction must be regarded as a loan. She points out that prior arrangements between the parties were different in kind, and cannot be relied on to construe the loan here. Ms. Nelkens also discounts the allegation that the loan was a tax ruse, because she was unaware of and derived no benefit from the alleged ruse. Ms. Nelkens requests this Court declare the transaction a loan, and suggests a remand for determination of its other terms.

ARGUMENT

I. Presumption of Gift Among Family Members

"The delivery of money without other evidence of the contract between the parties raises no presumption of law that it was intended to be a loan, rather than the payment of a debt, or a gift." *Page v. Hazelton*, 74 N.H. 252 (1907). But "transfers of property between or among close family members" are presumed to be gifts.

> Parents routinely make gifts to their minor and adult children. Many of these transfers occur without formalities; frequently there is no accompanying documentation reflecting the parent's intent to make a gift. But, because of their routine nature, it is usually safe to presume that transfers of property from parents to their children are intended as gifts. This presumption is, of course, rebuttable. When the presumption is rebutted, then the burden shifts to the parents to show, by words or actions, that they did not intend to make a gift.

Cohen v. Raymond, __ N.H. __, 128 A.3d 1072, 1074-75 (decided Nov. 17, 2015) (citations omitted).

> This presumption is strongest when the grantee is the wife of the payor or a minor child. The presumption is less strong in the case of an adult son.... In any event, the presumption can be rebutted.

Chamberlin v. Chamberlin, 116 N.H. 368, 371 (1976) (citations omitted); *Murano v. Murano*, 122 N.H. 223, 228 (1982) (presumption applies in transfer between father and son where son "neither executed a promissory note nor gave a mortgage to his father," and no evidence of interest rate nor expectation of repayment); *Shelley v. Landry*, 97 N.H. 27, 29 (1951) ("conveyance by a father to his daughter created a rebuttable presumption" of gift).

The presumption can be rebutted by the conduct of the parties, *Foley v. Foley*, 90 N.H. 281 (1939) ("What would the [party's] conduct ... naturally lead a reasonable person ... to infer?") (presumption not rebutted by separation and change of insurance

beneficiaries); *Shelley v. Landry*, 97 N.H. 27, 30 (1951) (presumption rebutted by testimony of daughter that father retained control until his death), and "by parol evidence showing that it was not the intention to make a gift." *Lahey v. Broderick*, 72 N.H. 180 (1903).

II. Interest Rate Proves a Loan

The elements of an *inter vivos* (among the living) gift are: 1) a "manifest intention of the donor to give," 2) "unconditional delivery," and 3) "acceptance of the thing given." *Dover Coöperative Bank v. Tobin's Estate*, 86 N.H. 209, 210 (1933) (superceded on other grounds by statute). "The terms 'to give' or 'to donate' are the precise antithesis of the term 'to loan,' which latter implies a promise to repay or return." *Payne v. Williams*, 160 P. 196, 197 (Colo. 1916); *see Royal Oak Realty Trust v. Mordita Realty Trust*, 146 N.H. 578 (2001) (funds joint venturer provided for financing were loans to joint venture).

A gift "goes into immediate and absolute effect." *Harriman v. Bunker*, 79 N.H. 127, 128 (1919); *Bean v. Bean*, 71 N.H. 538, 543 (1902).

If however, one retains control over the thing allegedly gifted, it is not a gift. *Packard v. Foster*, 95 N.H. 47, 49 (1948) ("It is plain that the decedent retained full control over the deposits until his death and hence there was no gift inter vivos to the plaintiff.") (superceded on other grounds by statute); *Harriman v. Bunker*, 79 N.H. at 128 (for an inter vivos gift, "the donor intends to part with all control and dominion over the property"); *Blazo v. Cochrane*, 71 N.H. 585, 588(1902) ("The distinguishing feature of a gift inter vivos is that it is unconditional."); *Bean v. Bean*, 71 N.H. at 543 ("Gifts inter vivos have no reference to the future.").

The existence of an interest rate indicates that the thing remains the property of and under the control of the lender. *Estate of Ross*, 42 N.E.3d 1246, 1252 (Ohio App. 2015) ("The fact that appellant made all the interest payments on the decedent's loan both before and after the decedent's death evidences that the decedent never gave up ownership, dominion or control over the loan proceeds.… [I]t is incongruous for a person who receives a cash gift

from another to make regular interest payments."); *Love v. Olson*, 645 P.2d 861, 863 (Colo. App. 1982) ("A gift is complete and irrevocable when the donor loses all control over the subject matter of the gift."); *Kirchner v. Lenz*, 87 N.W. 497 (Iowa 1901).

Thus a stipulated interest rate rebuts the presumption of gift, and the transaction is a loan. *Bahr v. Cooper*, 58 A.2d 604 (N.J. Eq. 1948) (oral agreement between husband and wife for 6 percent interest); *Klaseus v. Meester*, 217 N.W. 593, 594 (Minn. 1928) (parties agreed there was five percent interest rate). If the exact interest rate is ambiguous, as long as the parties stipulated to some interest rate, the transaction is a loan. *Id.*

Even without explicit agreement on a rate, a history of regular payment of interest installments establishes the interest rate and makes the transaction a loan. *Osterkamp v. Stiles*, 235 P.3d 178, 191 (Alaska 2010); *Denver Nat. Bank v. McLagan*, 298 P.2d 386, 389 (Colo. 1956); *Gudden v. Gudden's Estate*, 89 N.W. 111, 112-13 (Wis. 1902).

A writing memorializing the arrangement is not necessary for an intra-family transaction to be a loan. *Osterkamp v. Stiles*, 235 P.3d 178, 191 (Alaska 2010) (transaction among parents deemed loan even when writing would indicate gift); *Welty v. Brady*, 123 P.3d 920, 925 (Wyo. 2005) (notations on memo line of check indicating agreement money would be repaid to in-laws); *Saum v. Moenter*, 654 N.E.2d 1333, 1335 (Ohio App. 1995) (oral agreement between parents, and daughter and husband, to pay principal "whenever they had the money" and to pay interest monthly; transaction held to be loan); *Denver Nat. Bank v. McLagan*, 298 P.2d 386, 389 (Colo. 1956) ("No note for this money was executed.... The undisputed fact remains, however, that the suggestion was made by Martha McLagan to the effect that John could use the $2,000 at 6%, and that interest actually was paid thereon); *Gudden v. Gudden's Estate*, 89 N.W. 111, 112-13 (Wis. 1902) (loan between husband and wife

where writing lost); *Kirchner v. Lenz*, 87 N.W. 497 (Iowa 1901) (oral loan between father and son implied by series of bank drafts).

In *Saum v. Moenter*, 654 N.E.2d 1333 (Ohio App. 1995), parents gave money to their daughter and her fiancé to help them buy a house. The oral agreement was for the couple to pay back the principle "whenever they had the money." But because the agreement was also "to pay interest each month," which they did for several years, the court held "this transaction constituted a loan." *Id*. at 1334-35.

As in *Saum v. Mounter*, between Ms. Nelkens, and Daniel and Bethany, there was no writing. But everybody agreed to a highly specific interest rate of $3\frac{3}{8}$ percent, however it was derived. Daniel and Bethany further acknowledged the interest rate though a 14-month record of payment of the highly specific amount of $562.50. Their acknowledgment of the interest rate is proof of a loan, and overcomes presumption of a gift.

III. No Course of Conduct Because New Hampshire Deal Was Different than Massachusetts

"A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." *Village Green Condo. Ass'n v. Hodges*, 167 N.H. 497, 506 (2015). But changed conduct is disjunctive, and evidences a discontinuation of previous understandings. *See In re Larue*, 156 N.H. 378, 381 (2007) ("It is undisputed that the parties have not followed the stipulated schedule set forth in that contract since it was executed.").

That there were other transactions earlier in their lives that might have been gifts does not establish a course of conduct, because there is no evidence that any of them involved agreement to an interest rate and regular monthly installments.

In Massachusetts, Ms. Nelkens was on the deed, yet took losses because, despite her attempt at security, there was no payback agreement. When she offered help for Daniel and Bethany to move to New Hampshire, however, Ms. Nelkens insisted on a specific arrangement. Rather than being on the deed, the parties established an interest rate. It was a different deal, on different terms. Daniel and Bethany cannot assume from her graciousness regarding loan losses in Massachusetts, that Ms. Nelkens would stoically suffer the same again.

IV. No Tax Ruse Because No Tax to Avoid

Daniel and Bethany's allegation that the parties' arrangement was a tax ruse is hollow.

First, neither Daniel nor Bethany specified how the loan arrangement would help Ms. Nelkens reduce or escape taxation, and there is no known gift tax or estate tax incentive to call something an interest payment that isn't.

Second, by declaring the $562.50 payments as interest income, which she did, Ms. Nelkens would tend to *increase* her tax liability.

Third, the only tax benefit anyone claimed was not Ms. Nelkens, but Daniel and Bethany, who said they enjoyed a tax deduction for mortgage interest. Taking a mortgage interest deduction, deserved or not,[7] suggests both that Daniel and Bethany *believed* the transaction was a loan, and also that it *was* a loan. *Simpson v. Goodman*, 727 So. 2d 555, 562 (La. App. 1998).

The absence of any evidence of a tax benefit to Ms. Nelkens undermines Daniel and Bethany's allegation that the arrangement was a tax ruse. To the extent Daniel and Bethany regarded the interest payments as a ruse to benefit themselves, it was their ruse, unbeneficial to Ms. Nelkens.

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[7]Tax rules require that a mortgage interest tax deduction be based on a mortgage, which must be in writing. *Johnson v. Home State Bank*, 501 U.S. 78, 82 (1991) ("A mortgage is an interest in real property that secures a creditor's right to repayment."); BLACK'S LAW DICTIONARY (5th ed.) ("A mortgage is an interest in land created by a written instrument providing security for the performance of a duty or the payment of a debt."); I.R.C. § 163(h)(3)(B) (defining mortgage interest deduction); IRS PUB. 936, *Home Mortgage Interest Deduction,* <www.irs.gov/pub/irs-pdf/p936.pdf> (requiring a writing and deferring to state law for perfection of mortgages); RSA 477:1, :3 & :15 (requiring mortgages be in writing); RSA 479:1 & :2 (same); OBJECTION TO MOTION TO DISMISS (Jan. 20, 2015), *Appx*. at 15. Here, there was no mortgage, suggesting Daniel and Bethany were not qualified to claim a mortgage interest deduction. *Muserlian v. Comm'r of Internal Revenue*, 932 F.2d 109 (2d Cir. 1991) (no donative intent in making "gifts" to family members such that interest paid on subsequent "loans" to taxpayer was deductible). Indeed, Daniel and Bethany appear to have made an admission of tax fraud. *Hrg*. at 7; I.R.C. § 7201 ("Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony.").

V. Remand for Reformation

In her complaint, Ms. Nelkens asked only for "[a]n acknowledgment of the debt owed" – essentially a declaratory judgment. RSA 491:22 ("Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive."). This is because she is responsible for both her developmentally disabled older son, and herself, and depending upon health and longevity, cannot afford to forgive hundreds of thousands of dollars loaned to her capable younger son. Ms. Nelkens did not commence this suit upon a default caused by non-payment; the default was when Daniel made clear he did not intend to continue payments into Ms. Nelkens's estate after death, and thus did not regard the repayment as an obligation. That the default was evoked during a family quarrel is a matter of timing, but does not affect the nature of the transaction.

It is apparent that the parties disagree on the terms of the loan. This court need not determine the exact contours of their arrangement, however. The declaration that it was a loan will enable the superior court, upon remand, to reform the contract to reflect the intent of the parties, *Patterson v. Tirollo*, 133 N.H. 623 (1990), to impress a constructive trust, *see Kachanian v. Kachanian*, 100 N.H. 135 (1956), to place a lien on the Alstead property, or to fix reasonable terms of repayment.

CONCLUSION

Doris Nelkens has obligations both to her older son and to her own support. While she was happy to help her independent younger son, and did not believe memorialization was necessary, she needed assurance of payback. When being on the deed in a prior loan did not function as she hoped, she insisted here on a particular rate of interest and a particular amount of payment. Acknowledging the rate, and having paid installments for fourteen months, Daniel and Bethany cannot now disavow the loan. That they claimed it as a loan on their taxes confirms it.

This Court should declare the transaction a loan, and remand for a determination of its other terms.

REQUEST FOR ORAL ARGUMENT

Doris Nelkens requests that her attorney, Joshua L. Gordon, be allowed oral argument because this case raises the legal issue, unresolved in this jurisdiction, whether an interest rate or interest rate payment causes a transaction to be a loan.

Respectfully submitted,

Doris Nelkens
By her Attorney,
Law Office of Joshua L. Gordon

Dated: March 16, 2016

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief.

I further certify that on March 16, 2016, copies of the foregoing will be forwarded to Daniel Kurz and Bethany Porter, *pro se*, at 828 Forest Rd., Alstead, NH 03602.

Dated: March 16, 2016

Joshua L. Gordon, Esq.

ADDENDUM