State of New Hampshire Supreme Court

NO. 2015-0571

2016 TERM

MAY SESSION

Doris Nelkens

v.

Daniel Kurz & Bethany Porter

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

REPLY BRIEF

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
NH Bar ID No. 9046

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ARGUMENT

I. No Agreement on Many Terms, but Parties Agree on One Important Term – Interest Rate

Daniel and Bethany characterize the transaction as an advance on their inheritance, structured to look like a loan in order to minimize the gift taxes they will pay after Ms. Nelkens's death. Ms. Nelkens characterizes the transaction simply as a loan.

Daniel and Bethany allege that Ms. Nelkens called in the loan to manipulate a family situation. Ms. Nelkens alleges that she abruptly realized Daniel and Bethany did not understand the gravity – the potential detriment to Daniel's older brother and Ms. Nelkens's senescence – of their assumption that payback was merely gratuitous.

It is obvious the parties did not have a meeting of the minds on many terms: whether payments involved only interest or also principal, the duration of the payback period, if the interest rate was fixed or flexible, how the interest rate was arrived at.

But they agree on *one* important thing – that there was an interest rate.

In their brief Daniel and Bethany concede this. They also concede they paid the interest rate in regular and steady monthly installments for over a year, corroborating the interest rate. Even if they redo their taxes, having claimed the transaction as a loan to the IRS is a further concession that at the time they believed the transaction was loan.

They also concede the transaction *was* a loan, but only for a limited tax purpose. Yet a transaction cannot be both a gift and a loan.

The parties' continuing differences regarding whether the loan was an advance, the substance of terms never agreed on, or the extent to which its timing was needled by a family quarrel, are not relevant to the decision here.

Based on the law cited in Ms. Nelkens's opening brief, an agreement on an interest

rate – regardless of the facts surrounding negotiations – means the transaction was not a gift, but a loan. Accordingly, this court should reverse.

II. Cases Cited in Appellee's Brief Are Not Informative

In her opening brief Ms. Nelkens cited *Saum v. Moenter*, 654 N.E.2d 1333, 1335 (Ohio App. 1995), as an analogue. In their brief, Daniel and Bethany attempt to distinguish the case. Despite this, *Saum* appears on point for the unremarkable proposition that when an inter-family oral agreement includes an interest rate, the transfer is a loan.

In their brief Daniel and Bethany also cite a number of cases from various jurisdictions. Each are substantially different from the facts here, and none appear to contribute to the resolution of the issue:

- In *Gould v. Van Horne*, 187 P. 35 (Cal. Ct. App. 1919), a wealthy woman handed her business agent, unrelated to her, a sizable check; thereafter the business agent from time to time paid the woman interest. After her death the woman's estate claimed the money was a loan because of the interest payments, but the transfer was found to be a gift based on the facts surrounding the transfer. The case does not involve an inter-family transaction, and is explicitly decided on the facts of what the woman said.

- In *Doty v. Willson*, 47 N.Y. 580 (1872), father gave money to son, with an interest rate, but the circumstances of delivery were "uncertain" and "equivocal." The appellate court remanded for fact-finding to determine the parties' intent.

- In *Henderson v. Hughes*, 182 A. 392 (Pa. 1936), a father owned interest-generating mortgages, which he assigned, without their knowledge, to his children. During his life, the father retained deeds and documents, and collected the proceeds. After his death, his estate disputed whether there was actual "delivery" of the securities. The court found that because there was recordation, there was delivery.

- In *Packer v. Clemson*, 112 A. 107 (Pa. 1920), son gave father valuable mining stocks, intended as gifts for the grandson. The court held that delivery of the gift was completed, even though the transfer was not entered in the company's books.

- In *Funston v. Twining*, 51 A. 736 (Pa. 1902), one sister gave the other sister a written mortgage, but at the same time made a statement that the amount expected was less than the mortgage called for, and also later orally absolved the mortgage altogether. The court held that on these facts, there was a donative intent as to the principal, and the transfer was a gift.

- In *Bowman v. Bowman*, 836 S.W.2d 563 (Tenn. Ct. App. 1991), parents granted a land deed to their son and daughter-in-law. Later the son and daughter-in-law granted it back. They argued they had conveyed the land back only because they were having marital problems, but that the parties intended the son and daughter-in-law would have the land returned to them if they demonstrated marital stability. Based on an assessment of credibility, the court determined the deed was not conditional, and therefore the parents owned the property.
- In *University of Vermont v. Wilbur's Estate*, 163 A. 572 (Vt. 1933), the University accepted a gift of securities from Wilbur, to be used to build a museum, on condition that additional money was raised from other sources. Later, Wolcott provided the additional money to build the Fleming Museum of Art, but reserved the right to receive an annuity for life. The court held that Wolcott's annuity did not defeat the fact that the money had been "raised" according to Wilbur's gift.

Although scattered cases can be found holding that a transfer with an interest rate is a gift, such as *Romeo v. Russo*, 107 A. 504 (Conn. 1919) (not cited by appellee), it remains the general rule, as argued in Ms. Nelkens's opening brief, that if an interest rate is agreed on or paid, the transfer is a loan. And even in *Romeo v. Russo* the court declared only a portion of the transfer a gift, and that was because the transaction involved a kick-back to avoid the state usury statute – suggesting the general rule abides except in unusual circumstances.

III. Augmented Burden of Proof to Rebut Presumption of Gift is Idiosyncratic to New Jersey

In their brief, Daniel and Bethany suggest that the burden of proof to rebut the presumption of gift is something greater than preponderance-of-the-evidence. This issue was not the subject of any litigation below, and does not appear in the notice of appeal. Beyond minor mention, it is not developed on appeal.

For support they cite a New Jersey case, *Bhagat v. Bhagat*, 84 A.3d 583 (N.J. 2014). *Bhagat* lengthily comments on a long line of New Jersey cases containing conflicting dicta, some of which imply the standard is as high as beyond-a-reasonable-doubt. The court rejected the highest burden, but given precedent and the idiosyncratic dicta, appears to have been constrained from determining the burden was the consensus preponderance standard. *Bhagat*, 84 A.3d at 596, *citing Restatement (Third) of Trusts* §9, cmt. f(1). The court thus assigned the clear-and-convincing standard. None of this is present in New Hampshire jurisprudence, and the matter appears unique to New Jersey.

IV. Promissory Estoppel Was Not Preserved, Is Not an Issue, and Cannot be Proven

Daniel and Bethany claim a benefit of promissory estoppel.

First, this issue was not preserved below, was not the subject of a counterclaim, and does not appear in any notice of appeal. Second, the argument is undeveloped. Third, promissory estoppel does not apply here. To assert promissory estoppel:

> The moving party must prove four essential elements: first, a representation or concealment of material facts made with knowledge of those facts; second, the party to whom the representation was made must have been ignorant of the truth of the matter; third, the representation must have intentionally, or through culpable negligence, induced the other party to rely upon it; and fourth, the other party must have been induced to rely upon the representation to his or her injury.

Great Lakes Aircraft Co. v. City of Claremont, 135 N.H. 270, 292 (1992). The knowledge, intention, ignorance, and inducement requirements of the doctrine create high burdens, which Daniel and Bethany have alleged no facts to meet.

V. Allegations Not Supported by the Record

In their brief Daniel and Bethany make a series of statements which may reflect their sentiments, but are not present in the record. There are many such instances, and despite their mostly negligible relation to the issue here, they cannot be overlooked because they reflect on the credibility of their brief generally, and on Ms. Nelkens's character.

- Daniel and Bethany allege that they ceased loan payments on consultation with a "tax advisor." *Kurz/Porter Brf*. at 10. Similarly, Daniel and Bethany allege that Ms. Nelkens "consulted an attorney" about asserting grandparent rights. *Kurz/Porter Brf*. at 11. In the record there is no mention of any such consultations, nor a tax advisor, nor an attorney. Indeed Daniel expressed his regret that he "was somewhat naïve at the time not consulting … a tax attorney." *Hrg.* at 12.
- Daniel and Bethany claim that "Ms. Nelkens began demanding repayment [in] July 2014" of the loan, *Kurz/Porter Brf*. at 6, 11, and that she sought "immediate repayment." *Kurz/Porter Brf*. at 6. Not so. The record shows Daniel and Bethany continued payments until *after* Ms. Nelkens commenced this suit in October, and that she sought repayment *to her estate* after death. This is not a collections action; it is a petition for declaratory judgment based on Daniel: 1) warning Ms. Nelkens that he and Bethany believed they had no obligation to her estate, and 2) declaring their intention that the money would be put in trust to the grandchildren after her death. COMPLAINT ¶ 6 (Oct. 6, 2014), *Appx*. at 1; *Trial* at 49.
- In their brief Daniel and Bethany claim that the $3\frac{3}{8}$ percent interest rate was based on the then-prevailing "Applicable Federal Rate (AFR)." *Kurz/Porter Brf*. at 5. The words "applicable federal rate," "AFR," or anything similar do not appear anywhere in the record.
- In their brief Daniel and Bethany twice claim "Ms. Nelkens was fully aware of the couple's finances." *Kurz/Porter Brf*. at 2, 6. The record does suggest the family was open about financial matters, but nothing in the record shows Ms. Nelkens knew the details of her son and daughter in law's financial situation.
- Daniel and Bethany "contend [it] is not the case" that Ms. Nelkens's concern was for her older developmentally disabled son. *Kurz/Porter Brf*. at 6. But it was not disputed below that part of Ms. Nelkens's motivation in seeking this declaratory judgment was ensuring the well-being of her older son after her death, and it cannot be seriously contended here.

- Daniel and Bethany claim that Ms. Nelkens said she was "not aware the couple was deducting these interest payments," *Kurz/Porter Brf*. at 9, and that this non-awareness was somehow inconsistent with other statements. At the outset of this suit Daniel and Bethany disclosed they had taken the deduction. ANSWER ¶ 3 (Oct. 17, 2014), *Appx*. at 6 ("It did also allow us to write this amount ($562.00/mo) off on our tax return as an interest payment."). This disclosure made Ms. Nelkens aware of the deduction, *Hrg.* at 7, but *after* the suit was commenced. Nothing in the record suggests Ms. Nelkens knew, *at the time of the transaction*, that Daniel and Bethany intended to claim the deduction. Nonetheless, because Ms. Nelkens regarded the transaction as a loan, it would have been safe for her to assume Daniel and Bethany would claim the deduction, which they did (and which Ms. Nelkens claimed as income). The dispute, to the extent there is one, confirms Ms. Nelkens's understanding that the transaction was a loan, and more important, confirms that Daniel and Bethany considered it a loan.

- In their brief Daniel and Bethany allege Ms. Nelkens drank and smoked while babysitting their children. *Kurz/Porter Brf*. at 10. The allegation was ruled inadmissible by the trial court on grounds of relevance, *Hrg.* at 9-10; *Trial* at 58, and hence not contested below. As in the trial court, this court is obligated to take no cognizance of the allegation. N.H. R. EVID. 402 ("Evidence which is not relevant is not admissible.").

- Daniel and Bethany claim that at the time the Massachusetts house was purchased, Ms. Nelkens's made payment directly by check to the closing agent – as a way to beat taxes. *Kurz/Porter Brf*. at 1. To the contrary, because Ms. Nelkens acquired part ownership of the Massachusetts house, it is reasonable she paid the seller.

- Daniel and Bethany say "Ms. Nelkens made it very clear that monies given to Daniel and his family in the form of gifts … were to be considered part of what would be his future inheritance." *Kurz/Porter Brf*. at 9. It is important to note that the only evidence in the record was Ms. Nelken's testimony that "I *may* leave this to you in my will anyway." *Hrg.* at 3 (emphasis added). Moreover, any such promise is not an enforceable oral contract to make a will. *See, e.g., Blanchard v. Calderwood*, 110 N.H. 29 (1969). In addition, Daniel and Bethany made clear they understood the Massachusetts transaction was a loan. *Trial* at 37 ("you lent us"); *Trial* at 39 (agreeing it would be paid back if possible).

- In his testimony Daniel claimed that the $200,000 loan was actually only a $165,000 loan because "we gave her back $35,000," *Hrg*. at 11-12; *see also Trial* at 23-24, 37. In their brief, however, Daniel and Bethany claim that the $35,000 "was recouped from the Plymouth sale [and] given back to Ms. Nelkens, per her request." *Kurz/Porter Brf*. at 4. There are two points regarding this $35,000. First, one does not pay back a gift, suggesting that whether the amount was $200,000 or $165,000, it was a loan. Second, Daniel and Bethany claimed in the first instance that the $35,000 was connected to the New Hampshire house, and in the second that it was connected to the Massachusetts house. It can be one of the other, but not both, suggesting prevarication by Daniel and Bethany, or that they are trying to twice claim the $35,000 benefit.

- Regarding the family dispute, Daniel and Bethany claim they "attempted to arrange supervised visits … which were not satisfactory to Ms. Nelkens," *Kurz/Porter Brf*. at 11, that Ms. Nelkens was "[u]nwilling to seek counseling," *Kurz/Porter Brf*. at 11, that Daniel and Bethany conditioned unsupervised visits "until Ms. Nelkens seeked professional counseling," *Kurz/Porter Brf*. at 10, and that "Ms. Nelkens still demanded access to see her grandchildren on her terms." *Kurz/Porter Brf*. at 10. While all of these matters were discussed at trial, there is nothing in the record supporting these categorical quotations appearing in Daniel and Bethany's brief.

- Finally, in their brief Daniel and Bethany say that Bethany attended college while in Maryland, *Kurz/Porter Brf*. at 1, that Ms. Nelkens "assisted with the search" for their house "and viewed many properties with them," *Kurz/Porter Brf*. at 3, that their house in New Hampshire "required foundation work along with mold and radon remediation," *Kurz/Porter Brf*. at 3, and that their "baby and a toddler requir[ed] a considerable amount of their time and care." *Kurz/Porter Brf*. at 7. While these facts may be true and are not particularly consequential, there is nothing in the record to support them.

As noted, even if none of these factual details impact the decision in this case, due to their contumelious nature it is pointed out here that the record does not support them.

CONCLUSION

The parties agreed on an interest rate, and Daniel and Bethany established a record of regular monthly installments, thereby corroborating the interest rate. Both parties declared the transaction as a loan on IRS forms, further corroborating their intent at the time. Among family members where there is no written promissory note, the existence of an interest rate overcomes the presumption of a gift. This court should reverse.

Respectfully submitted,

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

Dated: May 25, 2016

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Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
NH Bar ID No. 9046

CERTIFICATION

I hereby certify that on May 25, 2016, copies of the foregoing will be forwarded to Daniel Kurz and Bethany Porter, *pro se*, at 828 Forest Rd., Alstead, NH 03602.

Dated: May 25, 2016

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Joshua L. Gordon, Esq.