THE STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 95-252

1995 TERM

SEPTEMBER SESSION

JANET QUILTY

v.

JOSEPH E. MARINO & ROSE MARINO

RULE 7 APPEAL FROM FINAL DECISION OF SUPERIOR COURT

BRIEF OF APPELLEE/DEFENDANT, JOSEPH & ROSE MARINO

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QUESTION 1:

May a restraint on alienation which expires the earlier of the death of the grantor or 30 years, and which allows alienation to members of the grantee's large family, and which allows a bequest of the property to any person, be enforced because it is a reasonable restraint on alienation.

QUESTION 2:

Did the Court properly exclude parol evidence to construe a deed restriction when the deed contains no ambiguities, the parol evidence is irrelevant to the deed, and there has been no change of circumstances.

QUESTION 3:

May the Plaintiff maintain a contract action when there is no contract on which to base an action, and the time for maintaining such an action has expired?

QUESTION 4:

Is the Plaintiff estopped from not complying with the deed restraint, and is the Plaintiff estopped from maintaining her suit to quiet title, because she negotiated the deed restraints, accepted delivery of the deed, had it recorded, and did not seek to quiet title at the appropriate time.

QUESTION 5:

Is the Plaintiff's suit barred by laches in that she delayed seven years in bringing her action and the Defendant suffered prejudice.

QUESTION 6:

Is the Plaintiff's suit barred by the doctrine of unclean hands because she did not deal in good faith with the Defendants.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

While the Defendant believes there are some factual inaccuracies in the Plaintiff's Statement of the Case, a separate Statement is not necessary.

SUMMARY OF ARGUMENT

The Defendant first argues that the common law did not oppose reasonable restraints on alienation, although it clearly did void absolute restraints. New Hampshire has also tolerated reasonable restraints on alienation for its entire judicial history.

The Defendant then argues that the restraint on alienation in this case is well within the zone of reasonableness New Hampshire law requires, and is in accord with other states' law on the matter.

The Defendant next argues that the lower court properly found that evidence of the deterioration of her relationship with her father subsequent to the Plaintiff's acceptance of the deed was inadmissible at trial because the deed was clear on its face.

Finally, the Defendant argues that the Plaintiff's alleged contract claim cannot be properly maintained, that she is estopped from not complying with the restraint and estopped from maintaining her action because she accepted delivery of the deed, that her claim is barred by laches, and that her claim is barred by the doctrine of unclean hands.

ARGUMENT

I. The Common Law was not Opposed to Reasonable Restraints on Alienation

A. English Common Law

The Plaintiff, as well as many secondary authorities, broadly report that "[i]n the common law, restraints against alienation in a fee simple conveyance are void." Plaintiff's Brief, opening line, at 10. However, a review of the history of the common law shows that the rule was not so absolute, and that it was far more complex. In his Commentaries on the Laws of England (1776), Blackstone provides a short history of the development of real estate law from feudal arrangements to the common law. After laying out the inability for most people living under the feudal land system to alienate their land, Blackstone wrote:

> "But by degrees this feudal severity is worn off, and experience hath shown, that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained."

2 Commentaries 288. Blackstone then briefly reviews a number of restraints on alienation, and reports that "these restrictions were in general removed by the statute of Quia Emptores Terrarum, whereby [most] persons . . . were left at liberty to alien all or any part of their lands at their own discretion." Id. at 289, citing inter alia 18 Edw. I. c. 1 (1290). However, the statute of quia emptores was merely sort of a quitclaim deed. In

(relatively) modern parlance, the statute said that a grantee shall hold land upon the same conditions (including fees and services owed to a lord) under which the grantor held the land. 2 Pollock & Maitland, The History of English Law, 337 (1959).

While the statute of quia emptores did remove some feudal restraints on alienation, Blackstone does not report that the common law forbade restraints to be placed on land by parties whom the Edwardian statutes had freed from feudal bounds. The common law contained no such prohibition, and in fact explicitly recognized restraints to alienation.

> "[I]f a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void . . . . But if the condition be such, that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, or the like, which conditions do not take away all power of alienation from the feofee, then such condition is good."

2 Coke on Littleton, §§ 360-61.[1] See e.g., Simonds v. Simonds, 44 Mass. (3 Metcalf) 558, 562 (1842) ("For although a general restraint on alienation by a tenant in fee is void, as being repugnant to the nature of the estate, and inconsistent with the essential enjoyment and beneficial use of property; yet a partial restraint on alienation, for a limited time, may be valid.");

[1]Sir Edward Coke's Institutes of the Laws of England (First Institute) or Commentary upon Littleton Not in the Name of the Author Only, But of the Law Itself (Philadelphia 1853). This volume is available in the vault at the New Hampshire Law Library at the New Hampshire Supreme Court.

Dougal v. Fryer, 3 Mo. 40 (1831) (restraint "may well accord with the maxim, that he who has power to give, has power to prescribe the terms of the gift . . . . It is not repugnant to the full property conveyed in the deed from [grantor], that the power of full enjoyment or alienation is withheld for a precise or limited period . . ."); M'Williams v. Nisly, 2 Serg. & Rawle 507, 512-13 (Pa 1816) ("[I]f, after giving a fee, a general and perpetual restriction of alienation were added, the restriction would be void. But if the restriction is partial, such as of alienating to a particular person, it would be good; because this is not inconsistent with a reasonable enjoyment of the fee. So, I take it, if the restriction was of alienation, during a particular time . . .) (emphasis in original).

Thus, despite the Plaintiff's claim that the common law abhored all restraints on alienation, in fact it had a much more complex and wordly attitude. 2 Pollock & Maitland, ch. 9, passim.

B. New Hampshire Common Law

The Plaintiff also misstates New Hampshire's common law on the matter. Despite her claim that New Hampshire has a common law rule that voids all restraints on alienation, New Hampshire has never adopted such a rule. At most, it can be said that New Hampshire law is attracted to the common law rule; the Court has a number of times stated the rule, but only in dicta. Flanders

v. Parker, 80 N.H. 566, 569 (1923) ("Any provision restraining the alienation . . . of an estate in fee simple . . . is void"; discredited as "dictum" in Brahmey v. Rollins, 87 N.H. 290, 293 (1935)). See also Eastman v. Bank, 87 N.H. 189 (1935) (general policy against restraints on alienation); Brahmey v. Rollins, 87 N.H. 290 (1935); Merrill v. Baptist Union, 73 N.H. 414 (1905) (no bar generally to restraints on alienation, but when land is tied up indefinitely, rule applies); Hunt v. Wright, 47 N.H. 396 (1867) (rule stated but deed condition found to not be a restraint on alienation).

However, every time the rule has been stated, the Court has been assiduous in pointing out that only "absolute" restraints on alienation are disfavored. Brahmey v. Rollins, 87 N.H. 290, 293 (1935) ("restraint . . .of an absolute nature is void") (emphasis added); Flanders v. Parker, 80 N.H. 566, 569 (1923) (rule applied only insofar as "the testator intended to create in the legatees an absolute inalienable estate") (emphasis added); Hunt v. Wright, 47 N.H. 396 (1867) ("It has been said that 'a grantor when he conveys an estate in fee, cannot annex a condition to his grant absolutely restraining alienation; . . . ; such restriction being imposed on him to prevent perpetuities; but short of that restriction the parties may model it as they please.'") (emphasis added, citation omitted). At no time has the Court said that all restraints on alienation are void.

It appears that New Hampshire has generally been more favorable to restraints on alienation than other states. Mills v. Nashua Fed. Sv's and Loan Asso., 121 N.H. 722 (1981) ("due on sale clause" not invalid restraint on alienation).

While it was not until 1971 that the court used the term "reasonable restraint on alienation," Grand Lodge v. Union Lodge, 111 N.H. 241 (1971), reasonableness has in fact has been the Court's approach. Horse Pond Fish & Game Club v. Cormier, 133 N.H. 648 (1990); Emerson v. King, 118 N.H. 684 (1978); Grand Lodge v. Union Lodge, 111 N.H. 241 (1971); Great Bay School & Training Ctr. v. Simplex Wire & Cable Co., 131 N.H. 682 (1989).

Old New Hampshire law was not alone in its cognitive dissonance -- reiterating the rule while not following it. In 1959 a scholar argued that the "rule" voiding restraints on alienation had become so perforated that courts in fact used a "reasonable restraint" approach, even though they tended not to use the word. H. Bernhard, The Minority Doctrine Concerning Direct Restraints on Alienation, 57 Mich. L. Rev. 1173 (1959). As the Restatement (Second) of Property has become more widely followed, and as it uses the modern "reasonable restraint" language, New Hampshire and other states have dropped the pretense of proclaiming they are following the old rule and have instead simply announced they will enforce reasonable restraints on alienation. Horse Pond Fish & Game Club v. Cormier, 133 N.H.

at 653. Thus, Horse Pond did not stake out a radical new direction as the plaintiff suggests, but simply codifies what the New Hampshire Court has been doing for over 150 years. Likewise, the Defendant's position here supporting a modest restraint on alienation is not a bold step either -- it is squarely within the bounds of New Hampshire jurisprudence. In fact, the New Hampshire Supreme Court has in every case upheld alienation restraints when the question was before it.

Moreover, the New Hampshire Court has recognized that restraints on alienation are important land planning tools. Traficante v. Pope, 115 N.H. 356, 358 (1975) ("Restrictions on the use of land by private parties have been particularly important in the twentieth century when the value of property often depends in large measure upon maintaining the character of the neighborhood in which it is situated."); Gephart v. Daigneault, 137 N.H. 166 (1993); Heston v. Ousler, 119 N.H. 58 (1979); Joslin v. Pine River Development Corp., 116 N.H. 814 (1976). They are particularly useful and important when the land is subject to a common plan or scheme, Traficante v. Pope, 115 N.H. at 360 ("Where a general scheme of development can be shown, the intent to benefit land retained or previously sold by the grantor-developer will be implied so as to permit enforcement of restrictions uniformly imposed in furtherance of the overall design."); Varney v. Fletcher, 106 N.H. 464 (1965), or where its

purpose is to benefit family relations. See Marston v. Norton, 5 N.H. 205 (1830) (common law restraint on alienation by a *feme covert* was for purposes of protecting family relations).

II. Reasonable Restraints on Alienation

A. Law Governing Restraints on Alienation

The New Hampshire Court has indicated that it will generally use the Restatement of Property as a guide for decision on restraints of alienation. Horse Pond Fish and Game Club v. Cormier, 133 N.H. 648 (1990). The Restatement's rule on restraints in donative transfers is:

> "4.1(1). A disabling restraint imposed in a donative transfer on an interest in property is invalid if the restraint, if effective, would make it impossible for any period of time from the date of the donative transfer to transfer such interest.
>
> "4.1(2). Any other disabling restraint in a donative transfer of an interest in property is valid if, and only if, under all the circumstances of the case and considering the purpose, nature, and duration of the restraint, the legal policy favoring freedom of alienation does not reasonably apply."

Restatement (Second) of Property § 4.1. Because there is no allegation that the restraint at issue "would make it impossible for any period of time from the date of the donative transfer to transfer such interest," subsection (1) does not apply. Subsection (2) is the reasonableness rule that once was considered the minority rule, but which has become standard, H. Bernhard, The Minority Doctrine, 57 Mich. L. Rev. at 1175, and which applies to this case.

The Plaintiff has mistakenly obscured the issue in this case by referring to other irrelevant sections of the Restatement. The Restatement, as well as several hundred years of property

law, divides restraints in to "disabling" restraints, "forfeiture" restraints, and "promissory" restraints. The Restatement defines a disabling restraint as:

> "Terms of a donative transfer of an interest in property which seek to invalidate a later transfer of that interest, in whole or in part, constitute a disabling restraint on alienation."

Restatement §3.1.

A forfeiture restraint is defined as:

> "Terms of a donative transfer of an interest in property which seek to terminate, or to subject to termination, that interest, in whole or in part, in the event of a later transfer constitute a forfeiture restraint on alienation."

Restatement §3.2.

A Promissory restraint is defined as:

> "The terms of a donative transfer of an interest in property which seek to impose a contractual liability on one who makes a later transfer of that interest constitute a promissory restraint on alienation. . . ."

Restatement §3.3.

Disabling restraints void a transfer if it is made; forfeiture restraints void the property interest of the person attempting to alienate; and promissory restraints create contract remedies and thus tend to be used by commercial landlords. Disabling restraints exist until the end of the period in the deed; forfeiture restraints end at the time of the conveyance because the property is forfeited. Promissory and forfeiture restraints may be eliminated upon agreement of all parties

concerned, whereas a disabling restraint cannot. Because of these differences, it is not surprising that courts have handled them differently. H. Bernhard, The Minority Doctrine, 57 Mich. L. Rev. at 1175.

The restraint in this case is a disabling restraint. The deed says that "Janet Quilty . . . may not pledge or mortgage or deed this property . . . without the prior written consent of [defendants]." Deed, quoted in Court's decision, Appendix to Plaintiff's Brief at 16. The deed does not say that if Janet Quilty makes such an alienation she forfeits her interest; instead it is apparent that such an alienation would be void, and that she would retain her interest in the property. Further, the Superior Court found that the restraint was a disabling restraint, and that it had no forfeiture provision. Defendants' Request for Rulings of Law, ¶ A, Appendix to Plaintiff's Brief at 38, granted by Court, Appendix to Plaintiff's Brief at 25.

Erroneously, the Plaintiff has cited and quoted the wrong section of the restatement. She has cited the sections having to do with forfeiture and promissory restraints. The Plaintiff bases much of her argument in her brief on a number of factors listed in the first Restatement, §406. Plaintiff's Brief at 17-21. Section 406, by its own terms is limited to "a promissory restraint or a forfeiture restraint," Restatement, §406(a), and is therefore inapplicable to this case.

B. Defining Reasonableness

In determining whether a restraint is reasonable, the restatement says that "all the circumstances of the case" should be considered; and that the purpose, nature, and duration of the restraint should be considered. These should be weighed against "the legal policy favoring freedom of alienation." Restatement § 4.1(2). The Restatement provides no other guidance in its commentary.

"A restraint is reasonable under the circumstances if the particular purpose behind its imposition outweighs its effect in terms of the actual hindering of alienability of the particular property involved." H. Bernhard, The Minority Doctrine, 57 Mich. L. Rev. at 1177.

Courts in California, which because the state has a statute allowing restraints (although the statute does not provide a definition), have developed a definition.

> "Reasonableness is determined by comparing the justification for a particular restraint on alienation with the quantum of restraint actually imposed by it. Under this balancing test, the greater the quantum of restraint that results from enforcement of a given clause, the greater must be the justification for that enforcement."

Gutzi Associates v. Switzer, 264 Cal. Rptr. 538 (1989) (citations and quotations omitted).

The single New Hampshire case touching the issue says that "[b]ecause all restraints against alienation are contrary to

th[e] policy of freedom of alienation, to be enforceable they must be reasonable in view of the justifiable interests of the parties." Horse Pond, 133 N.H. at 653 (citations omitted).

Although the language in each is different, these four definitions are for practical purposes identical. Individually and collectively they say that the court must take into account all the circumstances of the case. The court must look into the nature and duration of the restraint as well as its creator's purpose and intent. These must be weighed against the policy favoring freedom of alienation.

The Plaintiff spends considerable ink in her brief creating a distinction between the Restatement and Horse Pond. This is a straw man argument; the two are not significantly different. The Plaintiff alleges that the Horse Pond definition of reasonableness "emasculates" the law disfavoring restraints. It does not. The "justifiable interests of the parties" the Plaintiff quotes from Horse Pond is not different from the "purpose, nature, and duration of the restraint" the Plaintiff quotes from the Restatement. While the language in Horse Pond is not as fully fleshed out as that in the Restatement, both look to what the creator was trying to accomplish and why. Similarly, the Plaintiff claims that the Horse Pond language neglects the importance of the policy. Apparently the Plaintiff has failed to read the first half of the sentence which she quotes from the

Horse Pond decision, and which is quoted above. The language could not be more clear that this Court intends a balance -- a balance of the policy against the restraint. The Plaintiff concludes her straw man argument by saying "[t]he creator of every restraint will be able to articulate a justification for the restraint, and all restraints will be upheld," Plaintiff's Brief at 16, a state of affairs which is as false as it is ridiculous.

It is somewhat vacuous for the Restatement to simply direct the Court to weigh various items against "the legal policy favoring freedom of alienation" because beyond its great age, it is unclear what the policy implies or includes. In fact, that legal policy is not as weighty as it at first appears. In Northwest Real Estate Co. v. Serio, 144 A. 245 (Md 1929) (Bond, C.J., dissenting), the Maryland Court of Appeals Chief Justice Bond provided a more in-depth look. In that case, the development company deed contained a provision that the land in a suburb of Baltimore should not be subsequently sold or rented, prior to 1932, without the consent of the company. The provision, similar to many in the years before zoning was constitutionalized, See J. Gordon, A Euclid Turn: R.B. Construction v. Jackson and the Zoning of Baltimore, 22 Maryland Historian 26 (1991), was for the purpose of "maintaining the property . . . and the surrounding property as a desirable high

class residential section." Serio, 144 A. at 245. When the original grantees attempted to sell the land to the Serio, the Company declined to give its consent, and Serio sued claiming the provision was an illegal restraint. The court recognized that the restraint was very short-lived, but held that "[t]he restriction imposed by the deed . . . was clearly repugnant to the fee-simple title which the deed conveyed." Serio, 144 A. at 246. The Chief Justice wrote that the restriction was

> "intended merely to give the developer of a suburban area of land power to control the character of the development for a time long enough to secure a return of his capital outlay, and to give early purchasers of lots and buildings some security in their own outlay. In those objects there is nothing against the public interest. We can hardly hold that the modern method of developing city or suburban areas as single large enterprises is detrimental to the public. On the contrary, it seems to be often the only method by which such areas can be conveniently and economically opened, so that houses may be provided upon convenient terms . . . . And the temporary restraint on alienation which the parties here involved have adopted to that end must, I think, be viewed as in point of fact reasonable."

Id. at 247.

The Chief Justice went on to explore the rationale for the general rule prohibiting of restraints on alienation.

> "One has been that of a supposed contradiction between a grant of complete ownership and any qualification of it. That objection . . . is a product of judicial fiat, and one of logicians rather than of practical men.
>
> "A second, and a more substantial, ground, is that the vendor in a conveyance embodying the restriction, having parted with his ownership, is now without

> interest in the restriction, and there are no rights protected by it. But that may or may not be true in a particular case, and, however true it may be in a transaction concerning simply one piece of property, such as the law has had to consider almost always in the past, it is very commonly not true in modern conveyances of real property. And it is not true in the present instance.
>
> "The third, and according to the weight of authority, the only considerable, ground for the law's interference, is that of public policy, or the public disadvantage in having property withdrawn from commerce and its improvement and development checked. But those detrimental consequences do not exist here. And, if they do not exist, why should the law be taking a stand to resist them, even when by doing so it denies to parties a right to make an agreement which may in fact redound to the public advantage? Public policy, or a policy of the courts looking to the public interest, is a stand with relation to conditions as they exist, and arises from those conditions, or it is without purpose or justification.

Id. at 247-48 (citations omitted) (paragraph format changed from original). Thus, the Chief Judge demonstrated that there may be less to the rule than it first appears, and that when putting the policy in the balance, the implications of the policy for the case at hand must be included. In later cases, Maryland and most other courts, as well as the Restatement, adopted this view.

C. Plethora of State Cases Provide a Logical Guide for this Court

While there is a line of cases disfavoring restraints, there is a plethora of state cases upholding them.

> "Quite generally the courts have recognized the wisdom of Littleton's precepts that there are valid partial restraints on alienation based on the persons to whom alienation may or may not be made or the conditions under which it may not be made."

4A Thompson on Real Property § 2016 (1979). These cases provide a logical guide for the court. Because the New Hampshire Court has already chosen to allow reasonable restraints, these cases provide further guidance.

In Grand Lodge v. Union Lodge, 111 N.H. 241, 244 (1971), the bylaws of the state-wide arm of the Odd Fellows (Grand Lodge) prohibited the local lodge from alienating real property unless the alienation was for the purposes of the organization and unless the local obtained the consent of the Grand Lodge. The local claimed that the bylaws worked an illegal restraint on alienation. The court said that the bylaws "requiring local lodges to obtain consent before selling or disposing of real property and prohibiting local lodges from disposing of property except for purposes of the [organization] are reasonable restrictions on the right of local lodges to convey their property." Grand Lodge is nearly identical to the case at hand, and is thus controlling precedent.

Some state courts have been unspecific about why a restraint was upheld. Koehler v. Rowland, 205 S.W. 217, 220 (Mo 1918) ("It

is entirely within the right and power of the grantor to impose a condition or restraint upon the power of alienation in certain cases, to certain persons, or for a certain time, or for certain purposes."); Langdon v. Ingram's Guardian, 28 Ind. 360, 362 (1867) ("As a general rule, a condition in a grant or devise that the grantee or devisee shall not alienate is void because repugnant to the estate, but a condition that the grantee or devisee shall not alienate for a particular time, or to a particular person or persons, is good.").

Generally, courts will uphold restraints if they are for a limited time. In Pond Creek Coal Co. v. Ronyan, 170 S.W. 501, 503 (Ky 1914), overruled on other grounds, Kentland Coal & Coke Co. v. Keen, 183 S.W. 247 (Ky 1916), a gift was made for the consideration of love and affection. The grantee was "bound not to sell said land during [grantor's] lifetime without his consent." The court found that "[t]here can be no question as the validity of the clause in [grantor's] deed forbidding alienation and his right to enforce it. . . . The restriction in this deed was limited to the lifetime of [the grantor]. That it was reasonable and enforceable there can be no doubt." Accord Fleming v. Blarent, 151 S.W.2d 88 (Ark. 1941) (no alienation for 11 years); Hutchinson v. Loomis, 244 S.W.2d 751 (Ky 1951) (deed contained clause: "it is expressly understood that grantee cannot convey said land to any person except one of grantor's

heirs"; upheld because restraint was for a "reasonable period," -- the life of grantor); Turner v. Lewis, 226 S.W. 367 (Ky 1920) (restraint during grantor's lifetime upheld); Queesborough Land Co. v. Cazeaux, 67 So. 641, 643 (La 1915) (condition in deed to not sell to negroes for 25 years upheld. Court said: "[W]hile the public policy of the state opposes the putting of property out of commerce, it at the same time favors the fullest liberty of contract and the widest latitude possible in the right to dispose of one's property as one lists, so long as no disposition is sought to be made contrary to good morals, public order, or express law. . . . In [previous case] a condition of perpetual and total inalienability was held to be void as putting property out of commerce, and therefore against public policy, but between total and perpetual inalienability and partial and temporary inalienability there is a very wide difference. The insertion of a condition of the latter character in contracts and donations is a matter of everyday occurrence, with challenge from no quarter. The question of how far such a condition will be sustained is one dependent very much upon the facts of each particular case. If the condition is founded upon no substantial reason but merely caprice, and is of a character to tie up property to the detriment of the public interest, it will not be sustained; otherwise it will.") (citations omitted) (note 14th amendment had not yet applied to private sales, case citing the Civil Rights

Cases, 109 U.S. 3, 62 (1883)); Legge v. Canty, 4 A.2d 465 (Md 1939) (condition to not sell property until death of deceased's sister, who was to live upon the land for her life, held valid); Simonds v. Simonds, 44 Mass. (3 Meltcalf) 558, 562 (1842) ("For although a general restraint on alienation by a tenant in fee is void, as being repugnant to the nature of the estate, and inconsistent with the essential enjoyment and beneficial use of property; yet a partial restraint on alienation, for a limited time, may be valid."); Furst v. Lacher, 182 N.W. 720 (Minn. 1921) (deed from parents to son with condition that "property shall not be sold or conveyed or in any manner whatsoever incumbered, during the lifetime of either of the grantors"; grantee went bankrupt, creditors foreclosed; court found where intent of parties clear, restraint will be enforced); Feit v. Richards, 53 A. 824, 825 (NJ 1902) (devise required that grantor could alienate land only with consent of surviving sisters; court found that absolute restraint is invalid, but because this restraint dies as sisters do, it is "limited or partial," and thus valid); Pennyman v. McGrogan, 18 UCCP 132 (Can 1868) (testator devised land to two sons in fee "but not to be assigned to any person, except a son of his, for the term of twenty years from the day of this decease"; court held condition valid, quoting Coke on Littleton, "a condition not to alien real or personal estate to a particular person or for a particular time is good").

When the grantor retains an interest, a restraint will be upheld. See e.g., Sloman et ux v. Cutler, 242 N.W. 735 (Mich. 1932).

Courts will allow a restraint if it fills an acceptable and worthwhile end. In Hanigan v. Wheeler, 504 P.2d 972 (Ariz. 1972), the deed had a condition to not alienate without written approval. The Court held:

> "We accept the fundamental principle that one of the primary incidents inherent in the ownership of property is the right of alienation or disposition. However, this right is not limitless. The right to make an assignment of property can be defeated where there is a clear stipulation to that effect. The current state of the law in this area appears to be that a restraint on the alienation of property may be sustained when the restraint is reasonably designed to attain or encourage acceptable social or economic ends."

Hanigan v. Wheeler, 504 P.2d at 975 (citations omitted) (emphasis added). Maintaining family relations is a common reason for upholding a restraint. For example, in Swannell v. Wilson, 79 N.E.2d 26 (Ill 1948), as part of divorce property settlement, the man and his first wife agreed to not convey property which they owned as joint tenants without the consent of the other. The man conveyed the property to his second wife. The court found that the consent provision was not a restraint on alienation because it was mutually agreed to in order to rectify a strained family relationship. Accord Hale v. Elkhorn Coal Corp., 268 S.W. 304 (Ky 1925) (parents conveyed to daughter, for consideration of $200 and love and affection, land with parents having right to

cultivate it during their lives and daughter was "not to sell or dispose of said land, or any part of it, as long as [parents] live, without their consent"; court held that restraint was enforceable.). See also Ritchey v. Villa Nueva Condominium Assn., 146 Cal. Rptr. 695, 700 (1978) (court upheld condominium bylaw restricting sale only to people over age of 18 because bylaw served important community purpose); Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Assn., 99 Cal. Rptr. 417, 422 (1972) (commercial mortgage provision required paying fee upon alienation; court said "it has been held that reasonable restraints made in protection of justifiable interests of the parties are sustainable. . . The [fee] by no means constitutes an absolute restraint and because we do not regard it as an exorbitant burden, . . . and because there are legitimate interests of the lender to be protected, . . . we do not discern an unlawful restraint on alienation.") (citations omitted); Malouff v. Midland Federal Savings & Loan Assn., 509 P.2d 1240, 1243 (Co 1973) (due on sale clause upheld; "The common law doctrine of restraint on alienation is a part of the law in Colorado. . . . [P]ublic policy demands that property interests be freely alienable and that restraint which withdraw property from the stream of commerce are invalid. In determining what restraints are invalid, some legal scholars have declared that all restraints on alienation are invalid. . . . In contrast to

this rigid approach is the view that holds a restraint on alienation may or may not be invalid, depending upon the reasonableness of the restraint. . . . We subscribe to the view that the question of the invalidity of a restraint depends upon its reasonableness in view of the justifiable interests of the parties."); Northwest Real Estate Co. v. Serio, 144 A. 245 (Md 1929) (Bond, C.J., dissenting); Lauderbough v. Williams, 186 A.2d 39, 41 (Pa 1962) (restriction on alienation to members of lake-shore association; court found while absolute restraints are against public policy, "a limited and reasonable restraint on the power of alienation may be valid." Court found, however, that association had no rules for membership, that association acted capriciously toward plaintiff, and that restraint was effectively unlimited and perpetual, thus unreasonable).

D. The Restraint Employed by the Defendant in this Case was Reasonable

When one takes into account all the circumstances of the case, and considers the nature and duration of the restraint and the creator's purpose and intent; and balances that against the policy favoring freedom of alienation, including the implications of the policy for the case and the public interest, it is apparent that the Superior Court made the correct decision in enforcing the restraint.

On review, this Court's job is limited. "If the findings can reasonably be made on all the evidence, they must stand. Our

function in reviewing the trial court's findings is not to decide whether we would have found differently but to determine whether a reasonable person could find as did the trial judge." Palazzi Corp. v. Stickney, Comm'r., 136 N.H. 250, 253 (1992) (internal quotations omitted).

The duration of the disabling restraint is short. It is limited to the lifetime of Joseph and Rose Marino, or June 1, 2018, whichever occurs first, or at most, 30 years. This term is well within the range other courts have found reasonable. Pond Creek Coal Co. v. Ronyan, 170 S.W. 501 (Ky 1914) (life of grantor); Fleming v. Blarent, 151 S.W.2d 88 (Ark. 1941) (11 years); Hutchinson v. Loomis, 244 S.W.2d 751 (Ky 1951) (life of grantor); Turner v. Lewis, 226 S.W. 367 (Ky 1920) (life of grantor); Stewart v. Brady, 66 Ky. (3 Bush) 623 (1868) (untill grantee is 35 years old); Queesborough Land Co. v. Cazeaux, 67 So. 641, 643 (La 1915) (25 years); Legge v. Canty, 4 A.2d 465 (Md 1939) (life of deceased's sister); Furst v. Lacher, 182 N.W. 720 (Minn. 1921) (life of grantors); Dougal v. Fryer, 3 Mo. 40 (1831) (until grantee reaches 25 years old); Feit v. Richards, 53 A. 824, 825 (NJ 1902) (life of deceased's sisters); M'Williams v. Nisly, 2 Serg. & Rawle 507 (Pa 1816) (life of grantor); Pennyman v. McGrogan, 18 UCCP 132 (Can 1868) (20 years from grantor's death). The lower court found that the restraint does not violate the rule against perpetuities. Defendants' Request for

Rulings of Law, ¶ C, Appendix to Plaintiff's Brief at 38, granted by Court, Appendix to Plaintiff's Brief at 25.

All of the cases above cited involve restraints that prevent the real estate from being alienated to anybody; that is, the number of persons to whom the land can be alienated during the duration of the restraint is zero. If the restraint was unusually long, the number of people to whom the land could be alienated may be relevant. But when the duration of the restraint is relatively short, as it is here, the number of persons is not important. Nonetheless, the Plaintiff comes from a large family, some of whom have expressed interest in buying, and the restraint does not prevent her from bequeathing the land to any person. Moreover, Joseph and Rose Marino have once given their consent to place a mortgage on the property, Defendants' Request for Rulings of Law, ¶ 18, Appendix to Plaintiff's Brief at 38, granted by Court, Appendix to Plaintiff's Brief at 25, showing that the Defendants have good-faith intent, and that they do not intend to unreasonably restrain the Plaintiff's actions.

The restraint fulfills a worthwhile purpose in that it is part of a common scheme and is designed to encourage family harmony. Swannell v. Wilson, 79 N.E.2d 26 (Ill 1948) (restraint designed to maintain family relationship); Hale v. Elkhorn Coal Corp., 268 S.W. 304 (Ky 1925) (restraint designed to maintain family relationship). Joseph and Rose Marino went so far as to

finance the entire cost of the Plaintiff's house, roughly $30,000, in order to further this purpose. Defendants' Request for Rulings of Law, ¶ 9, Appendix to Plaintiff's Brief at 36, granted by Court, Appendix to Plaintiff's Brief at 25; Transcript at 78-79, 102-03, 179, 184-85.

The Plaintiff claims that the relationship which the restraint is designed to maintain has been "irretrievably broken." Plaintiff's Brief at 18. However, in so claiming, the Plaintiff takes an unjustifiably narrow view of the purpose of the restraint. Joseph and Rose Marino intended the "Marino Compound" not just for the enjoyment of themselves and the Plaintiff, but for the entire Marino family, which is quite large. A number of the Plaintiff's siblings, either through deed or trust, have property interests in the Marino Compound; the others have a standing offer from Joseph and Rose Marino to acquire such an interest. Joseph and Rose Marino are concerned about not just their relationship with the Plaintiff, but with the complex web of relationships among themselves, their children, their grandchildren, their siblings, and the entire network of relationships which families generate. In effect, the entire family, while not party to this case, have an interest in it, and in the land that comprises the Marino Compound.

The Plaintiff has not alleged that that entire structure of relationships is broken. If that were so, the Plaintiff could

maintain that the restraint served no purpose. She has alleged only that her relationship with her father is poor. It may be in the Plaintiff's interest to focus narrowly on a single relationship. But in so doing, she is asking this court to assume out of existence the very purpose the restraint was designed to serve.

The Plaintiff was actively involved in negotiating the terms of her deed. She was well represented, by an attorney who is now a sitting Superior Court Judge. The terms of the deed were well known to her. The Plaintiff testified she wanted her deed before she built her house, but was worried about her relationship with her father. Her proper remedy, if these were her concerns, would have been to demand a deed, through legal process if necessary, before spending her time and effort building a house. Moreover, the Plaintiff has for many years enjoyed the Marino Compound, has accepted from the Defendants gifts totaling the entire price of building her house, and has even gone so far as to have her lot extensively logged.

If the restraint is not enforced, Joseph and Rose Marino's scheme would collapse. The other siblings who own a piece of the property would lose the familial and emotional value of Joseph and Rose Marino's common plan. The other siblings would have little incentive to someday join. The Marino compound was to be Joseph and Rose Marino's lasting contribution to nourishing close

relationships among their children. Applying the rule against restraints would destroy that. In the long term it would be more destructive than the events leading up to this lawsuit. Thus, it would be unreasonable to apply the rule here.

For these reasons, the public policy and the private interests which the restraint fosters trump the old rule. The restraint in this case is therefore reasonable and should be enforced.

E. Law Cited by Plaintiff is not Supportive of Her Position

The Plaintiff cites a number of cases in her brief to support her position that restraints on alienation are illegal. However, none of the law she cites is supportive of her position.

The Plaintiff cites three New Hampshire cases, Hunt v. Wright, 47 N.H. at 396; Eastman v. Bank, 87 N.H. at 189, and Brahmey v. Rollins, 87 N.H. at 290, for the proposition that New Hampshire has a general rule against alienation. As noted, however, New Hampshire's rule extends only to absolute restraints on alienation, which is not present in this case. Thus the cases provide no support for her position.

The Plaintiff cites Taormina Theosophical Community, Inc. v. Silver, 190 Cal. Rptr. 38 (1983). The case is not on point. First, it construes a california statute. Second, it merely sets forth the reasonable restraint rule, reiterating that "only unreasonable restraints are invalid." Id., 190 Cal.Rptr at 43.

Third, while the facts as written by the court are ambiguous, apparently it found that the restraints were not disabling restraints, but were either forfeiture or promissory restraints, as the court quoted section 406 of the first Restatement. Id. Finally, the court relied on its finding that the Taormina Theosophical Community served a religious, or nearly religious, purpose, thus violating California law. For these reasons, it is an unreliable citation.

The Plaintiff cites Hacker v. Hacker, 138 N.Y.S. 194, 198 (1912), but it is not on point. The case concerned an ambiguous will, and the court had attempted to determine its meaning with reference to extrinsic rules, and for this reason cited the policy favoring free alienation, which the court found embodied in New York's constitution.

The Plaintiff cites Courts v. Courts' Guardian, 18 S.W.2d 957 (Ky 1929). However, this case is merely an example of an absolute restraint, not present in the case at hand. The restraint in Courts' Guardian was "not confined to a definite and reasonable time, but continues during the entire life of the devisee," who was an infant at the time of the decision, "and seems to contemplate that it would run with the land and extend to all vendees of the devisee, immediate and remote." Courts, 18 SW2d at 958.

Finally, the Plaintiff cites Gartley v. Ricketts, 760 P.2d

143 (New Mex. 1988). Gartley does not bolster the Plaintiff's cause, however, because the rule in New Mexico is that "reasonable restraints upon the alienation of property are enforceable." Gartley, 760 P.2d at 146 (internal citation omitted). The court found the restraint, which sought to keep the land in the family, unreasonable, because "[t]he restraint is not limited in duration. The condition remains to bind all successive heirs and devisees into the unlimited future." Id. That is hardly the situation in the present case, making Gartley inapplicable.

The Superior Court in its decision in this case cited Ink v. Plott, 175 N.E.2d 94 (Ohio 1960). The Plaintiff attempts to distinguish it, but the case is squarely on point. In Ink, according to the common scheme reflected in all the deeds concerned, owners of lots had to have the consent of their neighbors before selling. The Ink court first set forth the reasonable restraint rule that can now be found in the Restatement, and which is operative in New Hampshire. The Ink court then stated plainly that it found the restraint was reasonable because it was not absolute. Finally, the Ink court said it found support for its position in Dixon v. Van Swerigen Co., 166 N.E. 887 (Ohio 1929), which found that common-scheme deed restrictions designed to retain the character of a residential lot plan were not unreasonable restraints on

alienation. Thus, contrary to the Plaintiff's position, the case is directly on point, and correctly relied upon by the Superior Court.

III. Court Properly Ruled that Events Subsequent to the Deed are Inadmissible

A. Nature of the Plaintiff's Relationship with her Father is Inadmissible Because it is Irrelevant

The Plaintiff sought to enter into evidence at trial testimony concerning the poor state of her relationship with her father. The trial court properly ruled that such evidence was inadmissible.

As stated, the reasonableness of a restraint is determined by a balance of the nature and duration of the restraint and the creator's purpose and intent against the policy favoring freedom of alienation. The evidence the Plaintiff sought to enter simply has nothing to do with the nature, the duration, the purpose, or the intent of the restraint. It also had nothing to do with the policy concerning restraints. As such it is not relevant.

The Plaintiff sought to have the evidence admitted because it is in her interest to keep the focus of this case on herself. However, as was pointed out above, the purpose of the restraint was not to benefit only the Plaintiff or only Joseph and Rose Marino, but to benefit the entire family. In fact, the Plaintiff's relationship with her parents is not so bad; the Defendants have given their consent to place a mortgage on the property, Defendants' Request for Rulings of Law, ¶ 18, Appendix to Plaintiff's Brief at 38, granted by Court, Appendix to Plaintiff's Brief at 25. But even if the Plaintiff proved that

her relationship with her father is violent combat, that has nothing to do with the benefit of the restraint for the rest of the family. Accordingly, the trial court properly excluded it because it is not relevant.

By the time parties -- any parties -- sue each other over a dispute, they are rarely friendly with each other. If this court were to declare that evidence of subsequent bad feelings between parties to a law suit was relevant, all litigants would seek to invalidate their deeds and promises based on it.

B. Nature of the Plaintiff's Relationship with her Father is Inadmissible Because it is Parol Evidence

It is a well established and elementary rule of deed construction that unless there is an ambiguity on the face of the deed, parol evidence is inadmissible. Flanagan v. Prudhomme, 138 N.H. 561, 566 (1994) ("Extrinsic evidence of the parties' intentions and the circumstances surrounding the conveyance may be used to clarify the terms of an ambiguous deed."); Quality Discount Market Corp. v. Laconia Planning Bd., 132 N.H. 734, 740 (1990) ("If the language of the document is ambiguous, a court may consider extrinsic evidence and the circumstances surrounding the conveyance to arrive at the parties' intent."); Locke Lake Colony Assoc. v. Town of Barnstead, 126 N.H. 136, 139 (1985) ("In the case of an ambiguous instrument, the intent of the parties may be derived by reference to extrinsic evidence and the circumstances surrounding the conveyance."); Ouellette v. Butler,

125 N.H. 184, 187-88 (1984) ("Extrinsic evidence is admissible when it serves to aid in interpretation, or to clarify an ambiguity rather than to contradict unambiguous terms of a written agreement."); MacKay v. Breault, 121 N.H. 135, 139 (1981) ("Parol evidence is . . . admissible to resolve . . . ambiguity."); In re estate of Sayewick, 120 N.H. 237, 242 (1980) ("We have long held that it is not permissible to ascertain the intent of a testator by extrinsic evidence which contradicts the express terms of a will. Extrinsic evidence may be received, however, to supplement or sustain the terms of the will, and to ascertain the testator's intent where the language used is ambiguous."); Goglia v. Rand, 114 N.H. 242, 254 (1974) ("While the parol evidence rule serves to bar extrinsic evidence tending to alter or contradict the terms of a written agreement recording the integrated understanding of the parties, the rule is subject to recognized exceptions. A commonly recognized exception is when, as in the present case, the parol evidence serves to aid in interpretation, or to clarify an ambiguity rather than to contradict unambiguous terms of a written agreement."); Smart v. Huckins, 82 N.H. 342, 347 (1926); Bartlett v. LaRochelle, 68 N.H. 211, 213 (1894); Swain v. Saltmarsh, 54 N.H. 9, 15-16 (1873) ("The deed in this case was well enough upon its face to convey a lot of land such as is described, if there had been any such lot in town"; court then heard parol evidence); Bell v. Woodward, 46

N.H. 315, 332 (1865) ("[W]here the language of a deed is doubtful in the description of the land conveyed, parol evidence of the practical interpretation by the acts of the parties is admissible to remove such doubt.").

When there is no ambiguity on the face of the deed, extrinsic evidence is inadmissible. Jones v. Bennett, 78 N.H. 224, 231 (1916) ("It is a general principle based upon sound reason that when the language of a will is plain and unambiguous in view of the attendant circumstances, no intention on the part of the testator is to be sought after other than the one so expressed.") (decision upon rehearing).

The Plaintiff has wisely refrained from arguing that the deed is ambiguous. In fact it is crystal clear, and in no want of interpretation with extrinsic evidence. As such, evidence concerning the Plaintiff's relationship with her father is inadmissible parol evidence.

C. Nature of the Plaintiff's Relationship with her Father is Inadmissible Because There has been no Change of Circumstances

The Plaintiff has also argued that the evidence of her poor relationship with her father is should be heard because there has been a subsequent change in circumstances, quoting the Restatement (Second) of Property, § 4.1, comment g.

The Restatement provides no guidance on what constitutes a change in circumstances. But in all of property law the only

context which regularly uses the term "change in circumstances" is in the area of the enforcement of aging covenants, when "obligations arising out of a covenant cannot be secured' if conditions have so changed since the making of the promise as to make it impossible longer to secure in a substantial degree the benefits intended to be secured by the performance of the promise.'" 5 Powell on Real Property, § 679(2), quoting Restatement of Property, § 564.

The "so called 'doctrine of changed circumstances' provides an important defense against a covenantee who is seeking injunctive relief when a restriction can be proved to have outlived its usefulness. Some degree of physical change . . . is essential to the existence of this defense." Id. (emphasis added).

Goldberg v. Al Tinson, Inc., 115 N.H. 271 (1975), for example, concerned a 1950 deed covenant prohibiting a North Conway lot to be used for a restaurant. Subsequently the "strip of land on Route 16 surrounding and including portions of the [restricted] property, sometimes referred to as the 'miracle mile,' was subject to extensive commercial development" in the 20 years since the covenant was written, "including a number of restaurants and other commercial establishments." Goldberg, 115 N.H. at 273. Thus the court found that "conditions 'have sufficiently changed so as to defeat the purpose of any claimed

restriction.'" Id. 115 N.H. at 274, quoting Restatement, § 564, comment *e* (1944). Accord Nashua Hospital v. Gage, 85 N.H. 335 (1932) (land in the then outskirts of Nashua covenanted against use for other than residential purposes; used for 30 years for a hospital with no protest; court held that anyone concerned had "slept upon their rights" and now the covenant had little continuting utility and was thus invalidated); but see Nashua Garden Crop. v. Gordon, 118 N.H. 379 (1978) (option contained covenant prohibiting business enterprises competitive with others nearby; court found that conditions in the area had not changed sufficiently to defeat the restriction).

Because there have been no physical changes in the Marino's land there is no "change in circumstances," to invalidate the deed restriction.

Moreover, even if emotional circumstances alone were to rise to the level of a "change in circumstances," as the Plaintiff implies, the status of the parties' feelings toward each other have not changed very much. The Plaintiff testified at trial that she had always have a difficult relationship with her father, Transcript at 16, and that as a child her father had constantly berated her and even abused her, Transcript at 132. Thus, even if the Plaintiff's relationship had been "irretrievably broken" after she sued him, the change was not great.

IV. Plaintiff's Contract Claim Cannot be Maintained

The Plaintiff claims that her deed is a contract, that the Defendants seek enforcement of the deed/contract, that there is an implied warranty of good faith in the deed/contract, and that the Defendants have not acted in good faith. Plaintiff's Brief at 28. The Plaintiff is wrong on all points.

Although in some contexts, such as commercial leases and contracts for the sale of land, there is some overlap between the law of property and the law of contract, a deed is not generally considered a contract.

"Property is the right of any person to possess, use, enjoy, and dispose of a thing." Eaton v. Boston, C. & M. R. Co., 51 N.H. 504, 511 (1872); see 8A Thompson on Real Property §§ 1, 4440. Put more humorously:

> "That is property to which the following label can be attached. To the world: Keep off unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The state."

F. Cohen, Dialogue on Private Property, 9 Rutgers L. Rev. 357, 374 (1954). A contract is "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1.

A deed requires certain form words that carry the baggage of hundreds of years of history; a contract does not. A contract can be changed, easily, by mere agreement of the parties; a deed

cannot be easily changed, especially as to covenants and conditions that run with the land. Holding a deed is evidence of ownership of land -- a piece of the earth; holding a contract is at most evidence of a promise. A deed is what is on the ground; a contract is what may come to be in the future. A deed of necessity represents a long-term, conservative interest; a contract is a relatively short-lived dynamic interest. There is little public interest in a contract, beyond consumer fraud and contracts of adhesion, and few require recording with public authority; the public has a significant interest in deeds, because a deed represents a scarce resource -- earth -- and most require recording with a public authority. A deed usually compels specific performance; at most a contract may get the holder damages.

Thus the deed between the Plaintiff and the Defendants cannot be considered a contract as the Plaintiff maintains.

Second, the Defendants have not sought to enforce anything; the Plaintiff sued to quiet title. Third, deeds do not carry with them a warranty of good faith, and fourth, the Plaintiff has offered no evidence that the Defendant acted in bad faith.

If the deed is a contract, as the Plaintiff maintains, then the Plaintiff has no remedy, as her contract statute of limitations has long since expired. Moreover, the Plaintiff raised contract issues for the first time in her Motion for

Reconsideration; the issue is not in her Petition to Quiet Title. Thus the matter of contract damages, if that is what the Plaintiff is now seeking, has not been preserved for appeal.

V. Plaintiff is Estopped from Not Complying with the Restraint, and is Estopped from Maintaining this Action

The Plaintiff claims that she did not like the deed, but felt she had to accept it. One of the requirements for a valid transfer of title is delivery of a deed. The Plaintiff has not alleged she was forced to accept the deed, such that the duress would invalidate it. In this case, there is no dispute that the title was delivered, and as such, title was legally and equitably transferred. Plaintiff, by participating in the delivery, is estopped from now claiming that the deed was inadequate. If she did not approve of the deed, she did not have to accept delivery. Hood v. Hood, 384 A.2d 706 (Me. 1978) Instead, she should have refused delivery, and sued on the implied purchase and sale contract she had at that time with her parents. It is too late for that now, as equitable conversion has long since occurred.

Moreover, the Plaintiff was represented by able counsel in the negotiation of her deed and the transfer of title to her. She presumably knew her rights. She cannot now argue that she was the victim of some sort of contract of adhesion.

VI. Plaintiff's Claim is Barred by Laches

The Plaintiff should be prevented from maintaining her action on the basis of laches. "'The party asserting laches bears the burden of proving both that the delay was unreasonable and that prejudice resulted from the delay.'" Borgadus v. Zinkevicz, 134 N.H. 527 (1991), citing Jenot v. White Mt.

Acceptance Corp., 124 N.H. 701 (1984). The Plaintiff's delay was unreasonable. As noted, above, the Plaintiff's proper remedy was to enforce the implied purchase and sale contract in 1987.

The Defendant has been prejudiced by the Plaintiff's delay. Joseph and Rose Marino, and indeed all members of the family, were the Plaintiff to prevail, would have an empty house on the land comprising the Marino Compound. Even if the family bought the house according to the terms of the Plaintiff's deed, they may not be able to use it, and they will indefinitely have a "white elephant" on their land which would require periodic maintaince and which would continue to accrue property tax liability. If they were to sell the property, it would destroy the common scheme the Plaintiffs have gone to so much trouble to create and maintain. This predjudice could have been avoided if the Plaintiff had sought earlier to rectify any objections she had to the deed.

The delay, combined with the prejudice, should compel this court to reject the Plaintiff's prayer on the basis of laches.

VII. Plaintiff's Claim is Barred by the Doctrine of Unclean Hands

The doctrine of unclean hands holds that a Plaintiff who has herself engaged in unconscionable conduct will be barred from equitable relief. Tuttle v. Palmer, 117 N.H. 477, 479 (1977). When the Plaintiff's behavior can be characterized as in "bad faith," the doctrine applies. Polonsky v. McIlwaine, 114 N.H.

467, 471 (1974). The Plaintiff in this case accepted a deed, which she negotiated over the course of months, Transcript at 157, and then promptly sued to quiet the title. It is apparent from that course of action that she did not negotiate or accept the deed in good faith.

The Plaintiff claims that the Defendants are somehow at fault for not having provided a deed to the Plaintiff at an earlier time. Plaintiff's Brief at 26. However, to the extent there was a delay in giving the Plaintiff her property, it was caused by difficulties in gaining subdivision approval from the Town of Francestown; the deed was offered as soon as the Town granted zoning permission. Transcript at 99-102.

Finally, the Plaintiff spent enjoying the Defendants' gift of land, build a house paid for entirely by the Defendants, and profited by logging her land.

These actions demonstrate the Plaintiff's bad faith. Accordingly, she should be barred from now taking advantage of this Court's equity jurisdiction.

CONCLUSION

Based on the forgoing, the Defendants request that this Honorable Court dismiss the Plaintiff's petition, and take any other action which justice requires.

Respectfully submitted,
Joseph E. and Rose Marino
By their Attorneys,

Dated: September 25, 1995

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Joseph E. and Rose Marino request that Attorney John J. Cronin, III be allowed 15 minutes for oral argument.

I hereby certify that on the 26th day of December 2000, a copy of the foregoing will be forwarded to the Mark D. Fernald.

Dated: September 25, 1995

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