

2013 WL 10939288 (N.H.) (Appellate Brief)
Supreme Court of New Hampshire.

In re: Estate of Ruth C. McCarty.

No. 2013-0398.
2013.

Rule 7 Appeal from a Decision of the 7th Circuit - Probate Division - Dover

Brief of Appellant, Kerry McCarty (Now Hanson), Executrix of the Estate of Ruth C. McCarty

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***ii QUESTIONS PRESENTED**

I Whether the Probate Court erred as a matter of law in interpreting [NH RSA 167:16](#) captioned “Enforcement of Assistance Liens” to be an exemption from a one year statute of limitations set forth in [NH RSA 556:5](#) for the State of New Hampshire in making a claim for medical assistance, not only when the State makes a claim to enforce a valid lien, but in any case the State has a mere claim for assistance, but as admitted by the State in this instance, when the State has no right to a lien?

II Whether the Probate Court committed clear error contrary to the guidelines for statutory interpretation established by the New Hampshire Supreme Court in *Frost v. Comm’r, N.H. Banking Dep’t.* 163 N.H. 365, 374 (2012) by concluding [NH RSA 167:16](#) is ambiguous, by inappropriately trying to determine what the Legislature would have meant, but ignoring the plain and ordinary meaning to the words used in the overall context of the Statute, and inappropriately relying on the long standing practices of the Department of Health and Human Services?

III Alternatively, if the Supreme Court upholds the Probate Court’s conclusion that “liens” and “claims” by the Department of Health and Human Services are used interchangeably throughout the legislative scheme, then this Court must determine whether the Probate Court erred in not applying the exemption to recovery set forth in [NH RSA 167:16-a \(IV\)\(b\)\(2\)](#) to instances when the State is not entitled to a lien, but only to a claim, even though the Department of Health and Human Services agrees that the exemption would have applied to the facts of this case if the State was entitled to a lien, but because the State admits it is not entitled to a lien the exemption to recovery does not apply?

***1 STATEMENT OF THE CASE AND FACTS**

This Appeal is taken from an Order of the 7th Circuit Court - Probate Division -Dover (Cassavechia J.) denying a Motion to Dismiss State of New Hampshire’s Claim for Medical Assistance through the State’s Medicaid Program filed by the Executrix of the Estate of Ruth C. McCarty (*See generally*, Order of April 17, 2013, appended to this brief).

Ruth C. McCarty deceased on October 11, 2009. (*See*. Order of April 17, 2013, p. 1). The only asset of the Estate consists of real estate located at 11 Elmview Circle, Dover, Strafford County, New Hampshire. (*See*. Order of April 17, 2013, p. 2). Pursuant to the decedent’s Will, the real estate located at 11 Elmview Circle in Dover, Strafford County, New Hampshire was to pass to the decedent’s daughter, Kerry McCarty. (*See*. Order of April 17, 2013, p. 2).

Prior to the decedent’s death, real estate located at 11 Elmview Circle, Dover, Strafford County, New Hampshire served as the primary residence of both the decedent and her daughter, Kerry McCarty. (*See*. Order of April 17, 2013, p. 1).

For three (3) years before Ruth McCarty deceased, she suffered from profound dementia. (*See*, Order of April 17, 2013, p. 1). Only as a result of Kerry McCarty providing care for her mother and/or coordinating care when she was not personally there, was Ruth McCarty able to live within her own home until she deceased. The decedent's doctor provided a letter opining that had Kerry not provided care and coordination for her mother, that Ruth McCarty would have had to be institutionalized several years prior. (*See*, Order of April 17, 2013, p. 1; *see also*, Motion to Dismiss *2 State of New Hampshire's Claim for Medical Assistance through the State's Medicaid Program, attached letter from physician, Appendix p. 5).

The State of New Hampshire, Department of Health and Human Services has made a claim for assistance provided to Ruth C. McCarty while she remained in her home in the amount of \$7,866.64. (*See*, Order of April 17, 2013, p. 1). The State of New Hampshire provided a notice to the Executrix of its "claim" on February 10, 2010. (*See*, Order of April 17, 2013, p. 2). The Executrix acknowledges that this was a timely notice of claim pursuant to [NH RSA 556:2](#). (*See*, Order of April 17, 2013, p. 2). However, the State of New Hampshire has brought no action against the Estate to perfect its claim within the one year statute of limitations set forth in [NH RSA 556:5](#). (*See*, Order of April 17, 2013, p. 2).

Initially, the Executrix, through her counsel, requested the State to withdraw its claim as being barred from recovery pursuant to [NH RSA 167:16-a \(IV\) \(b\) \(2\)](#). (*See*, Motion to Dismiss State of New Hampshire's Claim for Medical Assistance through the State's Medicaid Program, paragraph 6, Appendix p. 2; *see also*, State's Objection to Motion to Dismiss State's Claim, paragraph 3-6, Appendix pp. 7-8). [NH RSA 167:16-a \(IV\) \(b\) \(2\)](#) states that in cases in which the State of New Hampshire would be entitled to a **lien** on an individual's home, recovery is allowed only if "No son or daughter of the individual who was residing in the individual's home for a period of at least two years immediately before the date of the individual's admission to a medical institution, nursing facility, or intermediate care facility and who establishes to the satisfaction of the State that he or she provided care to individual which permitted such individual to reside at home rather than in an institution...". However, the State has taken the *3 position that this limitation to recovery is only applied when the State is entitled to a lien, and because the state was not entitled to a lien (because the assistance recipient was not institutionalized) this limitation to recovery did not apply. (*See*, Motion to Dismiss State of New Hampshire's Claim for Medical Assistance through the State's Medicaid Program, paragraph 7, Appendix p. 2; *see also*, State's Objection to Motion to Dismiss State's Claim, paragraphs 3-6, Appendix pp. 7-8).

Indeed, the State has acknowledged that had Ruth McCarty been placed in a nursing home after two years, instead of remaining at home at substantial savings to the State, that the State would not have been entitled to recovery pursuant to [NH RSA 167:16-a \(IV\) \(b\) \(2\)](#). (*See*, Hearing Transcript, p. 27 In. 10-14).

Both the State (*see*, [Hearing Transcript, p. 27 In. 10-14](#)) and the lower Court (*see* Order of April 17, 2013, p. 3) found the logic of the statute troubling which limits the State's ability to recover had the assistance recipient been institutionalized at a much greater expense to the State, but not when the assistance recipient remains at home as a direct result of the care provided by a child.

Based on the position taken by the State above, the Executrix informed the State that their claim was barred for failing to perfect its claim within the one year statute of limitations set forth in [NH RSA 556:5](#). notice of which was timely filed pursuant to [NH RSA 556:2](#). (*See*, Motion to Dismiss State of New Hampshire's Claim for Medical Assistance through the State's Medicaid Program, paragraph 10-12, Appendix p. 2).

The State then utilized [NH RSA 167:16](#) entitled "Enforcement of Assistance **Liens**" (emphasis added) to claim the State was not bound by the one year statute of limitations in [NH RSA 556:5](#) even though the State admits it is not entitled to a lien. *4 (*See*, State's Objection to Motion to Dismiss State's Claim, paragraphs 7-22, Appendix pp. 8-10).

On February 27, 2012, the Executrix Filed a Motion to Dismiss State of New Hampshire's Claim for Medical Assistance Through the State's medicaid Program. (*See generally*, Motion to Dismiss State of New Hampshire's Claim for Medical Assistance through the State's Medicaid Program, Appendix pp. 1-6).

On April 10, 2012, the State filed the State's Objection to Motion to Dismiss State's Claim. (*See generally*, State's Objection to Motion to Dismiss State's Claim, Appendix pp. 7-17).

On April 16, 2012, the Executrix filed a Response to State's Objection to Motion to Dismiss State's Claim. (*See generally*, Response to State's Objection to Motion to Dismiss State's Claim, Appendix pp. 18-21).

A Hearing on the Motion was held on October 16, 2012, and the 7th Circuit - Probate Division - Dover (Cassavechia J) issued an Order on April 17, 2013. (*See generally*, Order of April 17, 2013, appended to this brief).

On April 29, 2013, the Executrix filed a Motion for Reconsideration, and the State filed the State's Objection to Motion for Reconsideration on May 8, 2013. (*See generally*, Motion for Reconsideration, Appendix pp. 22-25; *see also*, State's Objection to Motion for Reconsideration, Appendix pp. 26-29).

The Court (Cassavechia J) denied the Motion for Reconsideration on May 13, 2013 and this Appeal followed. (*See*, Order of May 13, 2013, Appendix p. 30).

***5 SUMMARY OF THE ARGUMENT**

This Appeal is taken from an Order of the 7th Circuit - Probate Division - Dover (Cassavechia J.) denying a Motion to Dismiss State of New Hampshire's Claim for Medical Assistance through the State's Medicaid Program filed by the Executrix of the Estate of Ruth C. McCarty. (*See generally*, Order of April 17, 2013, appended to this brief).

The Probate Court committed clear error when it erroneously interpreted [NH RSA 167:16 III](#) to be an exemption from the one year statute of limitations in [RSA 556:5](#), not only when the State makes a claim to enforce a valid lien, but in any case the State has a mere claim for assistance and no right to a lien. The Probate Court ignored the plain and ordinary meaning to the words used and the overall context of [NH RSA 167:16](#).

Instead, the Probate Court concluded that [NH RSA 167:16](#) is ambiguous. Interestingly, in reaching the conclusion that the statute is ambiguous, the Court relies not on the plain and ordinary meaning to the words used, rather it relies on the State's argument that "... it is more logical for the legislature to have intended." not to burden the State with having to file a separate civil action, or that the Legislature "intended" to treat claims and liens similarly. (*See*, Order of April 17, 2013, p. 6). By only utilizing Legislative intent to conclude that [NH RSA 167:16](#) is ambiguous, the Court committed clear error. Indeed, the Court acknowledged that it should "...not consider legislative history to construe a statute that is clear on its face." (*See*, Order of April 17, 2013, p. 7 citing *In re Guardianship of Eaton*, 163 N.H. 386, 389 (2012)). Without an alternative basis for concluding the statute is ambiguous, the Court committed clear error.

***6** Even if this Court agrees with the Probate Court concluding the statute is ambiguous, the Court should not rely on the State's "long-standing practice" as a basis for ignoring the plain and ordinary meaning to the words used in determining if the statute is ambiguous. Indeed, it is clear from the statute's legislative history that the legislature was attempting to limit the State's ability to recover medical assistance in light of the *Pes Fosses v. Shumway* (case no 97-CV-625B (D.N.H.)) case which ultimately determined the State's recovery actions were overly expansive.

Finally, if this Court ultimately concludes its statutory interpretation of [NH RSA 167:16](#) is correct, then it should utilize the same basis for concluding the exemption to recovery set forth in [RSA 167:16-a \(IV\) \(b\) \(2\)](#) should apply to liens or claims.

In conclusion, this Court should reverse the decision of the 7th Circuit - Probate Division - Dover (Cassavechia J.) and dismiss the State of New Hampshire's Claim for Medical Assistance through the State's Medicaid Program made against the Estate of Ruth C. McCarty.

***7 ARGUMENT**

The questions presented within this appeal are of statutory interpretation. The New Hampshire Supreme Court is the final arbiter of the intent of the legislature. *Phetteplace v. Town of Lyme*, 144 N.H. 621, 624 (2000). The Court reviews the trial court's interpretation of a statute *de novo*. *Monahan-Fortin Properties v. Town of Hudson*. 148 N.H. 769, 771 (2002).

I. The Probate Court erred when it concluded that the State's claim was not barred by the statute of limitation, RSA 556:5 due to a perceived exemption in RSA 167:16.

After timely filing a claim against the estate, the New Hampshire Department of Health and Human Services (hereinafter "State") failed to file a subsequent action needed to enforce the claim within the one year limitation period of RSA 556:5. The State relies on an exception of RSA 167:16, III:

III. Notwithstanding RSA 556:5 and any other provision of law to the contrary, the administrator of a recipient's estate shall be conclusively presumed to have accepted a claim for recovery of assistance which is subject to the jurisdiction of the probate court unless, within 12 months from the initial grant of administration, the administrator commences an equitable action in the superior court challenging the validity or amount of the commissioner's **claim and lien**. (emphasis added.)

The Probate Court assigned meaning to RSA 167:16, III outside of the plain language, thus committing plain error. The language of the statute is considered first *8 when interpreting statutes and the Court assigns plain and ordinary meaning to the words used. *State v. Benard*, 158 N.H. 43, 44 (2008). The exception of RSA 167:16, III is specifically for an administrator challenging the "commissioner's claim and lien" (*see*, emphasis above in context). A plain reading of the statute dictates that *both* a claim and a lien are necessary for the exception. Use of the conjunctive *and* instead of the disjunctive *or* shows legislative intent because "[i]t is well-established that the words in the statute itself are the touchstone of the legislature's intention." *Greenhalge v. Town of Dunbarton*, 122 N.H. 1038, 1040 (1982). In the present case, there is only a claim and not a lien. Therefore, the exception was applied incorrectly.

The Probate Court also failed to look at the whole statute and statutory scheme when incorrectly deciding the exception. As a general rule in statutory interpretation, courts should read statutes in context with other related statutes dealing with the same issue and not in isolation. *In Re Kaplan*, 153 NH 296, 299 (2006). The context of RSA 167:16, when read as a whole, only references claims as a manner to enforce a lien; not claims as a term of art meaning independent methods of payment such as in the instant case.

Importantly, the title of the entire section is "Enforcement of Assistance **Liens**" (emphasis added) and makes no mentions of claims, like in other sections. *See*, e.g. RSA 167:14: *Claims and Liens*. A caption or title of a statute is persuasive, though not conclusive *Lorette v. Peter-Sam Inv. Properties*, 140 N.H. 208, 211 (1995).

Further, the context of NH RSA 167:16 read as a whole only references claims as a manner to enforce a lien. Throughout RSA 167:16 I, II and III (the later is the *9 provision the State relies upon in exempting itself from the one year statute of limitations) reference is to both a claim *and* lien. NH RSA 167:16 as it is entitled and as it reads is clearly intended to be the process by which the State of New Hampshire can make a claim pursuant to an assistance lien. The Probate Court even acknowledged that "[t]he Statue itself does not specifically reference the enforcement of a DHHS Claim for recovery in a situation in which DHHS does not have a lien, such as presented here." (*See*, Order of April 17, 2013, Page 7). Yet, the Court ignores the plain and ordinary meaning to the words used and instead rules that the exemption from the one-year statute of limitations in NH RSA 167:16 III applies "...when it has timely filed a claim against the estate or a lien on a decedent's real estate." (*See*, Order of April 17, 2013 p. 9 final sentence (emphasis added)). This is clear error, by not just adding language the legislature did not include, but rather changing the language altogether.

In addition, the context of the overall statutory scheme for Medicaid Assistance Recovery specifically identifies instances when the State is entitled to a lien and when it is not. The overall statutory scheme for Medicaid Assistance Recovery treats instances that the State is entitled to a lien very differently. (See, [NH RSA 167:1](#), [NH RSA 167:14-a](#), [NH RSA 167:16 -a](#)). Indeed, the State admits that "...claims and liens are two separate mechanisms to recovery." (See, State's Objection to Motion to Dismiss State's Claim, paragraph 22, Appendix p. 10). Yet, the Court ignores the context of the overall statutory scheme for Medicaid Assistance Recovery and rules that for the purposes of [NH RSA 167:16](#) there should not be a distinction between the way a lien is enforced versus a mere claim. This is clear error.

***10** This Court should find that the exemption from the one year statute of limitations contained in [NH RSA 167:16 III](#) is only applicable when the State is entitled to a lien. The fact that the State was not entitled to a lien in this instance is not disputed. The fact that the State did not perfect its claim within the one year statute of limitations is likewise not disputed. Accordingly, this Court should reverse the Probate Court and dismiss the State's claim.

II. The Probate Court erred in characterizing [RSA 167:16](#) as ambiguous and looking beyond the words of the statute.

When construing a statute, the Court "ascrib[e] the plain and ordinary meaning to the words used by the legislature." *Franklin Lodge of Elks v. Marcoux*, 149 N.H. 581, 585 (2003). If that language is unambiguous and yields no absurd result, the Court looks no further in interpreting the statute. *State v. Stewart*, 155 N.H. 212, 921 (2007). Only when it finds a statute's language ambiguous, or when a plain language reading creates an absurd result, will this Court resort to supplementary interpretive tools such as legislative history. *State v. Yates*, 152 N.H. 245, 255 (2005).

The Probate Court concluded that [RSA 167:16](#) is ambiguous because both parties came "to diametrically opposed arguments" not because the statute language itself was ambiguous or yields an absurd result. (See, Order of April 17, 2013, p. 7). A statute is also ambiguous where more than one reasonable interpretation exists *Appeal of Routhier*, 143 N.H. 404, 405-06 (1999). However, the State's interpretation is not reasonable because it refers beyond the plain and ordinary language. In order to have the Court reach the conclusion that the statute is ambiguous the State argues that "... it ***11** is more logical for the legislature to have intended..." not to burden the State with having to file a separate civil action, or that the Legislature "intended" to treat claims and liens similarly. (See, Order of April 17, 2013 p. 6). By only utilizing the State's interpretation of the Legislative intent, and not the plain and ordinary meaning to the words used by the legislature, to conclude that [NH RSA 167:16](#) is ambiguous, the Court committed clear error. The Probate Court deviated from the standard for characterizing the statute of ambiguous and erred as a matter of law.

III. Even if the [RSA 167:16](#) is ambiguous, the Probate Court erred in its interpretation.

When statutory language is ambiguous, the Court examines the statute's overall objective and presumes that the legislature would not pass an act that would lead to an absurd or illogical result. *Marceau v. Concord Heritage Life Ins. Co.*, 149 N.H. 216, 220 (2003).

The State misplaces its argument in incomplete legislative history research. As cited in the State's original objection, the legislature's revisions in 2000 are as follows:

III. Notwithstanding [RSA 556:5](#) and any other provision of law to the contrary, the administrator of a recipient's estate[, or the estate of a recipient's spouse,] shall be conclusively presumed to have accepted a claim for recovery of assistance which is [the subject of a lien against real estate] subject to the jurisdiction of the probate court unless, within 12 months from the initial grant of administration, the administrator commences an equitable action in the superior ***12** court challenging the validity or amount of the commissioner's claim and lien.

N.H. Laws 2000 ch. 156:5.

The State claims that the purpose of this amendment was to “clarify what the State had already been doing for a number of years” (*see*, State's Objection to Motion to Dismiss, paragraph 27, Appendix p. 11) however the opposite is true. Senator John King brought the amendments in the form of Senate Bill 311 and stated one of the purposes as: “The bill is an effort to **correct the methods used by DHHS** in its recovery of Medicaid payments” S.B. 311 100th N.H. Cong., 1st sess. No. 602: P. 1 (2000) (emphasis added). The past actions of the agency do not coincide with the intention of the legislature; in fact, the legislature intended to change the procedures of the State.

Removal of the phrase “subject of a lien against real estate” matches with the overall changes to the statutory scheme of Medicaid recovery in 2000. The *DesFosses* case challenged the process of collection of Medicaid assistance. Relative to the Recovery of Public Assistance: Hearings on S.B. 311 Before the House Committee of Health, Human Services, and **Elderly** Affairs, 100th N.H. Cong., 1st Sess. (2000). In addition to paying reparation for past actions, the *DesFosses* settlement dictated that the State change procedures. Part of that included placing exceptions for recovery (e.g. undue hardship) and disallowing the State to recover against real estate that is occupied by the spouse. In doing so, the legislature limited the State's scope on recovery as a reaction to the *DesFosses* case. *Id.* The State's argument that the legislature expanded their enforcement in **RSA 167:16** is illogical in light of the legislature's overall intent for amendments in 2000.

***13** While “...the long-standing practical and plausible interpretation applied by the agency responsible for its implementation, without any interference by the legislature, is evidence that the administrative construction conforms to the legislative intent.” *N.H. Retirement System v. Sununu*, 126 N.H. 104, 109 (1985), no such evidence applies to this case. Indeed, the State's interpretation is not long-standing, was proven impractical by the *Des Fosses* lawsuit, and the changes made by the legislature as a direct result of the *Des Fosses* case recently specifically interfered with the State's policy. Therefore, deference to the State's interpretation would be equally illogical because of the drastic changes in the recent past to its policies and procedures.

The State's legislative history is incomplete because it does not include the legislative intent from 1992, when the substance of the contested language was written. The final form of the bill stated the following as the purpose of the amendments:

“... This bill is intended to clarify that the state can use the contingent claim procedure under **RSA 556:6** to establish the amount that it is owed when a recipient of medical assistance dies and is survived by a spouse, and to provide a less ponderous method of **enforcing liens against the real estate** of deceased recipients and recipient spouses. HB 503, Chapter 30, N.H. Laws of 1992 (emphasis added).

Therefore, even if the statute is considered ambiguous, the legislative history and intent shows that the statute of limitations does not apply to a claim, only a lien.

***14 IV. The Probate Court erred in not applying the exemption to recovery set forth in **RSA 167:16-a (IV)(b)(2)**.**

The Court incorrectly dismissed the exemption to recovery set forth in **RSA 167:16-a (IV) (b) (2)** as an improper use of equitable powers. If the Court ultimately concludes its statutory interpretation of **RSA 167:16** is correct, then it can utilize the same basis for concluding the exemption to recovery set forth in **RSA 167:16-a (IV) (b) (2)** should apply to liens **or** claims. There is no doubt that it is more logical for the legislature to have intended that the policy reasons for exemption to recovery set forth in **RSA 167:16-a (IV) (b) (2)** exist whether the manner of recovery is by a lien or claim. Indeed, the Court acknowledges that the Estate argues “...from the Court's perspective rather logically...” (*See*, Order of April 17, 2013 p. 3) not to treat claims and liens differently for the exemption to recovery set forth in **RSA 167:16-a (IV) (b) (2)**. If the logical intent of the Legislature to advance a policy decision can be utilized to interpret **NH RSA 167:16**, then it should likewise be able to be utilized in interpreting the exemption to recovery set forth in **RSA 167:16-a (IV) (b) (2)**.

Though the Court gives deference to the agency's own interpretation of its regulations, "that deference is not total" and the Court "must examine the agency's interpretation to determine if it is consistent with the language of the regulation and with the purpose which the regulation is intended to serve." *Appeal of Alley*. 137 N.H. 40, 42 (1993). The application of the State's interpretation of [RSA 167:16-a \(IV\) \(b\) \(2\)](#) yields an absurd result to this case. In the words of opposing counsel:

*15 "That said, this case is a little bit understandably troubling, in that Ms. Hanson kept her mother in the home, saved the state money by doing so. You know, I can represent that \$7,800 might be a month in a nursing home, and Mom stayed at home for three years". (Hearing Transcript, Page 27, lines 10-14). Had Mrs. McCarty stayed in the nursing home, costing the state significantly more money, this case would fit under the exception created in 2000 in response to the *DesFosses* case. Just as in the *DesFosses* case, the State is overzealously collecting to the detriment of state citizens. The State claims it is bound by the law, but [RSA 167:16, III](#) offers two waivers of recovery at the discretion of the State. The State further interprets the waivers in its own rules:

(b) Recovery of medical assistance pursuant to [RSA 167:14](#) shall be waived if recovery will result in undue hardship to the heir as determined under He-W 695.04 or if **the department determines that it is not cost effective to recover the assistance paid.** [NH ADC HE-W 695.03 \(b\)](#) (emphasis added).

Further, the State defines "cost effective" in [NH ADC HE-W 695.02](#), the definition section of the relevant chapter as, "the amount of public assistance recovered exceeds the total cost to the department of pursuing the recovery by \$500.00 or more." Even though the State has admitted the tremendous savings the appellant saved the state by voluntarily assuming care for her mother instead sending her to a nursing home, this claim has ensued for years. By its own rules, the agency should have waived the recovery.

*16 Therefore, if this Court concludes that the legislature intended [NH RSA 167:16](#) to be properly interpreted to cover either claims or liens, then it should likewise conclude the legislature intended the exemption under [NH RSA 167:16-a](#) should also properly be interpreted to cover either claims or liens. Accordingly, the State's claim should be dismissed as non-recoverable.

CONCLUSION

In conclusion, this Court should reverse the decision of the 7th Circuit - Probate Division - Dover (Cassavechia J.) and dismiss the State of New Hampshire's Claim for Medical Assistance through the State's Medicaid Program made against the Estate of Ruth C. McCarty.

REQUEST FOR ORAL ARGUMENT

The Appellant requests that this Court schedule a 15 minute oral argument in this matter to hear Attorney Michael J. Bolduc.