

Dear Stewart Partners,

We hope you are making a smooth transition from summer to fall. In this week's update, we are highlighting several recent (and interesting) court decisions from Maine and New Hampshire. The first three case summaries stem from the state of Maine and involve various real estate rights, including a case about an ancient oak tree, an important case about deed restrictions against short-term rentals such as those popularized by online vacation home portals like Air BNB and VRBO, and a case about a challenge to the municipal approval of a multi-unit residential building. The last summary covers a recent NH Supreme Court order whereby the Court issued an opinion limiting the application of the homestead exemption to title holders only. We have also included a reminder about the New England Land Title Association Annual Conference, which takes place next week. There's still time to register for a day or the full conference.



The Ancient Oak Tree Case, *Atkins v. Adams*, 2023 ME 59

Atkins and Adams own neighboring residential properties in Cape Elizabeth, Maine. A massive 100-year-old oak tree sits on the Atkins property. A large limb splits off near the ground and extends over the Adams property. Atkins sued Adams in Superior Court seeking, among other things, a judgment declaring that Adams had "no right to touch, damage, remove, sever, or cut down any part or portion of the Oak Tree." Adams counterclaimed seeking a judgment declaring that Adams did have "the right to trim, cut, or remove branches, limbs, and trunks" extending onto the Adams property. The trial court found in favor of Adams, holding Adams could trim any branches overhanging the Adams property.

On appeal, the Law Court first distinguished between "boundary" and "non-boundary" trees. A boundary tree has a base that straddles two properties. Such trees are the common property of both property owners as tenants in common. Non-boundary trees, like the one in this case, have their bases completely on one party's property. Surprisingly, this was the first time the Pine Tree State's highest court adjudicated the rights of an abutter to trim limbs of a non-boundary tree. In so doing, the court agreed with the Superior Court and adopted the majority position throughout the country that abutters have the right to trim the limbs of their neighbor's non-boundary trees, even if doing so kills the tree. Although the Law Court affirmed the trial court's decision allowing Adams to trim the leader limb, it concluded its decision with the following cautionary words of wisdom:

As Lord Chancellor Herschell commented in 1895, “It may be, and probably is, generally a very unneighborly act to cut down the branches of overhanging trees unless they are really doing some substantial harm to the neighbor.” Lemmon v. Webb [1895] LXXI LT 647 HL at 648 (Eng.). Although our opinion defines with finality the parties’ legal rights with respect to the oak tree, it is now the parties’ prerogative to define their neighborly relations.

To read the full decision, please follow this link: [Atkins v. Adams, 2023 ME 59](#)



The Short-Term Rental Restriction Case, Morgan v. Townsend, 2023 ME 62

Townsend, Morgan, and Ward own oceanfront properties in Cushing, Maine, each of which came from a single parent parcel. Each deed out from the parent parcel contained the following restriction benefiting and burdening all three parcels:

The premises herein conveyed shall not be used or occupied for any purpose other than for private residential purposes and no trade or business shall be conducted therefrom; and no building, structure, trailer, mobile home, object or thing whatsoever other than a private dwelling house for use and occupancy by one family and such out buildings as are usual, customary and appurtenant to a private residence shall be erected or placed thereon, and not more than one such dwelling shall be erected or placed on said lot...

The Townsend property includes a five-bedroom, five-bathroom house and a two-bedroom, one-bathroom guest cottage. The main house has a 900 square foot recreation room, 24 commercial-grade Adirondack style chairs, a hot tub, a commercial-grade lobster cooker, a fire pit, outdoor recreation equipment, flood lights, a deck, and a grill. Townsend has not lived there since the 1970s. For the past few years, Townsend has been renting the entire property to short-term renters, presumably through one of the online vacation rental portals. In a two-year period, more than 50 different groups rented the property. The Ward and Morgan lots also have guest houses. Ward and Morgan reside on their properties.

Ward and Morgan sued Townsend in Superior Court seeking a judgment declaring, among other things, that Townsend violated the deed restriction. Townsend filed counterclaims asserting, among other things, that if he violated the restriction, Ward and Morgan did so too because of their guest houses. The Superior Court ruled in favor of Ward and Morgan, finding that Townsend violated the deed restriction by “using the [p]roperty to conduct a full-scale commercial business in violation of the restrictive covenant,” and that there was insufficient evidence to find that Ward and Morgan had violated the restriction by having guest cottages. The court entered an injunction as follows: “Townsend is permanently enjoined from using his property in violation of the restrictive covenant contained in his deed.” Townsend then moved the court to clarify the scope of the injunction, which the court summarily denied. Townsend appealed to the Maine Supreme Judicial Court sitting as the Law Court.

On appeal, the Law Court issued a split decision in which the majority agreed with the Superior Court that Townsend violated the “no trade or business” provision of the deed restriction based upon “Townsend’s pattern of use, maintenance, advertising, and holding out of his property [all of which brought] his rentals squarely within the definition of a

business, such as a hotel.” However, the majority went on to clarify that its decision does not prohibit Townsend from renting his property on a year-round or even month-to-month basis to single groups, or even “occasional short-term rentals to one group at a time totaling a small number of days per year,” because so doing would not constitute a business or commercial activity under existing Law Court precedent. It then remanded the case back to the Superior Court to “recraft the injunction to define “short-term rental” and to set a limit, consistent with the definition, on the number of days per year that Townsend may use the property for short-term rentals.”

To read the full decision, please follow this link: [Morgan v. Townsend, 2023 ME 62](#)



The Planning Board Case, Murray v. Portland, 2023 ME 57

The City of Portland’s Planning Board approved a 12-unit residential development over the objections of a group of neighbors. Those neighbors challenged the approval in Superior Court. Specifically, the neighbors alleged that the Planning Board should not have approved the project because the proposed building violated municipal setbacks and height requirements, and because the building failed to comply with certain historic-preservation design requirements. The Superior Court affirmed the Planning Board’s approval of the project. The neighbors appealed to the Law Court. On appeal, the Law Court determined that the Planning Board’s approval failed to contain any findings of fact regarding the issues complained of by the neighbors. As such, the Law Court remanded the case back to the Superior Court with instructions to remand the matter back to the Planning Board to address the missing findings of fact.

To read the full decision, please follow this link: [Murray v. City of Portland - Maine - Case Law - VLEX 941800090](#)



The Homestead Exemption Case, Brady v. Sumski, (opinion issued August 17, 2023-not yet published)

Katherine Brady appealed from a decision of the Bankruptcy Court holding that she was not entitled to claim a homestead exemption on behalf of her non-debtor spouse. The Bankruptcy Court concluded that to maintain a homestead right pursuant to New Hampshire’s RSA 480:1, a person had to demonstrate both occupancy and ownership interests in the homestead property. Because plaintiff’s husband was not an owner of the property, the court concluded that he was not entitled to a homestead exemption under RSA 480:1, and plaintiff could neither assert a homestead exemption on behalf of her husband, nor claim that he possessed a lien that secured his interest in the property.

The United States District Court for the District of New Hampshire certified two questions of Law for the New Hampshire Supreme Court’s consideration:

1. Does the ownership requirement described in the second sentence of RSA 480:1 apply to all real property occupied as a homestead, or does it apply only to

manufactured housing occupied as a homestead?

That is to say, assuming the homestead is real property other than manufactured housing, does the non-owning occupying spouse of one who holds a homestead right pursuant to RSA 480:1 also have a present, vested, non-contingent homestead right of his or her own, which is currently valued at \$120,000?

2. Does a non-owning spouse who occupies (as a homestead) a manufactured housing unit with an owning spouse have a present, non-contingent, and enforceable homestead right with respect to that home, which is currently valued at \$120,000? [The Court did not address this question because the residence at issue in this case was not a manufactured home.]

The NH Supreme Court answered the first certified question in the negative and concluded “RSA 480:1 included an ownership requirement that applied to all real property occupied as a homestead and a non-owning occupying spouse of another who held a homestead right, pursuant to the statute, did not hold a present, non-contingent homestead right of his or her own.”

This holding does not change the need in a real estate transaction for waivers and releases of the homestead right pursuant to RSA 480:5-a which provides that “[n]o deed shall convey or encumber the homestead right, except a mortgage made at the time of purchase to secure payment of the purchase money, unless it is executed by the owner and wife or husband, if any, with the formalities required for the conveyance of land.” The effect of this case is to limit the current \$120,000 exemption in a bankruptcy to only the title holder spouse.

Stay tuned for more on this as the NH Attorney General urges the Legislature to act. The following is from a news release issued by the office of the Attorney General:

The Court should interpret the statute broadly, consistent with its historical application and purpose to protect consumers. The family home is often the largest and most important asset of New Hampshire families, and the exemption should be broadly construed to afford the maximum protection of the family home. This decision alters the legal landscape, as it runs counter to what many consumer practitioners in the State had long understood the law to be.

This decision will likely have a broad, adverse impact on the ability of New Hampshire consumers to obtain a fresh start through bankruptcy and may endanger home ownership for married consumers outside of bankruptcy with debts they cannot pay if there is equity in their home.

“The purpose of the homestead exemption is to ensure family stability and to shield the family, and our society, from the consequences of homelessness. It is difficult to see how a single \$120,000 exemption is capable of offering that protection today to New Hampshire's families,” said Attorney General Formella. “I would therefore encourage the Legislature to accept the Court's invitation to amend the statute to restore these critical protections and clarify that both spouses are entitled to their own homestead right in the family home as long as one spouse is the title owner of the property.”

To read the full decision, please follow this link: [Brady v. Sumski](#)



New England Land Title Association Annual Conference – September 18-20, 2023

The New England Land Title Association (NELTA) is holding its annual conference Monday September 18, 2023, through Wednesday, September 20, 2023, in Portsmouth, New Hampshire. To view a list of the scheduled sessions, click here:

<https://nelta.org/events/EventDetails.aspx?id=1747329>

This year, there are reduced rates for those who only want to attend the Tuesday educational sessions. We hope to see you there!



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