

State of New Hampshire
Supreme Court

NO. 2019-0645

2020 TERM
MARCH SESSION

In Re Simone Garczynski Irrevocable Trust

RULE 7 APPEAL OF FINAL DECISION OF THE
NASHUA PROBATE COURT

BRIEF OF APPELLANT, JAMES GARCZYNSKI

March 23, 2020

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QUESTION PRESENTED

- I. Did the court err in not implementing the terms of its order, by allowing Michael yet another opportunity to purchase the house, despite previously ordering that when specific conditions were not met, “Michael’s right to purchase the property shall be extinguished”?

Preserved: MOTION TO UPHOLD TRANSFER OF REAL ESTATE
(Aug. 24, 2018), *Appx.* at 3; *Compel Hrg.*, *passim*.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. First Appeal Results in Remand

Simone Garczynski had four children: Dennis, James, Michael, and Marlana.¹ In 1992, Simone created the Simone Garczynski Irrevocable Trust, into which she put a modest suburban home in Goffstown, New Hampshire where the children grew up and where Michael and James continue to live.² Upon her death, the Trust would distribute Simone's estate to her children in equal shares, though it required Dennis's and Michael's to be placed in special needs trusts rather than distributed outright. *See In re Simone Garczynski Irrevocable Trust*, N.H. Sup.Ct. No. 2017-0487 (decided July 26, 2018), *Addendum* at 29.

¹Due to the shared last name by many of the people involved, first names will be used.

²The transcriptionist designated the four hearings in this matter as simply "Hearing Volume I," "Hearing Volume II," "Hearing Volume III," and "Hearing Volume IV." Although consecutively numbered, these designations are somewhat misleading because the four transcripts are not from, for example, a single hearing that occurred on four different days, but rather are transcripts of four separate hearings noticed to the parties at four separate times for four separate purposes. The record suggests the following:

"Hearing Volume I" was a Structuring Conference held on September 9, 2018. It was followed by a "Structuring Conference Order" (Sept. 13, 2018), *Appx.* at 15. Accordingly, and for brevity, that transcript is cited herein as "*Structuring Conf.*"

"Hearing Volume II" was an evidentiary hearing to gather facts regarding who should get the house. The hearing was referred to as a "Trial" in the Structuring Conference Order, ¶8. Accordingly, that transcript is cited herein as "*Trial.*"

"Hearing Volume III" was a hearing that arose after a Michael failed to comply with the court's detailed order about how he could perfect purchase of the house, and was precipitated by Michael's Motion to Compel Transfer of Property (Apr. 9, 2019), *Appx.* at 49. The court's scheduling order referred to the hearing as: "Matters to be considered: Motion to Compel Transfer of Property." NOTICE OF HEARING (Apr. 30, 2019), *Appx.* at 62. Accordingly, that transcript is cited herein as "*Compel Hrg.*"

"Hearing Volume IV" concerned procedural issues and Marlana's request for interim distribution, and its scheduling order suggests those purposes. NOTICE OF HEARING (Aug. 21, 2019), *Appx.* at 70. Accordingly, that transcript is cited herein as "*Distribution Hrg.*"

Simone died in November 2014. This dispute regarding who will get the house has prevented a final accounting and distribution of Trust assets, and has caused hardship for the other siblings.³ *Compel Hrg.* at 177; *Distribution Hrg.*, *passim*; MOTION TO UPHOLD TRANSFER OF REAL ESTATE ¶ 17 (Aug. 24, 2018), *Appx.* at 3; MARLANA’S MOTION FOR DISBURSEMENT (July 10, 2019) (omitted from appendix); MARLANA’S MOTION FOR IMMEDIATE DISBURSEMENT (Aug. 19, 2019) (omitted from appendix); ORDER (on interim distribution) (Oct. 9, 2019) (omitted from appendix).

While the procedural status of this case is lengthy, the Probate Court summarized the litigation:

Pursuant to a mediated agreement made an order of the court in November 2015, Michael Garczynski had the right to purchase the property for an amount of \$179,900. Subsequently, there was miscommunication between Michael ... and James ..., acting as trustee, and the real property was not transferred to Michael. After additional orders of the court, Michael was afforded an additional opportunity to purchase the property by order issued October 24, 2016. Michael’s purchase of the property was not completed at that time and the court ordered that James could purchase the real property from the trust on the same terms and conditions offered to Michael. Michael appealed to the Supreme Court and this court’s order was vacated and the case remanded.

ORDER (Feb. 8, 2019), *Addendum* at 34. The result is that James now owns the house, which he bought from the Trust in January 2017, but Michael was to be given another opportunity to purchase.

The New Hampshire Supreme Court held that while Michael had

³The court allowed a partial interim distribution at the request of Marlana. ORDER (Oct. 9, 2019) (omitted from appendix); *Distribution Hrg.*, *passim*.

tendered a check with an incorrect payee (made out to the Simone Garczynski Revocable Trust rather than the Irrevocable Trust), it was the Trust's lawyer having hewed to deadlines that proximately prevented the closing. *In re Simone Garczynski Irrevocable Trust*, N.H. Sup.Ct. No. 2017-0487, at 5 (“[B]y refusing to convey the property at any time after December 17 [2016], the trustee repudiated his obligations under the October order ... Under these circumstances, Michael’s failure to close by December 23, 2016 was excused.”). Thus the Supreme Court remanded. *Id.*

Upon remand, the Nashua Probate Court (*Patricia B. Quigley*, J.) held a structuring conference. It first declined to revise its pre-appeal order to validate, *nunc pro tunc*, James’s purchase. *Structuring Conf.* at 8; MOTION TO UPHOLD TRANSFER OF REAL ESTATE (Aug. 24, 2018) (margin order), *Appx.* at 3; NOTICE OF DECISION (Sept. 24, 2018), *Appx.* at 19. The court then instructed the parties regarding what information and topics to present at a later evidentiary trial, and ordered them to submit detailed proposed orders. *Structuring Conf.* at 9-17; ORDER (Sept. 21, 2018) at 2-3, *Appx.* at 16.

Because the Supreme Court order worked no divestment, and James had bought the house from the Trust in January 2017, James remains its owner. Michael conceded he knew that. *Trial* at 42, 72-73; ORDER (Feb. 8, 2019) at 2.

II. Trial Testimony

In December 2018, the Probate Court held a bench trial, took direct- and cross-examination of both brothers, accepted exhibits, and heard argument from attorneys for James, Michael, and the Trust. *Trial* at 34.

Michael testified that he wanted to purchase the house and had the means; understood that if allowed to purchase, he would pay James and not the Trust, because James is the current owner; believed his purchase price should be \$179,900, the same as agreed upon in 2015; blamed his bank for designation of the wrong payee (Revocable Trust) on the pre-appeal check; claimed he is entitled to unrestricted distribution (“and go to Las Vegas”) even though the trust instrument specifies a special needs trust for his share; and rejected any duty to pay carrying costs, including taxes and utilities, even though he has been living there for over 30 years. *Trial* at 38-68.

James testified and confirmed that he also has been living in the house for over 30 years, that he became the sole owner by purchasing it from the Trust pursuant to the order which formed the basis for the first appeal, and that he still owns it. *Trial* at 71-73. James noted that since he became owner in January 2017, he invested time and money in maintenance, and offered into evidence his work-logs and expense-sheets. *Trial* at 72, 79, 82-91, 99-103; WORK-LOG, 2017-2018, Exh. D, *Appx.* at 136; EXPENSE REPORT 2017-2018, Exh. E., *Appx.* at 141; SETTLEMENT STATEMENT (Jan. 6, 2017), Exh. A, *Appx.* at 103. Michael, by contrast, contributed nothing since James became owner – in money or effort – toward water, sewer, phone, heating oil, taxes, upkeep, maintenance, or repair. *Trial* at 72, 84, 90-91, 104, 127, 130.

James further testified that he and Michael are unable to communicate about anything, including expenses. James believes Michael has obstructed improvement by repeatedly contacting the police about such minor issues as setting the air conditioner temperature, and has diminished the value of the

house by repeatedly urinating in puddles around the house and not cleaning it up. *Trial* at 47, 104-06, 135-36. Consequently, James reported, the house is “in terrible condition, ... [i]t stinks, it’s moldy. It needs complete renovation from inside out, top to bottom.” *Trial* at 103-04, 133; TRUST’S REQUEST FOR FINDINGS ¶ 35 (Dec. 13, 2018), *Appx.* at 36; ORDER (Feb. 8, 2019) at 4.

The Trust offered evidence of the value of the house, using Goffstown’s tax assessment of \$255,700, and also a market analysis commissioned by the Trust of between \$214,900 and \$219,900. TOWN TAX ASSESSMENT (2018), Exh. B, *Appx.* at 144; CENTURY 21 REAL ESTATE SERVICES PROPOSAL (Sept. 26, 2018), Exh. C, *Appx.* at 104; *Trial* at 75-79. James’s personal opinion of the house’s value was inconsistent and sentimental. *Trial* at 104, 119, 131, 134.

James testified that he would personally like to continue owning the house, though he acknowledged that acquiring it from the Trust cost him withdrawal penalties and was financially disadvantageous for him. If the court forces him to part with it, he believes he should share in any increase in its value since 2015 because the money he put into it could have been invested elsewhere. He also contends that he should not be liable for any reduced value caused by Michael. As trustee, James said he regrets the repeated delays caused by having entered into the 2015 mediation agreement which allowed Michael to buy the house. *Trial* at 92-93, 132-33, 145-47.

Finally, James explained that while he understands the Supreme Court’s order remanding the case to the Probate Court, it was the Trust’s lawyer who negotiated the dates of the non-purchase that led to the first appeal, and that he personally did not “repudiate” anything. *Trial* at 112-13.

III. Court Issues “Very Specific Orders”

As directed, the parties appeared at trial with proposed orders. MICHAEL’S PROPOSED ORDER (Dec. 13, 2018), *Appx.* at 34; JAMES’S PROPOSED FINAL ORDER (Dec. 13, 2018), *Appx.* at 27; JAMES’S MEMO IN SUPPORT OF PROPOSED FINAL ORDER (Dec. 13, 2018), *Appx.* at 23. Toward the end of trial, the court reiterated the need for “very specific orders.”

I had thought that in the past, I had made very specific orders. Clearly, they were not specific enough. So in terms of whatever help either party can give me in terms of the specifications, I would appreciate it.... I do understand they need to be specific.... I know these parties don’t get along. I know that there will be difficulty. What I need to know is how to construct an order that both parties can live with to resolve this so it’s not a continuing dispute.

Trial at 107-08.

Consequently, after trial, in February 2019, the court issued a lengthy order that appears to address every issue it could visualize going wrong. ORDER (Feb. 8, 2019), *Addendum* at 34, 38. The court noted that while Michael desired to purchase the house at its 2015 price, and James wanted to share in whatever increase in value the house sustained between 2015 and 2019, “neither party’s requests are entirely reasonable.” *Id.* at 4. The court explicitly rejected finding that James, as trustee, breached any fiduciary duties, because “although later overturned, James was acting pursuant to this court’s order.” *Id.* at 4; *see also* ORDER (Sept. 21, 2018) at 1-2, *Appx.* at 16; MICHAEL’S REQUESTS FOR FINDINGS & RULINGS ¶ 5 (Dec. 13, 2018), *Appx.* at 28.

On the ultimate issue, the court ruled that “[a]fter consideration of the information provided at the hearing and in the pleadings, ... the property shall be available for purchase by Michael for an amount of \$193,000,” plus a calculated amount for shared carrying costs. ORDER (Feb. 8, 2019).

The court then listed 17 explicit, numbered instructions specifying how and when Michael could exercise his right to buy the house: a 30-day “purchase period,” a potential extension to “no later than 45 days from the date of the notice of decision,” and in whose office the closing would occur. *Id.* ¶¶ 1-4, 7-9.

Regarding payment, the order provided:

5. At the time of closing, Michael shall provide a *bank check payable to James Garczynski* for the full amount owed by the purchaser. No later than two hours prior to closing, Michael or his attorney shall send a copy of the bank check to James’ attorney, Daniel Craig, Esq.

6. At the time of closing, Michael Garczynski shall provide a separate bank check payable in the amount of \$12,330 for his one-half share in the care and costs of the real estate from January 2017 through January 2019. *The check shall be made payable to James Garczynski.*

Id. ¶¶ 5, 6 (emphasis added).

The order also provided timetables for James removing himself and his things upon Michael successfully purchasing the house. *Id.* ¶¶ 10-15. But:

2. ... If the closing has not occurred within 45 days from the date of the notice of decision, then *Michael’s right to purchase the property shall be extinguished.*

16. If Michael does not timely purchase the property, he shall vacate the premises no later than 60 days after the “purchase period” has ended....

17. If Michael remains on the premises and has not purchased the property within the “purchase period,” he shall be personally responsible for one-half the expenses of the property (including real estate taxes, utilities and repairs) and the costs associated with removing him from the property, including attorneys fees.

Id. ¶¶ 2, 16, 17 (emphasis added).

IV. Michael Flouts Court Order

Although there were scheduling complications, in March 2019 the parties met for a closing in accordance with the dates and conditions specified in the February court order. However, the checks Michael presented were not drawn “payable to James Garczynski,” as the order specified. Even though he knew James was the owner of the house, Michael made the checks payable to the *Trust*. Attorney Craig (representing James individually) refused to accept the checks, despite the urging of Attorney Kennedy (representing Michael). Hence, no closing occurred, and the deadline passed. *Compel Hrg.* at 164-66, 172; *Distribution Hrg.* at 191; MOTION TO COMPEL TRANSFER OF PROPERTY (Apr. 9, 2019), *Appx.* at 49; OBJECTION TO MOTION TO COMPEL TRANSFER OF PROPERTY (Apr. 16, 2019), *Appx.* at 53, 37; ORDER (June 12, 2019), *Appx.* at 67; ORDER (Aug. 14, 2019), *Addendum* at 44.

This time Michael did not blame the bank. Rather, he declared that he intentionally put the wrong payee on the checks, in knowing violation of the court order, his animus being that he did not trust James. *Trial* at 60; *Compel Hrg.* at 166-67, 181; MOTION TO COMPEL TRANSFER OF PROPERTY; OBJECTION TO MOTION TO COMPEL TRANSFER.

Despite not owning the property, Attorney Paris (the Trust’s lawyer) accepted Michael’s checks. A few days later, Attorney Paris attempted to return the money by issuing checks in the same amounts to Michael, though Michael refused to cash them. This was “worrisome” to the Trust because the outstanding checks could be cashed at any time. *Distribution Hrg.* at 212-13, 217; MOTION FOR RECONSIDERATION (Aug. 29, 2019), *Appx.* at 77.

In addition to sabotaging the closing, the wrongly-drawn checks also created a quandary – and another round of litigation. Michael’s attorney proposed the sale could be completed by simply moving the money from the Trust to James. *Compel Hrg.* at 168. But the Trust’s lawyer regarded that as a

fiduciary breach with possible adverse tax implications, *Compel Hrg.* at 174; OBJECTION TO MOTION TO COMPEL TRANSFER ¶¶ 10-11; MOTION FOR MODIFICATION (Oct. 17, 2019), *Appx.* at 100, and the court regarded it as a potential unlawful intermingling of funds. *Compel Hrg.* at 170. James gibed Michael for the “self-created” problem, but was willing to go along with Michael’s proposal. *Compel Hrg.* at 172-73. The court resolved this immediate issue – rectifying Michael’s purposeful mistake – by, despite misgivings, allowing transfer of funds from the Trust to James if the sale were completed. ORDER (Aug. 14, 2019) at 3-4, *Addendum* at 46-47.

After a hearing in June 2019, the court found that Michael was “well aware” that the Trust had not owned the property since January 2017. It commented that this was the second time Michael had scuttled a closing by presenting a check with a wrong payee. ORDER (Aug. 14, 2019), *Addendum* at 44; *Compel Hrg.* at 166. The court squarely blamed Michael for the problem:

Michael ... was uncooperative and inaccurate in completing the purchase.... Michael ... has yet again not followed the court orders. Michael[’s] ... deliberate actions in disregarding the court orders has delayed resolution of the ownership of the property and caused additional litigation.

ORDER (Aug. 14, 2019). The court criticized Michael for repeatedly violating its orders:

This court has issued multiple orders in an attempt to allow for the transfer of this property to one or another of the trust beneficiaries. On multiple occasions, Michael ... has been allowed to purchase the property and has not successfully completed all the tasks necessary to do so. In February 2019, this court again issued a very specific order providing Michael Garczynski an opportunity to purchase the property. He did not follow the orders of the court.

ORDER (June 12, 2019), *Appx.* at 67; *Compel Hrg.* at 164. The court then expressed its incredulity at Michael’s conduct, noting it was “really appalled, quite frankly.” “Is there something in that order that you did not comprehend? ... This hearing, and all the pleadings since the last hearing, have been a waste of time and money.” *Compel Hrg.* at 171, 165, 175. The court pondered:

How can I make it more clear than I have, as to what he needs to do to get this property transferred?... How many times does he get to frankly screw it up, prior to saying no, he can’t do this anymore?... [T]ell me why it is I reward [Michael] for time and again not complying with court orders? ... I have no confidence that [Michael] will ever follow a court order. ... So tell me why it is I should give [Michael] yet another bite at the apple?

Compel Hrg. at 166-68.

V. Court Reneges on Commitment to Enforce its Order

To answer the court's question, Michael asserted that he should be entitled to buy at the 2015 price of \$179,900, *Trial* at 58, 154-55; *Compel Hrg.* at 167; OBJECTION TO MOTION TO UPHOLD TRANSFER (Aug. 31, 2018), *Appx.* at 3; MICHAEL'S PROPOSED ORDER (DEC. 13, 2018); ORDER (Feb. 8, 2019) at 3; OBJECTION TO RECONSIDERATION (addressing James's motion) (Sept. 6, 2019), *Appx.* at 90; OBJECTION TO RECONSIDERATION (addressing Trust's motion) (Sept. 6, 2019), *Appx.* at 93, and that the court should ignore Michael's misdeeds. *Trial* at 155-57; *Compel Hrg.* at 176.

James argued that he already owns the house, undoing the 2017 sale would be cumbersome, and rewarding Michael for his purposeful mistake would be unjust and unfair. James noted that Michael already had many chances to purchase, all of which he bungled, making it likely that, if given another chance, he will again.

James emphasized that the February 2019 order was clear that if Michael did not close by the deadline, his "right to purchase the property shall be extinguished." James argued that the law does not allow a court to disregard its own enforcement orders. RESPONSE TO MOTION TO UPHOLD (Sept. 4, 2018); JAMES'S PROPOSED FINAL ORDER (Dec. 13, 2018); OBJECTION TO MOTION TO COMPEL TRANSFER OF PROPERTY (Apr. 16, 2019); MOTION FOR RECONSIDERATION (Aug. 27, 2019), *Appx.* at 71; *see* ORDER (Feb. 8, 2019).

James also suggested that if the court does allow Michael to purchase, it should be at a price higher than the 2015 agreement, in order to avoid penalizing James, and to hold Michael accountable for the diminution of value he has caused. MOTION FOR RECONSIDERATION (Aug. 27, 2019); JAMES'S PROPOSED FINAL ORDER (Dec. 13, 2018); MEMO IN SUPPORT OF PROPOSED FINAL ORDER (Dec. 13, 2018).

The Trust's lawyer argued that James's purchase was valid; that undoing

James's purchase would be cumbersome and expensive due to valuation, taxation, and calculation of costs; that Michael has repeatedly been "dilatory and neglectful" of court orders and will likely be again; that Michael's actions have prevented the Trust from distributing assets to the beneficiaries; and that pursuant to the court order, "as a result of his failure to comply, Michael ... forfeited his right to purchase the real estate." TRUST'S PROPOSED ORDER (June 6, 2019), *Appx.* at 64; MOTION TO UPHOLD TRANSFER OF REAL ESTATE (Aug. 24, 2018), *Appx.* at 3.

After the transfer hearing, the Probate Court issued an order in August 2019 critical of Michael. It found that "[o]n multiple occasions since 2015, Michael ... has been allowed to purchase this property"; that despite "a very specific, detailed order" and knowing that James has owned the house since 2017, Michael purposely paid the Trust rather than James; that Michael has been "uncooperative and inaccurate in completing the purchase" and "has yet again not followed the court orders"; that Michael has "not contributed to the maintenance or expenses of the house, has not paid real estate taxes or utilities, and has not provided any repairs to the property despite the court order specifically so requiring"; and that these "deliberate actions in disregarding the court orders have delayed resolution of the ownership of the property and caused additional litigation." ORDER (Aug. 14, 2019), *Addendum* at 46.

Nonetheless, the court noted that Michael "did provide funds for the purchase and for the amount then owed to James ... for house expenses," and that "[a]fter consideration of the information provided at the hearing and in the pleadings, Michael ... will be provided another opportunity to purchase the real estate." *Id.*

The court then issued another list of detailed instructions similar to its previous February 2019 order, including the identical enforcement provision that, "[i]f the closing has not occurred within 45 days from the date of the

notice of decision, then Michael[']s ... right to purchase the property shall be extinguished.” *Id.*

Both James and the Trust filed motions for reconsideration reiterating that the court’s enforcement provisions should have been implemented; the motions were denied. JAMES’S MOTION FOR RECONSIDERATION (Aug. 27, 2019), *Appx.* at 71; TRUST’S MOTION FOR RECONSIDERATION (Aug. 29, 2019) (denied in margin order), *Appx.* at 77; OBJECTION TO RECONSIDERATION (addressing James’s motion) (Sept. 6, 2019), *Appx.* at 90; OBJECTION TO RECONSIDERATION (addressing Trust’s motion) (Sept. 6, 2019), *Appx.* at 93; NOTICE OF DECISION (Oct. 1, 2019), *Appx.* at 95. This appeal followed.

SUMMARY OF ARGUMENT

James first recites that courts have a duty to enforce their orders, in order to uphold the integrity of the judicial system. James then recounts Michael's numerous opportunities to purchase the property since 2015, by simply tendering the purchase price to the proper payee. James notes that Michael's failures have been deliberate and self-caused, and not the result of any misfortune or mistake. James thus requests this court reverse the Probate Court's refusal to implement its reasonable order that, upon Michael's failure, his right to purchase was extinguished.

ARGUMENT

Michael deliberately violated the specific terms of a court order, but the court refused to implement its own reasonable orders. Michael's mocking the conditions of the order, without consequence, undermines the integrity of the judicial system and the equitable authority of the court.

I. Michael's Right to Purchase Should Have Been Extinguished

In 2015, James and Michael agreed that, upon Michael expressing a wish to purchase, he could, and the agreement was approved by the court. Since that time, there has been nothing stopping Michael from purchasing by simply tendering the agreed-upon price to the correct payee.

After Michael was repeatedly unable or unwilling to complete the sale, despite asserting that he wanted to, the court felt compelled to make very specific orders. Thus the court's February 2019 order was clear and undisputed. It provided a time and place for closing, and specified the proper payee. If Michael did not comply by a date certain, the order provided that "Michael's right to purchase the property shall be extinguished." This requirement was reasonable given the 2015 agreement and Michael's numerous opportunities to close.

Michael's most recent excuse for paying the wrong payee was that he did not trust James. Even crediting that, Michael had plenty of options short of violating the court order. He could have drawn a check to the proper payee and given the check to his lawyer, the Trust's lawyer, or James's personal lawyer. At any point during the ongoing dispute, he could have asked for appointment of an escrow agent, conservator, or receiver. He could have simply requested a receipt upon tendering his checks. If he believed the payee provision was unjust, he could have appealed the order. *State v. Vincelette*, 172 N.H. 350, 357 n.2 (2019) ("If a person believes a court order is incorrect, the proper remedy is to appeal the order."). The order did not place Michael in any moral or legal

dilemma in which violating the court order was the least bad option. *See, e.g., State v. Weitzman*, 121 N.H. 83 (1981) (competing harms defense); *Settle v. Settle*, 121 N.H. 397, 399 (1981) (“[W]e also are not persuaded by the defendant’s alleged concern for the protection of the trustee’s or creditors’ rights and find that it is simply a sham designed to interfere with the orderly process of litigation.”).

Michael’s violation of the court order caused damage. It further prevented resolution of the Trust and finalizing the distribution of its assets. It produced uncertainty and delay, and cost everyone. As the court noted, “[t]his hearing, and all the pleadings since the last hearing, have been a waste of time and money.” *Compel Hrg.* at 175.

If this matter sounded in contempt or mandamus, Michael would be plainly liable. *See State v. Smith*, 163 N.H. 13, 20 (2011) (“[W]ell-established law makes it clear that the deliberate violation of a court order can be punished as a criminal contempt.”); 52 AM. JUR. 2d *Mandamus* § 341 (“The duty of a court to issue proper writs and orders to enforce a judgment or decree generally is of a ministerial character, involving no exercise of judgment or discretion, and as such may be enforced by mandamus.”).

Accordingly, the Probate Court should have enforced its mandate that if Michael did not comply with its clear and certain terms, his “right to purchase the property shall be extinguished.” This court should extinguish it.

II. Courts Have a Duty to Enforce Their Reasonable Orders

The United States Supreme Court has made clear that courts have a duty to enforce their orders:

The essence of paramount judicial power over a subject confers the authority *and imposes the duty to enforce* a judgment rendered in the exercise of such power.

People of Porto Rico v. Rosaly y Castillo, 227 U.S. 270, 276 (1913) (emphasis added); *see also City of Lebanon v. Townsend*, 120 N.H. 836, 839 (1980).

Courts have repeatedly emphasized this understanding of their basic duties. *See Johnson v. Johnson*, 544 P.2d 65 (Alaska 1975) (“[A] court not only has inherent power to enforce its decrees, but it also has a duty to do so.”); *Security Trust & Savings Bank v. Southern Pac. R. Co.*, 45 P.2d 268, 269-70 (Cal. App. 1935) (when there is a final court order, court is “impelled” to enforce); *Cities Service Oil Co. v. Village of Oak Brook*, 405 N.E.2d 379 (Ill. App. 1980) (“A court has inherent power to enforce its orders and decrees and should see to it that such judgments are enforced when called upon to do so.”); *State v. Miller*, 217 P.2d 287 (Kan. 1950) (“Courts have inherent power to enforce their own judgments and should see to it that they are enforced when ... they are called upon to do so.”); *Band v. Livonia Associates*, 439 N.W.2d 285 (Mich. App. 1989) (“A court has the basic responsibility of enforcing its own orders....”); *Smith v. Foss*, 582 P.2d 329 (Mont. 1978) (“A party that has obtained judgment in his favor must be able to obtain enforcement of the judgment.”); *Welser v. Welser*, 149 A.2d 814 (N.J. App. Div. 1959) (“Courts have inherent power to enforce their own judgments and should see to it that they are enforced when they are called upon to do so.”); *Goodsell v. Goodsell*, 228 P.2d 155 (Wash. 1951) (“A court not only has the right, but it is its duty to make its decrees effective and to prevent evasions thereof.”).

When a person deliberately violates a court order, he directly attacks the

integrity of the judicial system and the court process, especially when the underlying court order is reasonable. *See State v. Nott*, 149 N.H. 280, 282 (2003) (purpose of criminal contempt for violation of court order is “to protect the authority and vindicate the dignity of the court”). Preservation of the integrity of the court arises in diverse contexts. *See, e.g., Grew’s Case*, 156 N.H. 361, 365-66 (2007) (“Where an attorney breaches his ethical duty to maintain personal integrity, public confidence in the integrity of officers of the court ... is undermined.”); *Alward v. Johnston*, 171 N.H. 574 (2018) (“The general function of judicial estoppel is to prevent abuse of the judicial process, resulting in an affront to the integrity of the courts.”); *State v. Mueller*, 166 N.H. 65, 68 (2014) (harmless error rule predicated on preservation of “integrity or public reputation of judicial proceedings”); *In re WMUR Channel 9*, 148 N.H. 644, 648 (2002) (whether cameras in courtroom “detract from the integrity of the proceedings”); *State v. Michaud*, 146 N.H. 29, 33 (2001) (whether dismissal of indictment for prosecutor’s misconduct is necessary to maintain “integrity of the court”).

The Probate Court had a duty to enforce. By not implementing its order, the court breached its duty and condoned violation of its integrity. Michael now has little incentive to comply with the court’s subsequent August 2019 order, because it is the same as the prior February 2019 one – which the court proved had no teeth. For these reasons, this court should reverse.

III. Michael Sought Equitable Relief Despite Unclean Hands

“New Hampshire adheres to the age-old precept that equitable relief will be denied if the party seeking it ‘comes to the court with unclean hands.’”

Arthur Young & Co. v. Sutherland, 631 A.2d 354, 367 (D.C. 1993); *Smith v. Lillian Donahue Trust*, 157 N.H. 502, 510 (2008); *Miami Subs Corp. v. Murray Family Trust*, 142 N.H. 501, 507 (1997); *Noddin v. Noddin*, 123 N.H. 73, 76 (1983); *Morrill v. Amoskeag Savings Bank*, 90 N.H. 358, 368 (1939).

Here, Michael asked the court for equitable relief – “to compel the transfer of the property” to him, MOTION TO COMPEL TRANSFER OF PROPERTY (Apr. 9, 2019), *Appx.* at 49, after knowingly and purposely violating the court’s order, even when he had multiple ways to accomplish the purchase within its terms.

While Michael might argue that both parties’ hands are unclean, the dirt is not symmetrical. Michael has repeatedly – at least three times – caused some failure to purchase the property after purporting a wish to buy. James can be tagged with, at most, the Trust’s attorney having been overly rigid regarding the December 2016 deadline. Accordingly, the Probate Court’s insistence on indulging Michael was misguided, unlawful, and unjust.

IV. There Is No Deference to the Lower Court's Refusal to Implement its Order

Court orders that have become final cannot be set aside without grievous cause. *Matter of Harman*, 168 N.H. 372, 375 (2015) (“[A] final judgment of divorce may be set aside or vacated when procured by fraud, accident, mistake, or misfortune.”); *Conant v. O’Meara*, 167 N.H. 644, 651 (2015) (“fraud will vitiate a judgment”); *Lancaster Nat. Bank v. Whitefield Sav. Bank & Tr. Co.*, 92 N.H. 337, 339 (1943) (“blamelessly unappreciated and unrealized” mistake of fact); *Merrimack Valley Wood Prod., Inc. v. Near*, 152 N.H. 192 (2005).

The Probate Court’s February 2019 order became final, and no party has alleged fraud, accident, mistake, or misfortune. Thus, the order cannot be set aside.

Court orders that have become final are interpreted according to the “four corners of the decree.” Once a court order has become final, there is no deference accorded to a lower court’s construction:

When we interpret court orders, the determining factor is the intent of the issuing court. As a general matter, a court decree or judgment is to be construed with reference to the issues it was meant to decide. While a trial court’s construction of its own decree may be accorded deference on appeal, after the time for appeal from a judgment has passed, the trial court’s post-judgment interpretation of the judgment is irrelevant to an appellate court’s determination of the judgment’s meaning. Neither what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance. What the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant.

Edwards v. Ral Automotive Group Inc., 156 N.H. 700, 705 (2008) (quotations and citations omitted).

While courts may have the authority to revisit their orders, doctrines

establishing such authority do not apply here because the court never revisited or reinterpreted a prior order.

In the present case, there was no request or effort to modify the February 2019 order setting forth the requirements for Michael to avoid extinguishing his right to purchase. Rather, the court re-issued an identical enforcement provision. In addition, the Probate Court made clear that its August 2019 non-enforcement holding was based on “information provided at the hearing and in the pleadings,” ORDER (Feb. 8, 2019), and not on the credibility of witnesses.

Accordingly, this case involves an issue of law, and this court accords no deference to the Probate Court’s refusal to enforce the terms of the February 2019 order.

CONCLUSION

Courts have a duty to enforce their reasonable orders. Here, by repeatedly paying the wrong payee in direct contravention of a clear and specific order, Michael deliberately violated the court order. The Probate Court was thus obliged to extinguish Michael's right to purchase. This court should reverse, to preserve the dignity and integrity of the Probate Court and the judicial system.

REQUEST FOR ORAL ARGUMENT

Because the issue raised in this appeal concerns the integrity of the judicial system, this court should entertain oral argument.

Respectfully submitted,

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By his Attorney,
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Dated: March 23, 2020

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief or is contained in a separate appendix. I further certify that this brief contains no more than 9,500 words, exclusive of those portions which are exempted.

I further certify that on March 23, 2020, copies of the foregoing will be forwarded to Doreen F. Connor, Esq.; and to Sarah A. Paris, Esq.

Dated: March 23, 2020

Joshua L. Gordon, Esq.

ADDENDUM

1. *In re Simone Garczynski Irrevocable Trust*,
N.H. Sup.Ct. No. 2017-0487 (decided July 26, 2018). [29](#)
2. PROBATE COURT ORDER (Feb. 8, 2019)
(setting forth purchase requirements). [34](#)
3. PROBATE COURT ORDER (Aug. 14, 2019)
(declining to enforce February 2019 order, and restating
conditions of sale). [44](#)