

State of New Hampshire  
Supreme Court

NO. 2009-0623

2010 TERM

FEBRUARY SESSION

In the Matter of Milena Matyas and John Toth

RULE 7 APPEAL OF FINAL DECISION OF  
NEWPORT FAMILY DIVISION COURT

BRIEF OF RESPONDENT/APPELLANT JOHN TOTH

By: Joshua L. Gordon, Esq.  
NH Bar ID No. 9046  
Law Office of Joshua L. Gordon  
26 S. Main St., #175  
Concord, NH 03301  
(603) 226-4225

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## QUESTIONS PRESENTED

- I. Did the court err in not considering part of the marital estate, and in not equitably dividing, a property interest which Ms. Matyas co-owns with her sister in Hungary?  
Preserved: PROPOSED ORDER ¶ 15 (Mar. 11, 2009), *appx.* at 5; PROPOSED ORDER ¶ 15 (Apr. 29, 2009), *appx.* at 19; RESPONDENT'S MOTION TO RECONSIDER ¶¶ 3-4 (June 29, 2009), *appx.* at 34; *Trn.* at 184-85

## STATEMENT OF FACTS AND STATEMENT OF THE CASE

John Toth was born in Hungary but emigrated to Canada. In 1987 when he was 43, he visited his mother in Hungary. There he met Milena Matyas, then 20, and they were married in Budapest. FINAL ORDER (June 18, 2009), *appx.* at 31. The couple returned to Canada. Mr. Toth had some success as a graphic designer, but ultimately his career stalled. Ms. Matyas got her nursing education, and bore the couple a son. FINAL ORDER (June 18, 2009), *appx.* at 31.

The family moved to New Hampshire in 1996 when Ms. Matyas got a job at the Dartmouth-Hitchcock Hospital in Lebanon. Mr. Toth stayed home to raise the child, MOTION FOR TEMPORARY ORDER (Oct. 14, 2008), *appx.* at 2, and later worked as a part-time school bus driver. Ms. Matyas's enjoyed a successful nursing career; in 2002 she was diagnosed with a degenerative disease, but was able to keep working with the support Mr. Toth provided at home.

Ms. Matyas alleges Mr. Toth has a controlling personality, whereas Mr. Toth found Ms. Matyas unreasonably incommunicative. Their relationship appears to have lacked some intimacy and suffered some infidelity. Ms. Matyas filed for divorce when their child became emancipated. *Trn.* at 87.

The court rejected both parties' request for a cause-based divorce. FINAL ORDER (June 18, 2009), *appx.* at 31. The issues it decided included alimony (none) and property division. The court awarded each their respective pension plans, bank accounts, and cars, and gave Ms. Matyas the marital home and its contents. FINAL DECREE (June 18, 2009), *appx.* at 25. As Mr. Toth's mother died shortly before the final hearing, Ms. Matyas made no claim to the house in Hungary he inherited. *Trn.* at 113, 185-86.

The single remaining dispute concerns an apartment located in Budapest, Hungary, which

is owned by Ms. Matyas and her sister. The property is held as a usufruct under Hungarian law – similar to a life estate. Ms. Matyas and her sister inherited the residence from their family and currently own it, while their mother lives there for the term of her life. *Trn.* at 48-53. Ms. Matyas’s sister does not intend to sell her interest. *Trn.* at 51, 54. It was estimated that if divided, the property is worth about \$150,000 to each party.<sup>1</sup> MOTION FOR TEMPORARY ORDER (Oct. 22, 2008), *appx.* at 1; MOTION FOR TEMPORARY ORDER (Jan. 27, 2009), *appx.* at 4; MOTION FOR OBJECTION (Mar. 13, 2009), *appx.* at 11; OBJECTION TO MOTION FOR RECONSIDERATION ¶¶ 9-15 (July 9, 2009), *appx.* at 37.

The Newport Family Division Court (*Bruce A. Cardello, J.*), declined to include the Budapest property in the marital estate. It held that Ms. Matyas:

does have some contingency interest, a remainder of a life estate in real estate in Hungary, but hers is only a ½ interest and it cannot be sold. The evidence was clear that any interest she may have in that real estate in Hungary holds no present financial value at all for [Ms. Matyas] due to her lack of control over it.

FINAL ORDER (June 18, 2009), *appx.* at 31, 32-33. Mr. Toth asked the court for reconsideration, which was denied. RESPONDENT’S MOTION TO RECONSIDER (June 29, 2009), *appx.* at 34; *Id* (notation) (July 15, 2009); NOTICE OF DECISION (July 28, 2009), *appx.* at 40. This appeal followed.

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<sup>1</sup>Mr. Toth had an appraisal, which was disclosed to Ms. Matyas, *see* MOTION FOR OBJECTION (Mar. 13, 2009), *appx.* at 11, 12, and which estimated the total value of the property at 61,102,000 Hungarian Forints, or about \$316,000 United States Dollars. The appraisal was in Hungarian, but had not been translated into English at the time of trial, so was not made a part of the record.

## **SUMMARY OF ARGUMENT**

After setting forth the facts, John Toth argues that property located in Hungary and belonging to Milena Matyas and her sister must be included in the marital estate to be equitably distributed. The definition of property in New Hampshire's divorce property division statute is broad, Ms. Matyas has an ownership interest, and the property has significant value.

## ARGUMENT

### I. Ms. Matyas's Interest in Hungarian Property Must be Included in Marital Estate

#### A. Hungarian Property Law

Property law in Hungary has been subject to a century-long transition involving monarchy, land reform, revolution, communism, and today's parliamentary republican government. Prior to the communist era, land law was largely a collection of maxims and not based in precedent.

Despite the conundrum of property law in a communist regime, the communists created a civil code and a court system, which imposed some regularity on land law. Thus current property law is controlled by the Civil Code, known as the Polgári Törvénykönyvr, or PTK, adopted in 1959.<sup>2</sup> Hugh Spall, Jr., *The Development of Private Property Rights in Communist Hungary and the Theory of Path Dependent Institutional Change*, 4 GLOBAL JURIST 2 (2004), *appx.* at 49; Hugh M. Spall, Jr., *Property Law in a Transitional Economy: The Case of Hungary*, Central Washington University (2000), unpublished, submitting author Academy of Business & Administrative Sciences, Globalization and Emerging Economies International Conference, Prague, Czech Republic (July 12, 2000), available at [www.sba.muohio.edu/abas/2000/PropertyLawinTransEcon.pdf](http://www.sba.muohio.edu/abas/2000/PropertyLawinTransEcon.pdf), *appx.* at 62.

The 1959 Code generally “authorized the acquisition of ownership rights in land and in anything that can be taken into possession,” allowed property to be acquired by gift, and recognized joint ownership. Spall, *Property Law in a Transitional Economy*, *appx.* at 65.

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<sup>2</sup>Portions of the 1959 Civil Code, Polgári Törvénykönyvr, were submitted by Ms. Matyas to the court below as an exhibit. EXH. 10, *see Trn.* at 111, 114. This and other sources of Hungarian law cited here are included in the appendix.

## 1. Usufruct

The Code defines usufruct: “A person may possess, use, and collect the proceeds of a property owned by another person by virtue of usufruct.” POLGÁRI TÖRVÉNYKÖNYVR § 157(1), *appx.* at 43. The two parties are called “owner” and “beneficiary.” The usufruct “shall remain in force even if ownership of the property is transferred,” POLGÁRI TÖRVÉNYKÖNYVR § 157(2), *appx.* at 43, and its term may not “exceed the lifetime of the beneficiary.” The Code sets forth rules for creation and termination of usufruct, and allocates responsibilities, liabilities, and maintenance obligations of the owner and beneficiary. POLGÁRI TÖRVÉNYKÖNYVR §§ 158-165, *appx.* at 43-45.

The Code ... recognized a right, called usufruct, which consisted of temporary and permanent use rights in another’s property or to the collection of the proceeds produced by an item of property. Usufruct rights could exist in real or personal property. Their maximum permissible length was the life of the owner. The transfer of the property subject to the usufruct did not destroy the usufruct. The owner of a usufruct could not transfer it to a third party and had to register the usufruct in the property register before he had enforceable rights against a bona fide purchaser for value. The usufruct appears to be identical to the common law property interest denominated as an easement in gross.

Spall, *Property Law in a Transitional Economy* at 62, 65.

## 2. Multiple Owners

The 1959 Code allows land to be owned by more than one person.

Although a “unanimous decision by the co-owners shall be required for ...transferring ownership of the entire thing, POLGÁRI TÖRVÉNYKÖNYVR § 144, *appx.* at 42, “[e]ach of the co-owners may freely dispose of his share of the property.” *Id.* at § 145. In that case, the other co-owners have a right of first refusal. *Id.* Thus, “a co-owner could dispose of his/her interest in the

property but the other co-owners had a preemptive right to acquire the share that was offered for sale.” Spall, *Property Law in a Transitional Economy* at 6.

Any individual co-owner could demand termination of the co-ownership. Termination resulted in division in kind unless such a division would prevent proper use of the property or result in a substantial loss of value. In such a case, the property had to be sold and the proceeds divided among the co-owners in proportion to their interests. Co-owners had the right of pre-emption against third parties. These provisions, with the exception of the pre-emption right, are identical to United States law.

Spall, *Property Law in a Transitional Economy* at 62, 68. Thus it appears that if the entire piece of property were to be alienated, all co-owners must agree; but if just one wants to sell her respective interest, there is no bar except that the co-owner has purchase priority over other potential buyers.

#### **B. Parties’ Understanding of Hungarian Property Law**

Although both parties offered opinions of experts in Hungarian law, the court did not hear them. Nonetheless, the parties’ understanding of Hungarian law appears to be largely accurate.

Ms. Matyas testified that “My mother has a usufructuary right, and what it means, that the ownership belongs to me and my sister, but she has the right to stay and live in the apartment as long as she is alive.” *Trn.* at 112. Ms. Matyas’s sister Monica testified that she is the legal half-owner of their mother’s apartment, it could be sold if the sisters agreed, her interest has some monetary value, and that value would be effected by the fact that a buyer would have to buy subject to the sisters’ mother living there for life. *Trn.* at 52-53.

### C. Usufruct in American Law

In American law and in New Hampshire specifically, a usufruct is generally seen as a life estate. *Boggs v. Boggs*, 520 U.S. 833 (1997) (“A lifetime usufruct is the rough equivalent of a common-law life estate.”); *Weeks v. Weeks*, 5 N.H. 326 (1831) (“a gift of a chattel for life is a gift of the usufruct only”); *U. S. Daughters of 1812-Chalmette Chapter v. Louisiana Dept. of Culture, Recreation and Tourism*, 404 So.2d 941 (La. 1981) (“A usufruct in favor of a natural person generally terminates upon the death of the usufructuary.”); *Winsberg v. Winsberg*, 96 So. 2d 44 (La. 1957).

The term “usufruct” refers to the right to the use, enjoyment, and avail of property belonging to another. It refers to the use and enjoyment of the profits of property belonging to another as long as that property is not damaged or altered in any way. When a usufruct is created, no estate passes out of the landlord and the usufruct may not be conveyed except by the landlord’s consent, and it is not subject to levy and sale.

...

A usufruct is of limited duration, and when it ends, the usufructuary is obligated to deliver the property to its owner. The usufruct also is obligated to preserve the substance of the property for the property owner. A usufruct in favor of a natural person generally terminates upon the death of the usufructuary.

28 AM. JUR. 2d *Estates* § 6 (usufruct).

When construing Hungarian usufructs, American courts have treated them as life estates. *See, Alvary v. United States*, 302 F.2d 790 (2nd Cir. 1962); *De Thassy v. C.I.R.*, T.C. Memo. 1963-180 (Tax Court. 1963). In accord with this, the court below understood Ms. Matyas’s interest as a “remainder of a life estate.” FINAL ORDER (June 18, 2009), *appx.* at 32.

#### **D. New Hampshire's Broad Definition of Property Includes Usufruct**

The New Hampshire statute defining the marital estate and what property belongs in it is very broad:

Property shall include all tangible and intangible property and assets, real or personal, belonging to either or both parties, whether title to the property is held in the name of either or both parties.

RSA 458:16-a, I. Given the statute's breadth, this court has rarely held that an item is outside its purview because "[t]he plain language of RSA 458:16-a, I, does not permit ... special exceptions." *In re Preston*, 147 N.H. 48, 51(N.H. 2001).

Unique or peculiar things are included as "property" in the statute. *See, e.g., In re Chamberlin*, 155 N.H. 13 (2007) (interest from irrevocable charitable trust constitutes marital property); *In re Harvey*, 153 N.H. 425 (2006) (gifted interests in real estate, timeshares and dental practice held marital property); *Holliday v. Holliday*, 139 N.H. 213 (1994) (no distinction between property brought to marriage and acquired during marriage); *Flaherty v. Flaherty*, 138 N.H. 337 (1994) (property in spendthrift trust part of marital estate).

Assets that present difficult ownership or valuation problems are not excluded from the marital estate. *See, e.g., Halliday v. Halliday*, 134 N.H. 388 (1991) (uncertainty of military pension vesting not reason to exclude from marital estate); *In re Valence*, 147 N.H. 663 (2002) (uncertainty of value of unvested stock options not reason to exclude from marital estate); *Bursey v. Town of Hudson*, 143 N.H. 42 (1998) (interest in corporation which held interest in real estate included in marital estate); *Hodgins v. Hodgins*, 126 N.H. 711 (1985) (future pension benefits included in marital estate).

Property encumbered by a life estate is routinely considered marital property. *See, e.g.,*

*Smith v. Truglia*, 135 N.H. 18 (1991) (“One of the marital assets was a parcel of land ... in which the defendant’s mother owned a life estate”); *Miller v. Miller*, 133 N.H. 587 (1990).

The extent to which a party has control over property is not a statutory consideration in determining whether it is part of the marital estate. In *Halliday v. Halliday*, 134 N.H. 388 (1991), for instance, it appears that neither party had much control over the military pension that was included in the marital estate.

#### **E. Hungarian Usufruct Must be Included in Marital Estate**

Whether the Hungarian property is classified as a usufruct, a life estate, or something else, Mr. Matyas’s interest in it must be included in the marital estate. There is no provision of New Hampshire’s broad property division statute exempting it. The lower court’s ruling that Ms. Matyas lacked control over the asset is not relevant. Its finding that the property cannot be sold, moreover, is not in accord with Hungarian law or even the parties’ understanding of its status.

## II. Value of the Hungarian Usufruct to the Marital Estate

### A. Usufruct has Value

As a property interest, the Hungarian usufruct has value. The Second Circuit ruled that a taxpayer was allowed to deduct from income taxes as a business loss the value of his Hungarian usufruct after it was confiscated by the communists in the early 1950s. *Alvary v. United States*, 302 F.2d 790 (2nd Cir. 1962).

Values are routinely placed on usufructs in American jurisdictions where they exist, and those values are routinely divided in marital cases.

Upon the parties' divorce in *Brown v. Brown*, 284 S.W.3d 17 (Ark. 2008), for instance, the court divided their property. When his father died Mr. Brown had inherited his parents' property interests, subject to a usufruct wherein his mother would live in the home for life. Like Ms. Matyas here, Mr. Brown argued that "due to the usufruct in favor of his mother, the property ... has no present value, and perhaps even no future value, to him." *Brown*, 284 S.W.3d at 22. In making the property division, the Arkansas Supreme Court rejected the argument. It held that Mr. Brown "will receive the value ... at the termination of the usufruct, which will occur at the time of his mother's remarriage or death," and that therefore "[t]he limitation on [Mr. Brown's] interest ..., in the form of the usufruct, is of no relevance, as the opportunity to add to his estate is a proper consideration." *Id.* at 23.

Similarly, in *Butler v. Butler*, 684 S.E.2d 191 (S.C. App. 2009), Mr. Butler sought to reduce alimony when the former Ms. Butler inherited a usufruct interest in her mother's house, an interest she co-owned with her sibling. Although it held little value, the lower court "expressly considered the usufruct interest in assessing the value of [wife's] assets." *Butler*, 684 S.E.2d at 195.

These cases demonstrate that it is commonplace for courts to determine the value of usufruct interests and to apply their value in family law matters.

## **B. Method of Valuation**

The method of valuation, although somewhat complex, is not mysterious. “A well-accepted method of determining the value of a life estate is to first determine the value of the fee, and then, knowing the age of the holder of the life estate, to look to published tables that contain life estate and remainder fractions.” *Simpson v. Calivas*, 139 N.H. 1 (1994); *Smith v. Truglia*, 135 N.H. 18 (1991) (suggesting similar methodology to value right of first refusal).

In Louisiana, a jurisdiction in which usufructs exist, valuation is made in the same manner. *Norsworthy v. Succession of Norsworthy*, 704 So.2d 953 (La. App. 1997) (value is established at end of usufruct term, taking into account mortality tables and present-value of money); *Succession of Caraway*, 639 So.2d 415 (La. App. 1994) (same); *Succession of Mullin v. Mullin*, 631 So.2d 647 (La. App. 1994) (same); *Succession of Henry*, 287 So.2d 214 (La. App. 1973) (providing example of mathematical computation).

Here, Ms. Matyas’s own witness – her sister with whom she co-owns the usufruct – testified that the sisters’ Hungarian property, despite the difficulty of establishing it, has a present monetary value. *Trn.* at 52-53.

It is thus apparent the lower court’s ruling – that the “real estate in Hungary holds no present financial value,” FINAL ORDER (June 18, 2009), *appx.* at 32-33 – is not accurate.

Most of the facts necessary to determine the value are known. Ms. Matyas acknowledged that the property is currently worth about \$150,000 to each party. OBJECTION TO MOTION

RECONSIDERATION ¶ 14 (July 9, 2009), *appx.* at 37 (Mr. Toth “goes on to claim that the value assigned to the Hungarian property should be \$150,000.00, which is the full value claimed by [Mr. Toth], and not the value less the value of the life estate.”).

Life expectancy tables are facts which this Court has directed should be admitted by judicial notice. *Simpson v. Calivas*, 139 N.H. at 11 (citing SUP.CT.R. 201 and SUPER.CT.R. 63A). Facts contained in the Central Intelligence Agency (CIA) World Factbook are routinely taken by judicial notice. *See e.g., Sadiki v. Gonzales*, 218 Fed.Appx. 27 (2<sup>nd</sup> Cir. 2007); *Federal Marine Terminals, Inc. v. Worcester Peat Co., Inc.*, 2000 WL 1061227 (D. Me. 2000).

According to the CIA, the 2009 life expectancy of a woman in Hungary 77.87 years. CENTRAL INTELLIGENCE AGENCY, *The World Factbook*, available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/hu.html>, *appx.* at 84, 85. The interest rate to be used for calculation of present value can be readily established.

Thus, upon remand, the lower court need only carry out the mathematical computation specified in *Simpson v. Calivas* to arrive at the total value of the Hungarian usufruct, divide by two because Ms. Matyas’s sister owns half, and then give Mr. Toth one-half that value as his share of the marital estate.

## CONCLUSION

In accordance with the foregoing, this Court should decree that the value of the Hungarian usufruct is part of the marital estate, and order that one-half its value in the marital estate should be paid to Mr. Toth by Ms. Matyas.

Respectfully submitted,

John Toth  
By his Attorney,

**Law Office of Joshua L. Gordon**

Dated: February 4, 2010

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Joshua L. Gordon, Esq.  
NH Bar ID No. 9046  
26 S. Main St., #175  
Concord, NH 03301  
(603) 226-4225

## REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for John Toth requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because it will give the parties the opportunity to discuss the implications of foreign law.

I hereby certify that on February 4, 2010, copies of the foregoing will be forwarded to Donald P. LoCascio, Esq.

Dated: February 4, 2010

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Joshua L. Gordon, Esq.