Maine
LAWYERS REVIEW

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Education Isn't Limited to The Classroom

Maine's Law Court finally answered the age-old question asked of every teacher since the first sunny Spring day, "Can we have class outside today?" with a resounding "Yes."

In October 2014, Fryeburg Academy, a private school located in the Town of Fryeburg, applied to the Town Planning Board for permits authorizing changes in the Academy's use of two parcels of land; one referred to as the Land Lot, the other, the House Lot.

The Academy sought to use the Land Lot, previously used for agricultural purposes, to teach outdoor classes on environmental sciences, agricultural studies, and physical education. The Academy sought to repurpose the House Lot, previously used for residential purposes, as offices for its admissions and advancement department, and for related storage.

Mary Costigan

The Planning Board approved both applications, after which the Fryeburg Trust, which owns land abutting both lots, appealed the Planning Board's decisions. Those were upheld by the Appeal Board, whose decision was appealed by the Trust and upheld by the Superior Court with regard to the Land Lot; but overturned regarding the House Lot, finding no educational use as classes would not be taught there.

The Trust timely appealed the decision regarding the Land Lot. The Academy and Town of Fryeburg timely appealed the decision concerning the House Lot. The Law Court ultimately found for the Academy; holding, in essence, that buildings need not be classrooms to qualify as educational buildings under zoning laws, despite the Trust's argument to the contrary.

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Quote of the Fortnight

"The real index of civilization is when people are kinder than they need to be."

— Louis de Bernieres, novelist
(b. 1954)

Auto Dealer Wins on Franchise Amendment Claim

Darling's, an authorized Ford dealer since 1989, began its foray into conveyance sales in 1903, when it first started selling cars, trucks, and even bicycles. It has since grown exponentially. The Darling's brand today includes dealerships in Bangor, Ellsworth, and Augusta for auto makers like Audi, Buick, Chevy, Ford, Jeep, Nissan, Volkswagen, Volvo, and more. But you don't get to be a major player in the world of car sales without hitting a few bumps in the road. Darling's Ford dealership went through a ten-year stretch of bumps en route to a Law Court decision in the dealership's favor, regarding bonus payments earned by the dealership.

Judy Metcalf

Noreen Patient

In 2000, amid much fanfare and a glamorous Las Vegas event, Ford launched the Blue Oval Certified (BOC) program, a bonus program paying dealers that met certain standards a 1.25% case bonus on the retail price of each Ford sold by the dealership. At first glance, one and a quarter percent may not seem like much, but applied to a dealership's sales volume, and taking into consideration Ford vehicles range between $15,000 for a sub-compact to nearly $50,000 for an SUV, these numbers add up quickly.

Not every dealership qualified as a BOC dealership; it required certification, dealer-initiated programs, elevated levels of customer care. Certification was heavily dependent upon customer feedback, so dealerships like Darling's, that first qualified as a BOC dealership in 2001 and was the first dealership in Maine to qualify as a BOC dealership, put in considerable work in order to qualify for these bonus payments.

Judy A.S. Metcalf of Eaton Peabody, who represented Darling's throughout this dispute noted that, "It required a huge commitment on the part of the dealers. It was a game-changer in how they all went about things — in terms of lighting in parking lots, a specific receptionist, hiring people; and it was incredibly successful in turning around what Ford perceived as a low perception among American manufacturers."

Maybe it was too successful, as Ford announced, in August 2004, that it was discontinuing the program as of April 1, 2005. While certainly disappointed that the program was being discontinued, the real issue Darling's took with the termination of the agreement was that Ford didn't follow the requirements of the Business Practices Between Motor Vehicle Manufacturers, Distributor and Dealers Act, 10 M.R.S. §§ 1171–1190-A, in issuing the notice. Specifically, § 1174(3)(B) requires notice of any substantial franchise change to be made by giving 90-days' written notice via certified mail — a step Ford declined to take and, to date, has still failed to do.

Darling's procedural journey started with its complaint against Ford filed with the Maine Motor Vehicle Franchise Board in December 2006, which eventually wound its way through not one, but two Law Court decisions; the second of which is discussed in this issue. Noreen A. Patient, also with Eaton Peabody, noted just how long that road has been,

Case Summary on pg. 3

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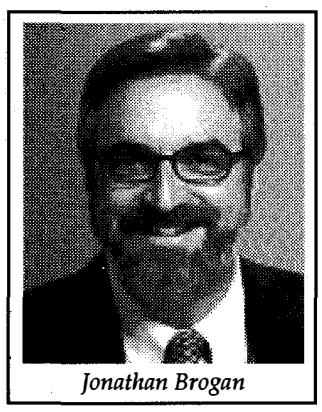
Politics as Usual?

The case of *Plante v. Long* is but the latest chapter in a long-running political battle that has plagued the Town of Berwick. According to Jonathan Brogan, who represents defendant Ronald P. Long, much of the turmoil began when the town sought to build a new public safety building, housing both the police department and the fire department. Some townspeople opposed the new construction, and the dispute, as they say, got ugly.



Jonathan Brogan

Plaintiff Bruce Plante, the town's assistant fire chief, was on the Board of Selectmen at the time. An article from September 2012, details how Plante sought to obtain a set of emails, under the Freedom of Access Act, that allegedly contained allegations he was fabricating emergency calls and responding to calls unnecessarily, in order to justify the department's size and budget.[1] The York County Superior Court ultimately ruled that the chair was justified in withholding three of the emails, as exempt from disclosure, because they related to complaints or charges of misconduct.

The controversy surrounding Plante dates back at least as far as early 2010. WMTW-TV in Portland reported on a January 2010 Board of Selectmen meeting at which residents called for his resignation. The complaint, at the time, was that Plante engaged in so-called "bullying" in order to push the agenda of the fire department.[2] Plante denied the allegations, asserting that he does what is best for the town, will continue to do so, and noting that he "tell[s] 'em what [he] thinks, [and] they don't always like it."

Many of these allegations of "bullying" reappeared in this most recent litigation. Town resident Roland Long is one of those residents who disagree with Plante. He has sent numerous emails to town officials, as well as filed complaints against Bruce Plante, as well as Dennis Plante, the town's fire chief. They sued, alleging that Long's comments about them were defamatory.

Long's summary judgment motion was granted for the reason that

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Business Issues: Equality and Fairness in Business Transfer to Kids

by David V. Jean, CPA, CExP

Stan Briggs was perplexed when he told his advisor, "My son, Patrick, has worked in the business for the last twelve years. In that time, the business has tripled its revenues and its profits. I've started to think about scaling back my activity and I realize how important it is (for my own retirement income) that Patrick be motivated to continue to grow the company profitably.

Since I'd like to have him own the business someday, is there a way to start transferring it to him now? It seems unfair to make him pay for all of the business value, since he created so much of it and since he is so important to my financial security. My son, of course, agrees wholeheartedly with this analysis, but I'm not so sure that his mother and sister are on the same page. What issues do I need to consider?"

Equal vs. Fair

First, Stan must determine if his son is already paying for the business through "sweat equity" (more working hours, greater risk, and lower compensation than he could have earned elsewhere). If so, any reduction in the purchase price is not a gift, but rather recognition of Patrick's contribution.

Second, are Patrick's efforts adding value to the business? If so, should Patrick have to pay for his efforts by receiving a reduced share of Stan's ultimate estate?

Third, if Patrick's involvement in the business is critical to Stan's retirement, Stan should consider tying his son to the business using "golden handcuffs," such as awarding ownership if Patrick stays to run the business — and the business stays profitable.

Fourth, in many business-owning families, every child is offered the opportunity for involvement in — and ultimately ownership of — the family business. Many times, however, only one child forgoes the allure of the "outside world" to commit to working in the sometimes uncertain and illiquid world of a closely-held business. (Not to mention that having you for a boss should have some payoff!)

David Jean

In short, make certain the transfer of ownership to a child is also a good business and retirement decision.

Where to Start

Analyze the transfer issue in light of your client's goals. Be certain that any transfer to children will satisfy their exit objectives. Explore other issues and concerns that may arise as you begin to transfer ownership to a child. For example, how much money will you need after you leave your business? What, if anything, needs to be done for your key employees or for your other children? Temper and qualify all transfers to children in light of your over-arching exit objectives. In short, make certain the transfer of ownership to a child is also a good business and retirement decision.

Using Advisors

When considering a transfer of your business to a child, don't underestimate the value of using experienced consultants and advisors. Their counsel, experience and input are perhaps never more important than when dealing with your own family. The need for independent, non-emotionally-charged advice can be critical. Having worked with other family businesses, these consultants along with your other advisors can offer practical advice.

Decision Framework

- First determine the level of contribution your business-active child has made to the value of the business.
- Second, determine the contribution that child must continue to make to ensure the achievement of your exit objectives. Those determinations can form the basis of what is "fair" with respect to both the business-active child and the other children.
- Third, use your advisors to help explain, guide and implement the transfer of the business.

David V. Jean, CPA, CExP, is the Director of Altus Exit Strategies, LLC. As a member of the BEI Network of Exit Planning Advisors, David helps business owners navigate a successful exit from their businesses. As a CPA, a Certified Exit Planner, and Principal with Albin, Randall & Bennett, CPAs, he brings financial consulting and tax expertise to the process.

Classroom *continued from page 1*

With regard to the Land Lot, the Law Court found the issue quite clear — the proposed change was to use the lot to teach classes, essentially rendering it an outdoor classroom, the very definition of an educational purpose. "The Academy's proposed use of the Land Lot to teach courses ... to students attending a secondary school fits squarely within the definition." *Fryeburg Trust* at ¶9.

The Court declined to read the Trust's suggested restrictions into the zoning ordinance, pointing out that doing so "would create an absurd result." It cited to a previous decision, wherein it held that the court may reject any construction that "creates absurd, illogical, unreasonable, inconsistent, or anomalous results." *See Dickau v. Vt. Mut. Ins. Co.* (ME 2014).

On the House Lot, again the Law Court agreed with the Planning Board in holding that the proposed use of the lot for administrative offices was integral to the operation of the school and, therefore, indistinguishable from the school. What the Trust argued for was described by the Law Court as "a crabbed reading" of the zoning ordinances — a reading that would only result in an illogical result — an approach which the Law Court again refused to take; finding that "schools comprise not only classrooms and teachers, but also administrators and administrative offices, which are integral to the functioning of the school." *Fryeburg Trust* at ¶11.

Perhaps most telling was the Law Court's quote from *Jordan v. City of Ellsworth* (ME 2003), "We are not required to disregard common sense when we interpret municipal ordinances." It is common sense that a secondary school's use of a field as an outdoor classroom for agricultural studies is an educational purpose. It is common sense that schools require administration (and administrators), maintenance, and many other support functions that aren't classrooms, to support the educational mission.

Fryeburg Academy was represented by Mary E. Costigan of Bernstein Shur in Portland. Edward L. Dilworth, III, of Dow's Law Office, P.A., in Norway, represented Fryeburg Trust. A request for comment from counsel from Fryeburg Academy was not returned by press time.

The opinion in *Fryeburg Trust v. Town of Fryeburg, et al.*, MLR#307-16, is summarized in this issue at page 5.

— Regan A. Sweeney, regans@mainelawyersreview.com

Franchise *continued from page 1*

"We started in front of an administrative body, we presented this to two different juries and argued before the Law Court twice, so it's the full spectrum of trial work."

It's not often that cases continue for 10% of a century, but in this instance it took a literal decade of litigation. "There are not many clients that will go through ten years of litigation to get to the point that [they] believe in. They believed in us from the outset, and were adamant that the statute meant what it says," said Patient. Metcalf echoed those sentiments, noting, "We are blessed to have a client that believes in both its rights under the law and its counsel. You cannot get what you're entitled to unless you fight for what you're entitled to."

The case has been remanded to the Business and Consumer docket for a new trial on damages, but is currently awaiting expiration of the period in which to request reconsideration.

The opinion in *Ford Motor Co. v. Darling's, et al.*, MLR#304-16, is summarized in this issue at page 3.

— Regan A. Sweeney, regans@mainelawyersreview.com

CURRENT DECISIONS INDEX

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Maine Law Court

FAMILY LAW
Modification of PR&R Order

Where trial court record shows that court properly considered 19-A M.R.S. § 1653(3) best interest factors, and made findings that one parent acted deceitfully and deliberately to restrict other parent's access to child, motion to modify parental rights and responsibilities was appropriately granted.

Clark and Leeman had a minor child together, and on February 8, 2011, the York District Court issued a parental rights and responsibilities (PR&R) judgment pertaining to their daughter. That judgment allocated PR&R to the parties, gave Clark primary residency, and made specific provisions for Leeman's visitation.

In the summer of 2014, Clark indicated his desire to move with the child from Massachusetts to Illinois. Due to this change, the parties sought and obtained modification of the PR&R order. However, Clark moved to Illinois but did not take daughter with him; instead she resided at her grandmother's residence in Massachusetts and attended the school there. Clark never told Leeman that their daughter didn't go with him and, as a result, Leeman did not see their child for five months.

Upon discovering the child was still in Massachusetts, Leeman moved to modify the PR&R order. After a hearing, the motion was granted and the child's primary residence was changed from Clark to Leeman. In its ruling, the Court made specific findings that Clark's actions "were clearly not in the best interests of [the child] and ... were detrimental to her," and that "Clark's dishonest acts 'disrupted [the child's] relationship with [Leeman].'"

Clark appealed from that ruling, arguing that the court erred in changing primary residence and that the change was not in the child's best interests.

The Law Court found that the trial court properly considered the relevant best interest factors, enumerated in 19-A M.R.S. § 1653(3). The trial court also found that Clark had engaged in an ongoing pattern of deceitful conduct for the purpose of preventing Leeman from seeing her daughter, which not only restricted Leeman's access to their child, but "required the child to be a part of his 'subterfuge.'"

Judgment affirmed.

Clark v. Leeman (Jabar, J.), 2016 ME 170, Yor-16-115, 11-29-2016

Appealed from District Court (York, *Janelle, J.*)

Matthew W. Howell for appellant Clark.

Kenneth P. Altshuer for appellee Leeman.

MLR #303-16 — 5 pages

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FRANCHISE LAW
Motor Vehicle Manufacturers, Distributors and Dealers Act
Damages

Where motor vehicle manufacturer failed to provide requisite notice under Motor Vehicle Manufacturers, Distributors and Dealers Act (MVMDD Act), 10 M.R.S. § 1171 *et seq.*, proposed modification of franchise is ineffective unless and until manufacturer provides dealer with written notice in conformity with statute.

Darling's, a local automobile dealership based in Bangor, entered into a service and sales agreement with Ford Motor Co. and became an authorized Ford dealer in 1989. In 2000, Ford created the Blue Oval Certified (BOC) program, a bonus program whereby dealers that met certain standards were paid a 1.25% case bonus on the retail price of each vehicle sold by the dealership. Darling's became certified as a BOC dealership in 2001.

In August 2004, Ford announced it was discontinuing the program and would stop making the 1.25% bonus payments as of April 1, 2005. Ford then introduced new bonus incentive programs, including the Accelerated Sales Challenge (ASC).

In December 2006, Darling's filed a twelve-count complaint against Ford with the Maine Motor Vehicle Franchise Board, alleging that Ford violated various provisions of the Business Practices Between MVMDD Act, 10 M.R.S. §§ 1171–1190-A. Among the claims was Darling's contention that Ford's termination of the BOC payments constituted a modification of the franchise that substantially and adversely affected Darling's rights, obligations, investment or return on investment and, therefore, that Ford had violated § 1174(3)(B) by failing to provide Darling's with proper notice of the modification. In its complaint, Darling's sought damages equal to the amount of BOC payments that Ford failed to make.

In May 2008, the Board concluded that Ford violated the MVMDD Act because it failed to provide Darling's with the statutorily-required notice in order to properly terminate the BOC program. The Board imposed a penalty of $10,000 against Ford and awarded Darling's damages in the amount of $145,223.08 — a sum representing the amount of payments that Darling's would have earned during a 270-day period beginning April 1, 2005, when Ford stopped making BOC payments, less any bonus payments received by Darling's under other incentive programs, like the ASC, during that time. The 270-day limit was arrived at by combining the 90-day period a dealer has to file a protest with the Board after receiving notice of a proposed franchise modification, and the subsequent 180-day period the Board has to render its decision.

Both Ford and Darling's petitioned the Superior Court for review of the Board's decision pursuant to M.R. Civ. P. 80C. Ford sought modification and reversal of the Board's decision. Darling's argued that the Board erred in limiting damages to the 270-day period. The petitions were consolidated and moved to the Business and Consumer Docket (BCD); at which point the Maine Automobile Dealership Association (MADA) sought and was granted intervenor status.

A jury trial was held in March 2011, on the factual question of whether Ford's discontinuation of the BOC program constituted a modification of the franchise that had a substantial effect on Darling's. The jury found for Darling's, though the parties agreed not to submit the issue of damages to the jury. Instead, the Court exercised its appellate jurisdiction over the Board's decision, and reviewed the administrative record to determine whether it supported the Board's damages award. The Court then issued orders confirming both the civil penalty and the damages award.

Darling's and MADA appealed from that decision. Ford cross-appealed and, after review by the Law Court in 2014, the Law Court held that Ford's termination of the BOC program was a modification of the franchise that triggered the MVMDD Act's 90-day notice requirement; and that the Board lacked jurisdiction to award damages for violations of the MVMDD Act. *See Ford I* (2014 ME). The case was remanded to the BCD for a determination of damages by a jury.

—continued on page 4