State of New Hampshire
Supreme Court

NO. 2008-0512

2009 TERM

JANUARY SESSION

Dana Duxbury-Fox

v.

Eugene Shakhnovich, &a.

RULE 7 APPEAL OF FINAL DECISION OF
CARROLL COUNTY SUPERIOR COURT

BRIEF OF PLAINTIFF/APPELLEE DANA DUXBURY-FOX

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QUESTION PRESENTED

Did the court correctly hold that Ms. Duxbury-Fox has a right to "use [her] right-of-way for parking motor vehicles, storage of boat trailers, and landing, loading, and unloading of boats at the dock or on the shore," when the language of her deeds, the parties' intent at the time of the relevant conveyances, and 75 years of consistent usage shows precisely that, and when the right-of-way is the only practical access to her landlocked camp?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Northern Cabins

Charles H. Brown originally owned a triangle of about 100 acres on the southern and western shores of Lower Beech Pond in Tuftonboro, New Hampshire. *Trn.* at 40. In the late 1920s he began selling portions of it, *Trn.* at 41, including several landlocked pond-frontage parcels at the northern tip of the triangle about a half-mile from the road. *Trn.* at 8-9, 132. Small summer cabins were built on the lots long before the parties here were born. *Trn.* at 9. Mr. Brown initially retained the land at the south end of the pond adjoining the road, though his family subsequently conveyed most of it.

This case concerns one of those landlocked parcels, and easement rights appurtenant to it over the retained land. The easement is crucial because it gives the landlocked parcels their only practical access to the road. *See* MAP: ORIGINAL TRIANGLE OF LAND, *infra* at 11.[1]

The plaintiff here is Dana Duxbury-Fox, whose grandfather acquired one of the landlocked parcels by two deeds in 1927 and 1930. The 1927 deed conveyed a portion of the pond frontage. It provides: "Permission is hereby given for said grantee to pass and repass over land of said grantor to lot above mentioned." DEED FROM CHARLES H. BROWN TO ROBERT B. CRAIG (1927), *Df.Appx.* at 45. The 1930 deed conveyed another contiguous portion of the pond frontage. It provides: "It is understood and agreed that the said Robert Craig, his heirs and

[1]Two maps, adapted from exhibits and annotated with record facts, are included in this Statement of the Facts. The first, Original Triangle of Land, constitutes page 11 of this brief. The second, Detail View of Right of Way Sliver, constitutes pages 12. Both maps were prepared for the convenience of this Court.

assigns, shall have the right to pass and repass over the land of said grantor." DEED FROM CHARLES H. BROWN TO ROBERT B. CRAIG (1930), *Df.Appx.* at 46; *see also*, PLAN OF BOUNDARY LINE ADJUSTMENT (Sept. 23, 1980), Pl.Exh.18 (showing location of formerly separate 1927 and 1930 lots, along with later back-land grant).

Several items are worthy of mention. First, the 1927 and 1930 deeds pertain to pond frontage and each uses the pond as one of their boundaries. While a later deed gives Ms. Duxbury-Fox ownership of some backland, the 1927 and 1930 deeds together form the pond frontage lot on which her camp was built. Second, although the 1927 deed gives "permission," the 1930 easement language grants a "*right* to pass and repass" over Brown's land. Third, though the 1927 conveyance is silent, the 1930 deed grants the right to pass and repass to the "heirs and assigns" of the original grantee.

As noted, Charles H. Brown retained the land on the road at the southern end of the pond, where its waters flow through a culvert from the south. From the time of the original grants in the 1920s until the early 1970s, owners of the landlocked parcels (known to the neighborhood collectively as the "campers," *Trn.* passim) accessed their land by boat from a "sandy beach" near the culvert. *Trn.* at 28-29. They parked their cars on the road near the culvert, kept their boats at the sandy beach, and transported building materials and supplies by boat from the beach to their camps a half-mile northwest. *Trn.* at 10-11, 21, 44, 50, 111, 133. As there has never been any public access to the pond, and never any road to the landlocked parcels, this has always been the primary – and only practical and reliable – way to access and supply the camps. *Trn.* at 11, 15, 44, 74, 99, 106, 111, 132.

II. Western Footpath

The land toward the southern end of the pond along the road was once farmland, but the northern portion of the Brown triangle was (and still is) hilly and thickly forested. *Trn.* at 12-13. There was a footpath, the exact location of which has moved over the years, from the road several lots west of the culvert near the Brown's original farmhouse, with spurs leading to each landlocked parcel. *Trn.* at 12, 14, 42-43, 117, 134-36; *see* TUFTONBORO TAX MAP, Df.Exh. K, *Appx. to this Brf.* at 35 (faint lines showing several alternative routes of path); SUBDIVISION OF LAND (approved June 20, 1980), Pl.Exh.17 (showing probable 1980 location). Portions of it have been at times nearly indiscernible. *Trn.* at 132. A previous legal proceeding recognized the half-mile footpath at three feet wide. *Trn.* at 136.

Consequently the campers from the inception of the neighborhood to the present have used the footpath sporadically, mainly for opening and closing camps in the spring and fall, and as an emergency route. *Trn.* at 15, 132. Thomas Morrison, owner since 1947 of the lot just to the north of Ms. Duxbury-Fox, testified that "even now … I think somebody would have to be pretty good physical shape to go in and out of that. Certainly couldn't carry in a bundle of shingles." *Trn.* at 135.

The remaining portion of the original triangle – the portion to the west with frontage on the road but not on the pond – was inherited by one of Charles H. Brown's sons, Bernard Brown. In 1976 Bernard Brown conveyed a portion at the northern tip to Ms. Duxbury-Fox's mother, Ruth Mills, which is contiguous but behind her pond parcel. DEED FROM BERNARD N. BROWN TO RUTH E. MILLS (1976), *Df.Appx.* at 47. Although this did not cure the landlock, it gave Ms. Duxbury-Fox a larger lot and some backland. The deed to this backland contains another

easement, the language of which provides: "[T]he rights to use existing rights of way over the remaining land of the Grantor as appurtenant to the premises hereby conveyed and the premises now owned by the Grantee." *Id.* Bernard Brown never owned the land to the east near the culvert, *and* the footpath had always crossed the land inherited by Bernard Brown, making clear that this easement refers to the footpath. SUBDIVISION OF LAND (approved June 20, 1980), Pl.Exh.17 (showing probable 1980 location of lower end of footpath); PLAN OF BOUNDARY LINE ADJUSTMENT (Sept. 23, 1980), Pl.Exh.18.

Collectively the land owned by Ms. Duxbury-Fox constitutes tax lot 4. *See* MAP: ORIGINAL TRIANGLE OF LAND, *infra* at 11.

Thus Ms. Duxbury-Fox owns two easements giving her road access to her landlocked camp. One is by boat over the land of the original grantor, Charles H. Brown, to the east near the culvert. The other is by footpath over land owned by Bernard Brown, with its trailhead variously located but always to the west by the farmhouse.

This case concerns just the first of those access points.

III. Eastern Sliver

After Charles H. Brown died in 1951, through various inheritances and family conveyances, the land near the culvert passed to his son Harold Brown, constituting lots 10, 11, 12, and 14 on the accompanying map. *Trn.* at 41-42, DEED FROM KATIE BROWN TO HAROLD AND ETHELYN BROWN (1961), Pl.Exh. 4. Of that, lots 10 and 11, now owned by Joyce Brown and George Palmer respectively, do not figure in this appeal. The remaining land, what became lots 12 and 14, are the focus of contention. *See* MAP: DETAIL VIEW OF RIGHT-OF-WAY SLIVER, *infra* at 12.

In 1969, Harold Brown sold to Snow most of what now constitutes lot 12. DEED FROM HAROLD BROWN AND ETHELYN BROWN TO PAUL SNOW AND ELEANOR SNOW (1969), Pl.Exhs. 5-A & 5-B. Snow built a small summer house.

Lot 14 on its eastern side directly abuts the culvert. It contains the sandy beach which for years had been the access to the road for the campers, the place where they kept their boats, and where they received deliveries of building materials, propane, and other supplies.

In 1971, Harold had an opportunity to sell the remaining lot 14 to one Alden Ringer, *Trn.* at 133, and so under the then new Tuftonboro zoning ordinance, he applied for a subdivision. The sketch he made for and submitted to the planning board, *Trn.* at 47, shows the Snow's lot already existing. BROWN TO RINGER SUBDIVISION (approved June 16, 1971), Pl.Exh. 6, *Appx. to this Brf.* at 34. The subdivision created two new lots. On the farthest east next to the culvert is the lot containing the sandy beach, which was sold to Ringer a few days later. In between Ringer's and Snow's the plan shows a "remnant" sliver labeled "Right of Way Brown." *Trn.* at 45. It runs 50 feet wide and about 100 feet from the road to the pond.

The traditional way the landlocked camp lots were accessed was from the beach on Ringer's land. Harold Brown thus created the sliver as a right-of-way in order to preserve access to the lots across the pond, and it was used in the same manner except that a boat dock was added. *Trn.* at 13-14, 31, 100, 104, 111, 115, 121-122, 134.

Harold Brown died a few months later. One of the campers, Lawrence Walsh, filed an appearance in the estate, but then withdrew it when Harold's widow assured him that the right-of-way would continue for the benefit of the landlocked camps. *Trn.* at 120. The correspondence among the Browns and the various campers at the time consistently and repeatedly mentions – and shows on map sketches – the sliver between the Snows and the Ringers, which is consistently and repeatedly called a "right-of-way."

Up until the creation of the right-of-way, the five families of campers and their visitors had been leaving their cars on the narrow road, posing a hazard directly in front of the two lots Harold Brown created. It was thus made 50 feet wide explicitly for the purpose of providing ample room to park for several families, store boats, put in a dock, and receive deliveries and supplies. *Trn.* at 128, 133 ("so they wouldn't have to park alongside the road"); *see* LETTER FROM LAWRENCE WALSH TO ETHELYN BROWN, EXECUTRIX (Feb. 13, 1973), *Df's.Appx.* at 51; NOTES OF LAWRENCE WALSH OF CONVERSATIONS WITH ETHELYN BROWN (June 1, 1973), *Df's.Appx.* at 52 (with map sketch showing "50' R/W"); LETTER FROM LAWRENCE WALSH TO ETHELYN BROWN, EXECUTRIX (June 4, 1973), *Df's.Appx.* at 53; LETTER FROM ETHELYN BROWN TO AMUNDSEN (Sept. 10, 1973) ("The 50 foot right-of-way between Snow's and Ringer's lots was left for the campers to use."), *Df's.Appx.* at 54-55 (with attached map sketch showing "50ft. right of way"); HOLIDAY CARD FROM CHARLIE E. BROWN TO AMUNDSEN (Dec. 16, 1973),

Df's.Appx. at 56 (showing right-of-way sliver between Snow and Ringer lots).

Based on the assurances, in 1973 several of the campers paid a local excavator to break through the stone wall along the road, clear brush, and lay gravel. *Trn.* at 13, 104; BILL FROM WALTER SMITH TO LARRY WALSH AND KENDALL MILLS (Nov. 1973), Pl.Exh.12 ("bill for clearing + putting gravel on 50 ft strip"). From that time to the present, Ms. Duxbury-Fox has accessed and supplied her landlocked cabin by boat from this right-of-way sliver.

After Harold Brown died in 1972 until the mid-1980s, the Browns collectively believed that Charles E. Brown (son of Harold and grandson of Charles H.) owned the sliver. When Charles E. Brown stumbled across his father Harold's will, however, he discovered that Ethelyn Brown (Harold's widow and Charles's mother) probably owned it, but that it was intended to go to him. *Trn.* at 46, 48-49. Consequently in 1987 Ethelyn Brown had a family friend and neighbor, who worked in the insurance business and was not an attorney, draft a deed to Charles E. Brown. *Trn.* at 49-50; ORDER, *Appx. to this Brf.* at 29. The deed specifies: "Some western shore owners … with limited access to their lots, have been permitted use of this 50 foot wide area in order to reach the Pond from Brown Road, namely shore-owners (now or formerly) (Lawrence Walsh, Ruth Mills, Trygve Amundsen and Messrs, Sokolov and Earle)." DEED FROM ETHELYN BROWN TO CHARLES BROWN (1987), *Df.Appx.* at 57, 58. It is on this language – the word "permitted" – that the defendants here base their claim that the right-of-way is something less than an easement.

After a time Snow sold lot 12 to Beard, who planned to build a large new year-round residence to replace Snow's small existing summer house. But the expansion would result in a violation of Tuftonboro's set-back requirements. *Trn.* at 53; *see* HOUSE PLAN (undated),

Pl.Exh.19. To cure it, Beard asked to acquire the right-of-way from Charles E. Brown. *Trn*. at 53-54. The resulting deed repeated the same language the non-lawyer neighbor had used to describe the right-of-way sliver in the 1987 deed to Charles from his mother. DEED FROM BROWN TO BEARD (2000), *Df.Appx.* at 60-61. During negotiations, Charles E. Brown "made it abundantly clear" to Beard "that the campers use this to park on and to launch their boats and keep their boats there to get to their cabins." *Trn.* at 55. Subsequent conveyances were to Morfopulos and then to Shakhnovich, the current owner and defendant/appellant here. Both these deeds repeated that same language. DEED FROM BEARD TO MORFOPULAS (2002), Pl.Exh. 22; DEED FROM MORFOPULAS TO SHAKHNOVIC (2004), Pl.Exh. 23. Separately, Ringer built a house on lot 14 in 1990 and lives there year-round. *Trn.* at 128.

IV. Southern Access

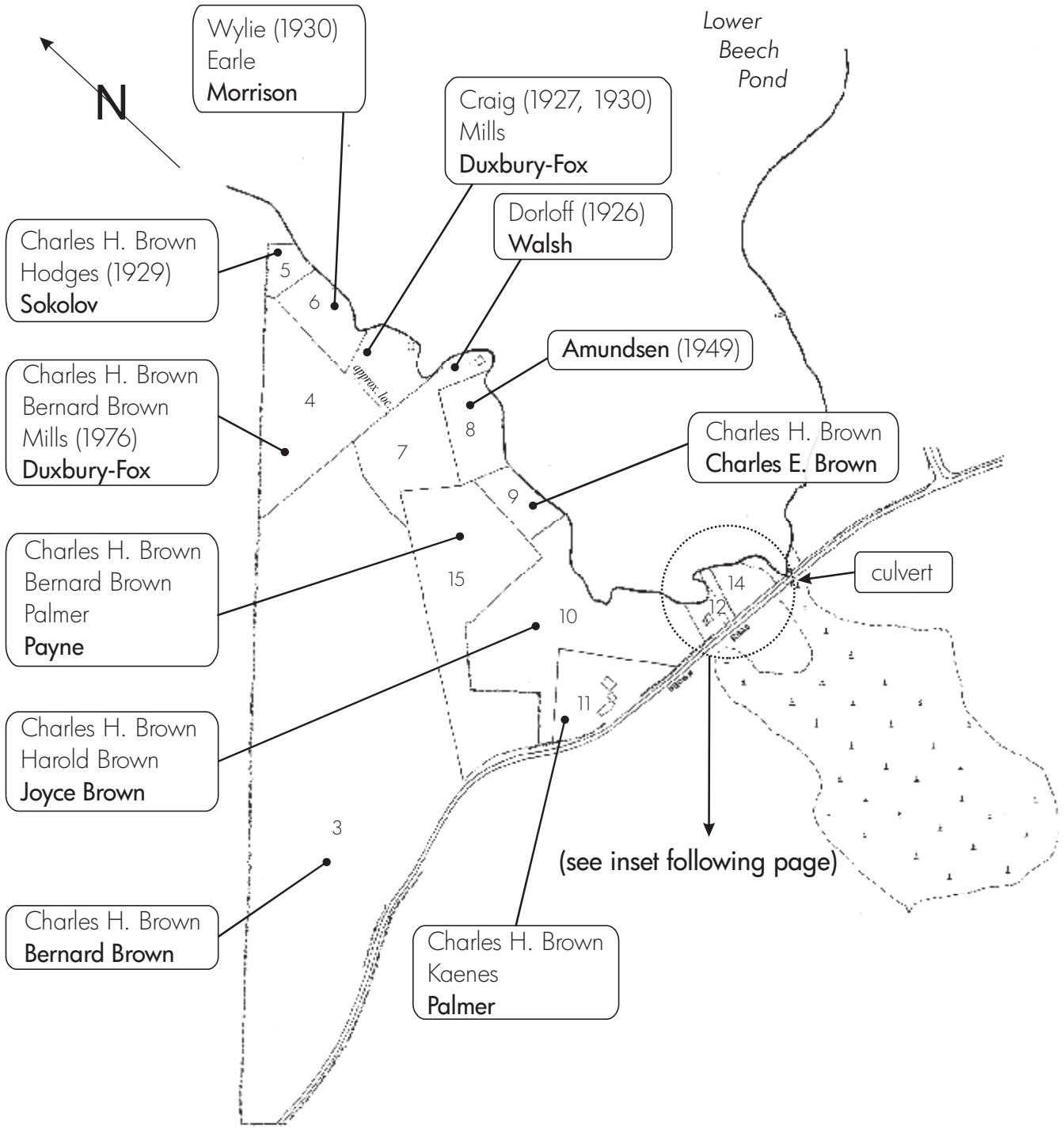
From the 1920s to the early 1970s Ms. Duxbury-Fox's family, and then she as a child and adult, used the Brown-family beach lot to access and supply their property. *Trn.* at 9, 10; ORDER, *Appx. to this Brf.* at 29. When the land near the culvert was sold to Ringer in 1971 , the then-current Brown owner relocated the access easement to the newly-created right-of-way sliver between Ringers' lot 14 and the now-Shakhnovich's lot 12. *Id.* All the campers appear to have agreed to the relocation. *Trn.* at 123, 103-104, 121-22, 134. All understood that the 50-foot right-or-way was a permanent access to their cabins, and was available for parking. *Trn.* at 50-51, 102. The owners of the Shakhnovich's lot through the years have also made use of the sliver. *Trn.* at 20 (parking, storage of boat and trailer), 56-57 (storage of construction materials).

In 2005 the Shakhnoviches sent a letter to Ms. Duxbury-Fox barring her from the southern access right-of-way, prompting Ms. Duxbury-Fox to file this petition to quiet title. The Carroll County Superior Court issued an preliminary injunction allowing Ms. Duxbury-Fox (upon posting a bond) to continue using the right-of-way as her family had for 75 years.

A bench trial was held in September 2007 (*Edward J. Fitzgerald, III*, J.). Ms. Duxbury-Fox arrived at the court from her cabin: "I … got in my boat and went over to my dock, got out of my boat, and walked to my car parked in the parking area" on the right-of-way. *Trn* at 16. The court took a view of the right-of-way, which is visually and physically separated from the Shakhnoviches by a tall stone embankment, a change in elevation, and a line of trees and shrubs.

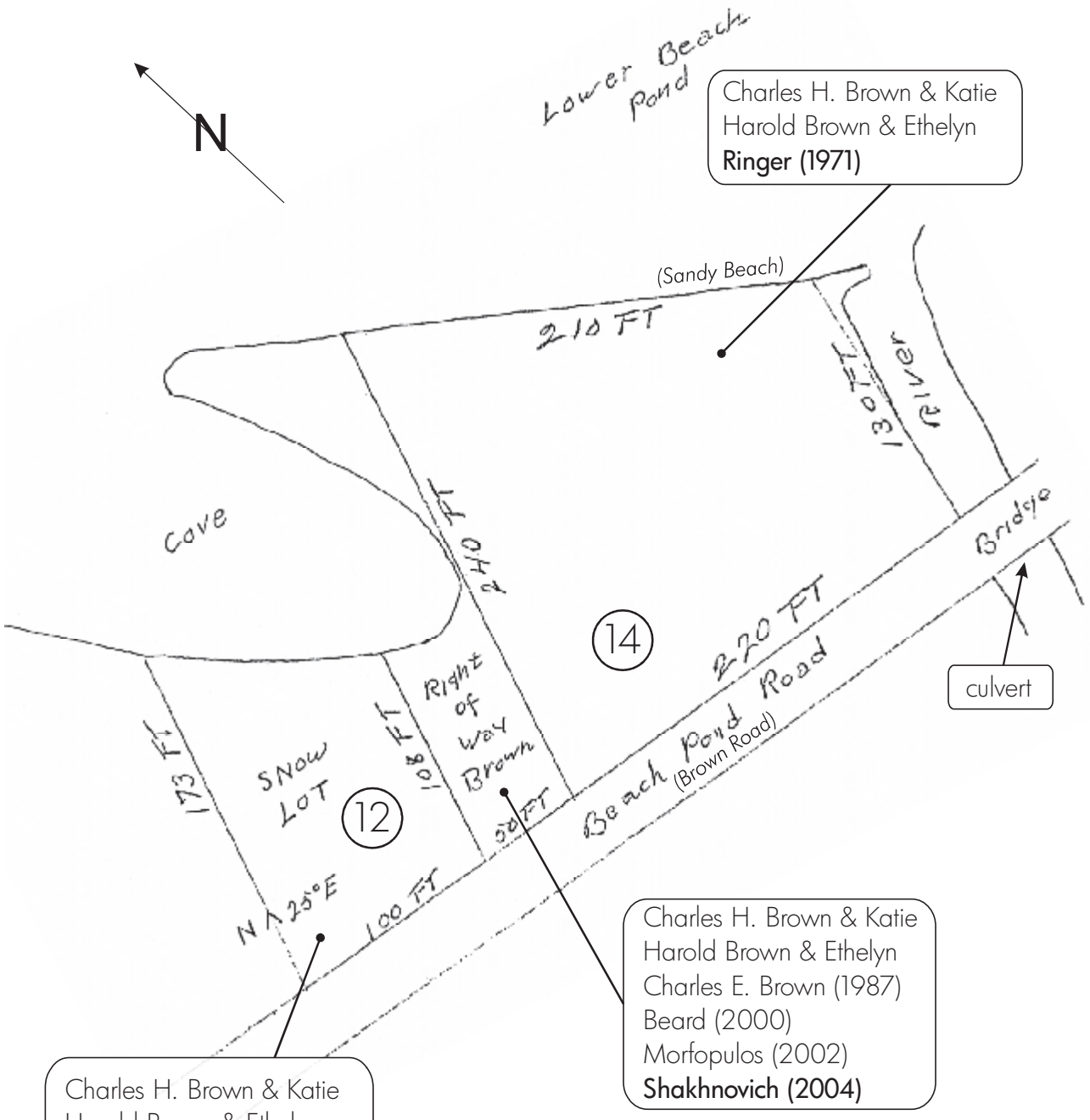
Based on the deeds and the long consistent use, the court ruled Ms. Duxbury-Fox owns an easement over the sliver. Specifically, it held Ms. Duxbury and the campers "may use the right-of-way for parking motor vehicles, storage of boat trailers, and landing, loading, and unloading of boats at the dock or on the shore." ORDER, *Appx.to this Brf.* at 33. The Shakhnoviches appealed.

Original Triangle of Land, with Ownership History and Lot Numbers*



*Adapted from TUFTONBORO TAX MAP, Pl.Exh.3, *Df.Appx.* at 50.

Detail View of Right-of-Way Sliver Between Lots 12 and 14*



*Adapted from BROWN TO RINGER SUBDIVISION (approved June 16, 1971), Pl.Exh. 6, *Appx. to this Brf.* at 34

SUMMARY OF ARGUMENT

Ms. Duxbury-Fox first discusses her 1927 and 1930 deeds, and shows that they create permanent access easement, by water, to her camp on Lower Beach Pond. She then notes that the only remaining issue is the easement's location. Despite the suggestion that her access is restricted to a three-foot wide half-mile long footpath, she shows that does not comport with the language of deeds, long consistent usage, or the intent of parties to various conveyances.

Ms. Duxbury-Fox acknowledges that the access was moved in 1971 to accommodate development, but argues that she retains deeded rights to the sliver right-of-way, in accord with subdivision plans, correspondence among the parties, maps, and deed language. Finally, she notes the nature of her long use has not changed, and disputes the suggestion that she has violated the scope of her easement.

ARGUMENT

I. Ms. Duxbury-Fox's Deed Unambiguously Creates a Permanent Access Easement

Deeds are construed by this Court in accord with the terms of their language to effect the intent of the parties "with reference to the surrounding circumstances known to the grantor at the time of the conveyance." *Ouellette v. Butler*, 125 N.H. 184, 187 (1984); *Harvey v. Hsu*, 144 N.H. 92, 94 (1999) ("Our determination of disputed deeds is based on the parties' intentions gleaned from construing the language of the deed from as nearly as possible the position of the parties at the time of the conveyance and in light of surrounding circumstances.").

> An appurtenant easement is a nonpossessory right to the use of another's land. It creates two distinct estates – the dominant estate, which is the land that benefits by the use of the easement, and the servient estate, which is the land burdened by the easement. … The benefit of an appurtenant easement can be used only in conjunction with ownership or occupancy of a particular parcel of land."

Arcidi v. Town of Rye, 150 N.H. 694, 698 (2000) (quotations and citations omitted).

An easement is created when the language of the deed indicates the creation of the "two distinct estates." In *Burcky v. Knowles,* 120 N.H. 244 (1980), this court held that a deed "[r]eserving … the right to pass and repass over a strip of land" created the two estates and thus an easement. The court explained:

> The grant of a general right to pass and repass entitles the dominant owner to use the right of way for any necessary or convenient purpose of passing pertaining to the ownership and occupancy of his land to which the right of way is appurtenant.

Burcky, 120 N.H. at 248-49.

The 1930 deed to Ms. Duxbury-Fox's grandfather, in operative language nearly identical to *Burcky*, says he and his "heirs and assigns, shall have the right to pass and repass over the land of [the] grantor." Ms. Duxbury-Fox's deed thus creates the "two distinct tenements in which a

dominant estate is benefitted by use of an easement on a servient estate." *Arcidi*, 150 N.H. at 699. The lower court accordingly found that the "language of the 1927 deed and the 1930 deed creates two distinct tenements in which a dominant estate is benefitted by use of an easement on a servient estate." ORDER, *Appx. to this Brf.* at 32.

Easements by definition run with the land. *See, Waterville Estates Association v. Town of Campton*, 122 N.H. 506 (1982); RSA 477:26. There is therefore no requirement that their creation recite the rights of "heirs and assigns." *Burcky v. Knowles*, 120 N.H. at 250 ("to the extent that any vestige of words of inheritance still underlie our caselaw to beguile and taunt the followers of William the Conqueror, we hereby declare them a legal nullity"). Nonetheless, the inclusion of words of inheritance in Ms. Duxbury-Fox's deed demonstrates an unambiguous intent to create rights permanent, and not merely temporary or personal.

At the time Ms. Duxbury-Fox's grandfather acquired the shorefront lots, both he and Charles H. Brown were aware of the geographical realities: that there was no road serving the lots, that the existing road veered up a hill to the south away from the lots, that the backland was privately owned, wooded and hilly, and that no road was ever likely. That is, they were aware that the lots had no practical access except by water.

Even ignoring the subsequent 75 years of water access, the circumstances on the ground were plainly the reason Ms. Duxbury-Fox's grandfather successfully kept an easement for access. *Ouellette v. Butler*, 125 N.H. at 188-89.

And those circumstances continue today. *White v. Eagle and Phenix Hotel Co.*, 68 N.H. 38, 39 (1894) (in determining whether an easement exists, the court may weigh benefits and injuries to the parties). Without water access, Ms. Duxbury-Fox would be limited to a three-foot

wide, half-mile long trail, which is impractical for all but the most limited uses. The Shakhnoviches themselves park a boat and trailer on the current right-of-way, the elevation of which is several feet below the Shakhnovich property, and separated by a rock embankment and a row of greenery.

The court below was thus correct in holding that an easement exists.

II. Where is the Access Easement?

The remaining issue is the location of the easement. The only known possibilities are the footpath, the sandy beach now owned by Ringer, and the designated sliver right-of-way between Ringer and Shakhnovich.

A. Not the Footpath

The Shakhnoviches contend that if Ms. Duxbury-Fox has an easement, it is the footpath several lots west of their property. The record, however, supports Ms. Duxbury-Fox's position that she has two easements – the access easement by water, and the intermittent emergency route by the footpath.

To the extent there is ambiguity, the court was correct in hearing extrinsic evidence to resolve the matter. *Flanagan v. Prudhomme*, 138 N.H. 561, 565-66 (1994) (extrinsic evidence to determine location of property on the ground); *Ouelette v. Butler*, 125 N.H. 184, 188 (1984) (extrinsic evidence to determine use of easement).

As noted, Robert Craig received deeds from Charles H. Brown in 1927 and 1930 conveying two lots – with the easement already discussed – that comprise Ms. Duxbury-Fox's shorefront.

In 1976, Ms. Duxbury-Fox's mother acquired a backland lot contiguous to the shorefront property. That deed, from Bernard Brown to Ruth Mills, contains a separate easement "to use existing rights of way over the remaining land of the Grantor." At that time the grantor, Bernard Brown, owned only the backland. The only "existing right[] of way over the remaining land" of Bernard brown was the footpath, and Bernard Brown never owned any other land ever used by Ms. Duxbury-Fox's family. This leaves no doubt that the 1976 easement refers to the footpath.

While it is theoretically possible that the 1927 and 1930 easements also refer merely to the footpath (as the land where it was variously routed was then owned by Charles H. Brown), that does not comport with the facts.

First, from 1927 forward, Ms. Duxbury-Fox's family's primary access was by water. They parked their cars on the road by the culvert, got into boats they kept at or near it, and rowed to their land. In this way they brought in materials to construct the house (twice, in fact, because the first camp burned in 1969), accepted dropoffs of supplies such as building materials and propane tanks, and received guests and visitors. The footpath, on the other hand, was used at most once each spring and fall to open and close the camp, and intermittently by children and for emergencies. It was not used as a regular access for people or supplies.

Second, the footpath is only three feet wide, goes a half-mile over hilly and wooded terrain, and had never been clearly marked. It could not in any practical way be used for regular access, for bringing in building material or household supplies, or for receiving guests. All parties were obviously aware of these limitations.

Third, if the 1930 deed had already conveyed merely the footpath, the 1976 easement (which is clearly limited to the footpath) would be surplusage. At the time of the 1976 conveyance, both Bernard Brown and Ruth Mills were aware that Ms. Duxbury-Fox's family had, for nearly a half-century, gained regular access by water and intermittent passage by footpath. They were also aware that for the five years before the 1976 conveyance, the water access was over the sliver right-of-way which is now in dispute.

Finally, if the deeds themselves did not already expressly provide practical access, given the circumstances reflected in the record, the route to Ms. Duxbury-Fox's camp by water would

qualify for an easement by necessity. *See Bradley v. Patterson*, 121 N.H. 802 (1981); *Hayes v. Moreau*, 104 N.H. 124 (1962); *Elliott v. Ferguson*, 104 N.H. 25 (1962); *Bean v. Dow*, 84 N.H. 464 (1930).

For these reasons, as the court below understood, it is not reasonable to suggest that the 1930 easement refers merely to the footpath.

B. Used to Be the Sandy Beach

Up until 1971, anyone with knowledge of the neighborhood would have said that Ms. Duxbury-Fox's access easement was at the sandy beach. The 1927 and 1930 deeds, which established the access easement, specified it was across land owned by the grantor, Charles H. Brown; at that time, he owned the lot containing the sandy beach. For the 45 years up until 1971, Ms. Duxbury-Fox and the other campers made open use of it for regular access to their camps.

C. Easement Relocated to the Sliver Right-of-Way

In 1971 the sandy beach lot was sold to Ringer. To make that sale possible, the then Brown owner subdivided the land near the culvert. The subdivision plan submitted to the town shows lot 12 owned by Snow, lot 14 destined for sale to Ringer, and a "right of way" 50 feet wide between them.

In that same time frame, in various communications among the neighborhood, letters were written and maps were drawn, all agreeing there was a 50 foot right-of-way for the purpose of accessing the campers' properties. Several of the campers improved the right-of-way by moving a rock wall, cutting trees, and laying gravel paving. Both the 50-foot width and the improvements were important because all recognized that parking off the narrow road edge was not sustainable, and that the campers needed adequate parking in addition to pond access.

After the 1971 sale to Ringer, and for the next 35 years until the request to cease which precipitated this suit, the campers made use of the designated right-of-way in exactly the same manner they had the sandy beach, with two exceptions – a dock was added, and they no longer had to park on the road.

It is apparent that what changed in 1971 was the location of the right-of-way, and that the new location was the sliver.

D. Relocated But Not Abandoned

The law provides for the relocation of easements to accommodate changes in development:

> When a deeded right of way is obstructed or impaired by the conduct of the owner of the servient estate, the owner of the dominant estate may deviate from the deeded right of way in order to preserve the right granted as long as the proposed deviation is not unduly burdensome to the servient estate.

Flanagan v. Prudhomme, 138 N.H. 561, 573 (1994); *Dumont v. Town of Wolfeboro,* 137 N.H. 1 (1993) (easement for access to backlot moved to accommodate zoning which restricted location of driveway).

When the Browns sold the sandy beach lot to Ringer, they in effect "obstructed or impaired" Ms. Duxbury-Fox's use of her deeded right-of-way. Luckily things were more neighborly than the law contemplates, and the Brown family provided a specific place for the easement to move to – the sliver mapped and described in the subdivision plan. Even if they had not, however, Ms. Duxbury-Fox would have been within her rights to deviate her use from the sandy beach to some other location provided it was not unduly burdensome to the Browns.

Upon an easement being relocated, the court may ratify it according to the circumstances

of the case, *id.* at 574, and may hear extrinsic evidence for that purpose. *Sheris v. Morton*, 111 N.H. 66, 69-70 (1971). The trial court's findings on the matter are entitled to deference, especially when, as here, the court took a view. *Id.* In its order the court below ratified the move which the neighbors effectuated in 1971.

Although easements can be abandoned, doing so "must involve 'clear, unequivocal, and decisive acts' by the owner of the dominant estate, 'manifesting either a present intent to relinquish the easement or a purpose inconsistent with its further existence.'" *Titcomb v. Anthony*, 126 N.H. 434, 437 (1985), quoting *Gagnon v. Carrier*, 96 N.H. 409, 411 (1951). There is nothing in the record showing any intent by any party to abandon the easement. Surely the campers acquiesced in its relocation, but consistently insisted on maintaining its existence.

It is apparent that Charles H. Brown intended Ms. Duxbury-Fox to have an access easement over his land. His son Harold Brown shared that intent, but wished the location to move to accommodate the sale to Ringer and to provide off-road parking. His grandson Charles E. Brown further shared that intent, and made it clear when Beard bought the sliver. It is equally apparent that the relocation was done with the agreement of the campers. This Court's "determination of disputed deeds is based on the parties' intentions gleaned from construing the language of the deed from as nearly as possible the position of the parties at the time of the conveyance and in light of surrounding circumstances." *Harvey v. Hsu*, 144 N.H. 92, 94 (1999).

Here it is clear that there were easement rights intended, that they were originally located at the sandy beach lot, and that they were relocated to the sliver right-of-way. The court was thus correct in ruling that Ms. Duxbury-Fox and the other campers have "an appurtenant easement to use the fifty-foot right-of-way as outlined in the Tuftonburo Planning Board's subdivision plan of 1971." ORDER, *Appx. to this Brf.* at 33.

III. 1987 Deed Language Irrelevant

In the mid-1980s, Charles E. Brown discovered he did not own the strip as he and his family believed. Consequently in 1987 his mother, Ethelyn Brown, had an amateurish deed drawn by a non-lawyer friend, conveying the property to him. The deed explicitly recognizes Ms. Duxbury-Fox's use of the sliver, which was subsequently conveyed to Beard, Shakhnovich's predecessor.

Had there been no 1987 deed, however, the situation here would not be any different. The access rights contained in Ms. Duxbury-Fox's deed would have been unchanged. Those rights would have moved from the sandy beach to the sliver right-of-way upon the 1971 subdivision and sale of the sandy beach lot to Ringer, regardless of the 1987 deed.

If the Shakhnovich deed were silent about the right-of-way, perhaps Shakhnovich could claim lack of notice. *See Ouellette v. Butler*, 125 N.H. 184, 188 (1984) (technical failure of easement deed nonetheless gave "constructive notice of [party's] interest in the property"). Or if the Duxbury-Fox deed were silent about access rights, perhaps the Shakhnoviches would have a claim (as they press here) that Ms. Duxbury-Fox has only a license. *Quality Discount Market Corp. v. Laconia Planning Board*, 132 N.H. 734, 741 (1990) ("Based on the parties' choice of words … and the parties' stated purpose, we hold [there was] a personal license.").

But there is sufficient language in the Shakhnovich deed to provide notice to Shakhnovich (or any of Beard's grantees) that there is some sort of right-of-way on the sliver, and that a reasonable purchaser would investigate the rights of the named "western shore owners."

Beyond that, the precise language is not important.

Thus the law regarding the distinction between an easement and a license is immaterial to this case. But even if it were, the law does not favor Shakhnovich. This Court has twice held that deeds otherwise suggesting only a license actually granted an easement when there was a clear intent to create two tenements with one benefitted by the other. Thus in *Waterville Estates Association v. Town of Campton*, 122 N.H. 506, 509 (1982), "[a]lthough the rights were revocable upon a two-thirds affirmative vote of the homeowners, and therefore did not fall within the strict definition of easements, they resembled easements appurtenant in numerous respects." And in *Ouellette v. Butler*, 125 N.H. 184, 188 (1984), this Court wrote:

> Where something beyond a mere temporary use of the land is promised; where the promise apparently is not founded on personal confidence, but has reference to the ownership and occupancy of other lands, and is made to facilitate the use of those lands in a particular manner and for an indefinite period, and where the right to revoke at any time would be inconsistent with the evident purpose of the permission; wherever, in short, the purpose has been to give an interest in the land, there may be a license but there will also be something more than a license, if the proper formalities for the conveyance of the proposed interest have been observed.

Ouellette, 125 N.H. at 188-89, quoting *Morrill v. Mackman*, 24 Mich. 279, 283 (1872).

Finally, citing Maine law, the Shakhnoviches argue that land rights cannot be granted to a "stranger." It is unclear how the concept applies here, as the deeds of both parties specifically reference the existence of rights of the other.

In short, the court below correctly found that Ms. Duxbury-Fox has an access easement, and that it is currently located on the sliver right-of-way identified for that purpose.

IV. Use of Easement Has Been the Same for 75 Years

Nothing in the record suggests that the campers' use of the right-of-way sliver has changed, with the exceptions that upon the 1971 relocation, a dock was added and off-road parking was provided. Otherwise, Ms. Duxbury-Fox and her predecessors have used her right-of-way in precisely the same way for 75 years. Accordingly the Shakhnoviches cannot maintain an allegation that the scope of use has unreasonably expanded.

CONCLUSION

In accord with the forgoing, Ms. Duxbury-Fox requests this honorable Court to affirm the holding of the court below allowing her to "use the right-of-way for parking motor vehicles, storage of boat trailers, and landing, loading, and unloading of boats at the dock or on the shore."

Respectfully submitted,

Dana Duxbury-Fox
By her Attorney,

Law Office of Joshua L. Gordon

Dated: January 13, 2009

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Dana Duxbury-Fox requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on January 13, 2009, copies of the foregoing will be forwarded to Randall F. Cooper, Esq., as well as to Jane Walsh, Thomas Morrison, and to Warren, Mary, and Betty Amundsen, at the addresses provided in their *Amicus Curiae* letter.

Dated: January 13, 2009

Joshua L. Gordon, Esq.

APPENDIX