

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT
Docket No. 04-E-0251

Edward J. Burke

v.

Bunny's Superette, Inc.,
Thomas M. Burke, Marie I. Burke,
and Bernardine P. Donelson

**RESPONSE TO THE POST-TRIAL MEMORANDUM SUBMITTED BY MARIE I.
BURKE AND BERNARDINE P. DONELSON**

NOW COMES Plaintiff Edward J. Burke by and through his attorney, Vincent A.

Wenners, Jr. Esq., and respectfully submits the following Response:

I. INTRODUCTION

The Defendants' Post-Trial Memorandum submitted by the defendants in this case contains several assumptions and errors that will be addressed point by point below.

II. ISSUES FOR REBUTTAL

A. Store ownership

The Defendants' Post-Trial Memorandum (Defendants' Memorandum) asserts in several places that the various members of the Burke family were not co-owners of the store prior to its incorporation in 1971. On page four (4) of the Memorandum it states, "Prior to the incorporation... Edward Burke, Bernardine Donelson and Thomas Burke were not owners of Bunny's Suprette." On page five (5), the Memorandum states that Marie Burke "...decided to gift a 25% interest in the business to each of her children," which implies that they were not

already co-owners.

In fact, there was a long-standing oral agreement that everything would be shared equally among all the members of the family, and the corporation was formed as an expression of that intent. The children had worked in the store at various times without pay even though there was no "obligation and/or expectation" that they would work in the store. (Defendants' Memorandum, p. 3.) This work illustrates the oral agreement of shared ownership, since they would help the store build equity by working without salary when they had few expenses, and would take a salary after they moved out of their parent's house and had more expenses. (Defendants' Memorandum, p. 3-4.)

When the family decided to incorporate in 1971, there is no evidence presented that the 25% shares allotted to each family member was a "gift." Instead, the incorporation merely formalized part of the equal-share oral agreement that already existed. There is no evidence of gift taxes paid, or even contemplated. Edward Burke was the one who approached the incorporating attorney, and he was the one who provided the attorney with the information necessary to incorporate. (Defendants' Memorandum, p. 5.) The very fact that the shares were distributed equally is evidence of the underlying agreement; if Marie had in fact had sole ownership, she could have incorporated the business to retain a controlling interest, or given the children non-voting shares, or one of several corporate structures other than even shares.

B. The Stock Transfer

The Defendants' Memorandum asserts that the Parole Evidence Rule should bar Edward Burke's attempt to avoid the written stock restriction. (Defendants' Memorandum, p. 14-15.) If this Court finds that the transfer of stock was a gift, then such gift would violate the underlying