Summary of Testimony of James Knapp
Regarding Amendment to 27 VSA § 2 to address Kirshon v. Abodeely-Mills
Sections 25 and 26 of Miscellaneous Judiciary Bill - 26-0161 ver 1.1 3/8/2026
House Judiciary Committee
March 10, 2026

Witness Background. Presently retired and serving as the Co-Chair of the Real Estate Section of the Vermont Bar Association. Previous experience - 25 years in private law practice concentrating in all aspects of real estate transactions, 10 years as State Counsel for three different Title Insurance Underwriters, 2 years as Practice Management Coordinator for the Vermont Bar Association, and 2 years as Interim Director of Property Valuation & Review. Original member of the Vermont Title Standards Sub-committee.

The Decision in *Kirshon v. Abodeely-Mills*

In January, 2026 the Vermont Supreme Court issued a decision in *Kirshon v. Abodeely-Mills*, 2026 VT 2, Docket No. 25-AP-145 (2026). The case involved a dispute between family members over the effect of two deeds, one dated in 1958 and the other in 1977. I the 1958 conveyance, Hazel Rathbun conveyed a property to herself and her three sons. The grant clause of the deed did not specify a tenancy, and the habendum clause included the phrase "as joint tenants with rights of survivorship, their heirs and assigns". There was a subsequent conveyance in 1977, that was not relevant to the Court's decision through which Hazel Rathbun conveyed her interest to her three sons. The parties to the case were the heirs of the sons. The Kirshons argued that the 1958 deed created a joint tenancy and as a result, the entire property was vested in Kirshon and her relatives. The Abodeely-Mills heirs argued that the 1958 deed was ambiguous because of the inconsistency between the grant clause and the *habendum* clause, and as a result, the 1958 deed should be interpreted as creating a tenancy in common. Under the Abodeely-Mills interpretation, the interest of each of the three brothers passed to their respective heirs and not to the survivor among the three brothers. The Supreme Court agreed with Abodeely-Mills and found that the 1958 deed created a tenancy in common.

The Rational of *Kirshon v. Abodeely-Mills*

The Supreme Court adopted a minority position for the interpretation of the use of the words "their heirs and assigns" that does not reflect the common understanding of those words by most practitioners in real estate conveyancing in Vermont. The basis of the Court's reasoning is (a) the presumption expressed in 27 VSA § 2, that in the absence of a clear expression otherwise, a conveyance to two or more grantees creates a tenancy in common; and (b) the inconsistency in using the combination of phrases (i) joint tenants with rights of survivorship, and (ii) "***their*** heirs and assigns" in the *habendum* clause. The Court focused on the fact that in a true joint tenancy, the heirs and assigns of any deceased grantee other than the last surviving joint tenant would not

take the interest of a deceased grantee and thus the use of the plural pronoun “their” modifying “heirs and assigns” had to be interpreted as intending to create a tenancy in common, not a joint tenancy.

The State of the Law and Conveyancing Practices Before *Kirshon v Abodeely-Mills*

- Traditionally, the grant clause in a deed identified the grantee(s)/person(s) to whom the property was conveyed, and the *habendum* clause identified the estate or interest granted to each. Therefore, it is not unusual for a deed to read similarly to the 1958 deed (e.g., no estate/interest in the grant clause and the intended estate or interest specified in the *habendum* clause) when the parties intended to create a joint tenancy with survivorship rights and not a tenancy in common.

- The phrase “heirs and assigns” preceded by a pronoun reflecting whether there was one grantee (thus “his/her” for one, or “their” for more than one) indicated that the intended estate or interest was a fee simple interest and not some lesser interest. Traditionally, that particular phrase did not impact whether the intended interest/estate was a joint tenancy or tenancy in common. That specific phrase has been in use for that purpose for 250+ years and relates back to when there were numerous other kinds of conveyances that might limit what interest the grantee(s) were intended to have.

- 27 VSA § 2, as presently written, expresses a preference for tenancy in common, another historical element dating back to colonial days or before, BUT specifically allows one to overcome the preference by using words like “joint tenants”, “joint tenants with rights of survivorship”, or “to the survivors of them”, resulting in a joint tenancy with rights of survivorship estate. Nowhere in 27 VSA § 2 is it specified where the words creating a joint tenancy need to appear, nor does the statute, as written indicate that using the phrase “their heirs and assigns” voids the attempt to create a joint tenancy.

- Comment 3 to Vermont Title Standard 14.1, expresses the understanding of a majority of conveyancers in Vermont that the words creating a joint tenancy may appear in either the grant clause or *habendum*, or both (but if the estate is expressed in both, it must be consistent).

The Challenges Created by the Rule of Kirshon V Abodeely-Mills

- There are likely thousands of deeds recorded in the land records of the municipalities and counties in Vermont that use the language of the 1958 deed, e.g., no estate in the grant clause, estate specified only in the *habendum* and nearly every deed written in the past 250 years uses the clause “his/her/their heirs and assigns” fully intending to create a joint tenancy and not a tenancy in common. All of those deeds may now be called into question in litigation under the rule announced in *Kirshon v. Abodeely Mills*, which results in unnecessary uncertainty regarding numerous titles.

The Proposed Amendments to 27 VSA § 2

- The proposed amendments to 27 VSA § 2 incorporate the common understanding of the conveyancers in Vermont regarding how one creates a joint tenancy in a deed. The amendments are consistent with the provisions of the Vermont Title Standards and common law principles developed through centuries of litigation in Vermont Courts.

- In response to inquiries submitted to members of the Vermont Bar, through title insurance underwriters and a post to the Real Estate Community and the Probate and Trust Community, we received 68 comments supporting the proposed changes and no comments opposing the proposed changes. All members of the Title Standards Subcommittee commenting expressed their approval of the proposed changes.