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Please respond to the Portsmouth office

December 21, 2017

Via Overnight Mail

Eileen Fox, Clerk
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

Re: David Hodges, Jr., Barry Sanborn & Patricia Sanborn Hodges
v. Alan Johnson, Trustee, William Saturley, Trustee, and
Joseph McDonald; Docket No. 2016-0130

Dear Clerk Fox:

I am enclosing an original and seven (7) copies of Motion for
Reconsideration or Rehearing.

Thank you for your cooperation.

Very truly yours,

Russell F. Hilliard
rhilliard@uptonhatfield.com

RFH/sem
Enclosure

cc: Roy W. Tilsley, Esq. (w/ enclosure)(via Overnight Mail)
Edward J. Sackman, Esq. (w/ enclosure)(via Overnight Mail)
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Alan Johnson (w/ enclosure)(via Electronic and U.S. Mail)
William Saturley, Esq. (w/ enclosure)(via Electronic and U.S. Mail)

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

2016-0130

David Hodges, Jr., Barry Sanborn, and Patricia Sanborn Hodges

v.

Alan Johnson and William Saturley, Trustees, and Joseph McDonald

MOTION FOR RECONSIDERATION OR REHEARING

The respondents in the above matter hereby move, pursuant to Rule 22, for reconsideration or rehearing (including briefing and argument) as follows:

Introduction

The Court misapprehended the applicability of the statutory duty of impartiality to this case, where the trust document specifically freed the trustees of that obligation and the lower court appropriately spent no time on the subject. The Court also treated the petitioners as having a “future beneficial interest” in the trust assets. That was another mistake, as the unique New Hampshire statute provides that non-vested petitioners have “neither a property interest nor an enforceable right.”

The New Hampshire General Court deliberately created a statutory framework to make ours the most progressive state in the country on trust management. The Court’s decision, affected as it is by these, and other errors, will undermine that effort.

The Court reached its decision without briefing or argument from the parties regarding the principal bases on which it affirmed the trial court’s decision. The Court should reconsider and reverse its own decision. In the alternative, the parties should be offered a chance to re-brief and re-argue the case before a full Court.

Reconsideration

1. As a consequence of two recusals, this matter was heard by a three (3) member Court, and resulted in an affirmance of the trial court order, on alternate grounds, by a 2-1 vote.¹

2. As acknowledged implicitly in the majority opinion, Sl. Op. at 10-12, and explicitly in the dissent, *id.* at 19, this appeal presented important questions of first impression in New Hampshire (and, given the uniform act at issue, perhaps nationally).²

3. Moreover, all participating Justices determined that the trial court erred in its analysis, and the basis for its conclusion. *Id.* at 10-11 (majority), 17 (dissent).

4. As set forth in the majority opinion, *id.* at 10-12, the Court sought to clarify three (3) things: the trial court's decision, *Shelton v. Tamposi* (164 N.H. 490 (2013)), and the duty of impartiality.

5. In doing so, the majority affirmed the trial court's ruling by ruling on issues neither decided by the trial court, nor briefed or argued by the parties on appeal (as described in the dissent):

¹ *Cf.* Rule 12-D(2)(a) ("Any case which has been heard by a 3JX panel shall be decided by unanimous order of the three justices"); (5)(a) ("Cases suitable for oral argument before a 3JX panel include, but are not limited to . . . appeals involving claims of error in the application of settled law"). This appeal would not have even qualified for a 3JX panel, and further has been decided by less than three (3) Justices. *Cf.* RSA 490:7 ("If one or more of the justices present is disqualified to sit in any case, one or more temporary justices may be assigned in accordance with RSA 490:3; provided that at least 3 justices, either full-time or temporarily appointed, must sit, participate, and *decide.*") (emphasis added).

² Because the New Hampshire statute differs in a number of material respects from the Uniform Law, the General Court, in 2015, amended RSA Chapter 564-B to be called the New Hampshire Trust Code, as opposed to the Uniform Trust Code. RSA 564-B:1-101. For the same reason, the statute was amended in 2014 to make clear that New Hampshire is a "non-uniform" jurisdiction. *See* RSA 564-B:11-1101 (promotion of uniformity given tertiary consideration).

- a. The circumstances under which a trustee violates the duty of impartiality when the trustee unequally distributes trust assets and/or eliminates a beneficiary's future interest in an irrevocable trust by decanting; and
- b. Whether the defendants violated that duty when they eliminated the future beneficial interests of the plaintiff ... through decanting, while retaining two of the settlors' children as beneficiaries. *Id.* at 17.

6. The respondents respectfully submit that the Court overlooked or misapprehended the following points of law and fact:

a. The Court misapprehended the applicability of a duty of impartiality pursuant to the statute, RSA 564-B:8-803, given the express provisions in the operative trust instruments, and the default rules established by RSA 564-B:1-105(b). In other words, and as acknowledged by the trial court, a trust instrument can negate the duty of impartiality, *see* Order at 11, as was the case here, *see id.* at 4,³ and therefore RSA 564-B:8-803 simply does not apply to this case.⁴

b. The Court erroneously assumed that “when the parties, in their appellate briefs, discuss whether the trial court erred when it found that the defendants failed to give ‘due regard’ to the plaintiffs’ beneficial interests, they, too, are referring to the duty of impartiality.” *Id.* at 11. In fact, the respondents were not discussing impartiality at all, as the trial court did not find a breach of the duty of impartiality.⁵ Had it done so, the respondents would have explicitly

³ The relevant provisions were set forth in Respondents’ Brief at 9-10, and are included here as Appendix A.

⁴ Likewise, the official comments to this provision of the UTC have no force and effect where, as here, the duty is negated by the trust instrument, *Cf.* Sl. Op. at 12, and the New Hampshire statute is non-uniform in relevant respects. *See* RSA 564-B:8-814(b, c).

⁵ In fact, the word “impartiality” appears only three (3) times in the Respondents’ Brief, at 1, 13, and 21, and each time in reference to the trial court having found no such breach of the duty. In the Respondents’ Reply Brief, it does not appear at all.

addressed the duty of impartiality, and particularly the statute and its default status.⁶

c. The Court throughout its decision refers to the elimination of “the plaintiffs’ future beneficial interests.” *Id.* at 2, 12-15.⁷ But by the unique terms of the New Hampshire Trust Code, the non-vested petitioners do not have a future beneficial interest. They have “neither a property interest nor an enforceable right,” RSA 564-B:8-814(b). This distinction is critical to the analysis in this case and explains why decanting was proper. The respondents’ decision to decant should be evaluated with this provision in mind. RSA 564-B:8-814(c) (“[I]f the terms of a trust permit distributions among a class of beneficiaries, distributions to or for the benefit of whom are subject to the exercise of the trustee’s discretion without a standard to guide the trustee in making distribution decisions, then the trustee may make distributions unequally among the beneficiaries and may make distributions entirely to one beneficiary *to the exclusion of the other beneficiaries.*” (emphasis added)).⁸

d. The trial court’s error – imposing the same duty upon the trustees as imposed by the statutory and common law duty of impartiality -- was not harmless. Even if the

⁶ Respectfully, the Court’s finding that the trial court meant to find a breach of the duty of impartiality is also unwarranted. The center piece of the petitioners’ case as explicitly expressed by their expert at trial was that the respondents breached their duty of impartiality. All three trust experts testified to this issue at trial, and the trial court even questioned Attorney Wells about it. Moreover, the parties submitted specific requests for findings on the issue of impartiality, the respondents addressed the issue in their trial brief, and the trial court discussed impartiality in its decision, even noting correctly that unlike the mandatory duties set forth in RSA 564-B:8-801, the duty of impartiality can be eliminated by the trust instrument. Hence, a much more plausible conclusion is that the trial court did not find a breach of the duty of impartiality because it agreed with the respondents that the duty did not apply in this case based on the language of the trusts. Or, alternatively, the trial court could have determined that the duty had not been breached.

⁷ This phrase does not appear in the statute, and it perpetuates the erroneous reliance by the trial court on Black’s Law Dictionary to define “beneficial interest” to mean “a right or expectancy in something,” and its conclusion that Section 801 required due consideration of the “rights and expectancies of the beneficiaries as they are delineated in the trust.” *Order* at 13. This is precisely the error identified by all participating Justices, and improperly endows the petitioners with rights and interests they do not possess.

⁸ It is also a principal reason why the trial court erred when it found that the respondents failed to consider the petitioners’ beneficial interests. Had the respondents failed to properly analyze the petitioners’ beneficial interests, then the Court could have affirmed the trial court’s decision on that basis.

trial court had intended to find a breach of the duty of impartiality,⁹ the analysis of that duty and whether it applies and was breached in this case, is completely different than the analysis of the duty to consider the interests of a beneficiary under RSA 546-B:8-801.

e. Even if the trial court meant to find a breach of the duty of impartiality, and even if that duty was not eliminated or modified by the terms of the trusts, the respondents did not breach the duty of impartiality.

f. The trial court failed to apply the correct standard of review to its consideration of respondents' actions. Instead of reviewing the respondents' decision to decant for an abuse of discretion, the trial court applied its own judgment of what was fair to determine that the respondents should have taken less drastic steps to effectuate the trusts' purpose and protect the family business held by the trusts from risk.

g. The Court's decision will discourage trustees from using decanting, a legitimate option allowed by the New Hampshire Trust Code, to remove disruptive contingent beneficiaries who pose a risk to the trust's purpose. The result will in some instances be harmful to the trust and other beneficiaries to whom the trustees owe a duty.

7. Given the acknowledged error of the trial court in relying upon RSA 564-B:8-801, *supra*, ¶3, and there being no other legitimate basis upon which to affirm the trial court's order, the respondents request that such order be reversed, and the matter remanded with instructions to dismiss the petition.

⁹ The entirety of the trial court's substantive analysis is set forth at 34–36, Respondents' Brief at 85-87. The word "impartiality" does not appear anywhere in this portion of the trial court's order. As aptly noted by the dissent, at 18: "Thus, I disagree with the majority that the trial court concluded that the defendants violated the statutory duty of impartiality. Had the trial court so concluded, it would have so stated."

Rehearing

8. Without prejudice to the request for reconsideration and reversal of the trial court order, the respondents request a rehearing, including briefing and arguing, for the following reasons.

9. The respondents have not been afforded their due process rights, and have been deprived of fundamental fairness, because they have not had an opportunity to address the grounds upon which the Court affirmed the trial court's decision. Had the trial court found a breach of the duty of impartiality, the respondents would have presented a different argument to the Court.

10. As noted in the respondents' (Brief for Respondents at 14-16) and amicus' briefing (Amicus Brief at 1), the New Hampshire General Court intended to create "the best and most attractive legal environment in the nation for trusts and fiduciary services," and the majority opinion, by its interpretation and application of the state statute, impairs that clear legislative intent.

11. The New Hampshire Trust Code, including its decanting provisions, is considered to be one of the most accessible and permissive in the nation. *See* Linda Garey and William V.A. Zorn, *Elder, Estate Planning & Probate Law: Decanting Irrevocable Trusts in NH: Tips and Recent Developments*, New Hampshire Bar News, March 16, 2016 ("New Hampshire is at the forefront of decanting nationwide, not only because it was one of the first states to pass a decanting statute, but also because it has continued to amend and update its decanting statute. ... Currently, New Hampshire has one of the most expansive decanting statutes in the country.").¹⁰ There is virtually no case law addressing the interaction between the trustee's duty to non-vested

¹⁰ Available at: <https://www.nhbar.org/publications/display-news-issue.asp?id=8312>.

contingent beneficiaries and the trustee's authority to remove a non-vested contingent beneficiary through decanting for the benefit of the trust and other contingent beneficiaries.¹¹

12. Under all of these circumstances, the important questions presented by this appeal can and should be addressed by a full court, recognizing that an assignment pursuant to RSA 490:3, II will be necessary.

13. As noted in the dissent at 19, there is a "virtual certainty ... of unintended and unknown consequences of deciding this important issue of first impression."¹² While every case is vitally important to the immediate parties, this one, in addition, is likewise important to the citizenry and public policy of New Hampshire.

14. This decision was rendered by a majority of the sitting judges, but the majority number is less than a majority of the full-court. Such "minority majority" decisions -- especially those with precedential impact, such as exists here -- can have pernicious effects and are to be avoided when possible, for a number of reasons. First, the simple possibility exists that additional judges could have combined with the actual dissenting judge to form a majority. The decision's power to control future controversies -- the essence of *stare decisis* -- is thereby diminished. Second, a limited number of participants means there was a limit on the content of the deliberations. This may have affected the outcome. Finally, the impact of the decision is

¹¹ The majority opinion relied upon an estate planning journal article regarding decanting, and cited it for the proposition that "it is difficult to imagine the factual scenario where the trustee would not violate its fiduciary duty of impartiality owed that [eliminated] beneficiary." The quotation is truncated from the actual publication; there, following a semi-colon, it concludes "under the right circumstances, however, this is possible." Anne Marie Levin & Todd A. Flubacher, Put Decanting to Work to Give Breath to Trust Purpose, 38 Est. Plan. 3, 10 (Jan. 2011).

¹² Existing trustees in New Hampshire may well assume that the trust instrument can effectively negate the duty of impartiality, but the majority opinion suggests it is non-waivable. While the decision deals only with decanting, it would logically apply to distributions that could otherwise be sprinkled in a discretionary fashion equally or unequally or to the exclusion of certain beneficiaries, and thus create uncertainty inconsistent with the General Court's intent in that context as well.

represented not only by the outcome affecting the parties, but by the reasoning employed by the court. Only two justices embrace the particular analysis of this decision. Were the same arguments made to a deeper bench, the same reasoning may not have carried the day. *See generally*, Jonathan Nash, “The Majority that Wasn’t: Stare Decisis, Majority Rule and the Mischief of Quorum Requirements,” University of Chicago Public Law & Legal Theory Working Paper, No. 227 (2008).

15. Accordingly, if reconsideration and reversal is not ordered, the appeal should be briefed and reargued before a full Court.

Respectfully submitted,

Alan Johnson and William Saturley,

By their attorneys,

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Date: December 21, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has this day been forwarded to Roy W. Tilsley, Jr., Esq. and Edward J. Sackman, Esq.



Russell F. Hilliard

APPENDIX A

The 2004 Trusts included identical provisions making the petitioners (and the other beneficiaries of the 2004 Trusts) eligible for distributions in the unlimited discretion of the trustee, and also permitting distributions to “distributee trusts,” and any one or more, of the group of beneficiaries, Art.II, ¶B, appendix at 128, 176.. The 2004 Trusts further defined a “distributee trust” as:

... any trust being administered under this trust instrument for the benefit of one or more, but not necessarily all, of the group consisting of [the Grantor’s] wife and [the Grantor’s] descendants, or any trust established by [the Grantor] under another trust instrument for the benefit of one or more, but not necessarily all, of the members of such group, as long as [the Grantor has] no interest in such trust that would cause all or a portion of the trust property to be included in [the Grantor’s] gross estate for federal estate tax purposes.

Art. XVI, ¶H, Appendix at 161, 209.

Finally, the 2004 Trusts permitted the trustee to make distributions among the group of sprinkle beneficiaries “without obligation to equalize such distributions among them.” Art. X, ¶A3, Appendix at 137, 185.

The 2010 and 2012 Trusts satisfy the definition of “distributee trusts” in the 2004 Trusts, as they are being administered under the provisions of the 2004 Trusts for the benefit of some, but not all of the beneficiaries of the 2004 Trusts. Further, there is no allegation, nor could there be, that the Grantor retained any estate taxable powers over, or interest in, the 2010 and 2012 Trusts.

In fact, the Trust documents gave the Trustees unlimited discretion to make distributions to “distributee trusts” and to “any one or more, of the group of beneficiaries.” Art. II, ¶B at 4 of the 2004 Trusts.