



**Bernstein, Shur,
Sawyer & Nelson, P.A.**
Jefferson Mill Building
670 North Commercial Street
Suite 108
PO Box 1120
Manchester, NH 03105-1120

T (603) 623-8700
F (603) 623-7775

BY HAND DELIVERY

January 22, 2018

Roy W. Tilsley, Jr.
(603) 665-8823 direct
rtilsley@bernsteinshur.com

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

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

Dear Clerk Fox:

Please find enclosed the original and seven (7) copies of an Objection to Motion for Permission to File a Reply to Objection to Motion for Reconsideration or Rehearing, for filing with the Court.

I certify that copies of the Objection to Motion for Permission to File a Reply to Objection to Motion for Reconsideration or Rehearing were sent by first class mail this date to Russell F. Hilliard, Esquire, and Jeffrey H. Karlin, Esquire.

Please contact me if you have any questions.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Roy W. Tilsley, Jr.", with a flourish at the end.

Roy W. Tilsley, Jr.

RWT/lmn
Enclosures

cc: Russell F. Hilliard, Esquire
Jeffrey H. Karlin, Esquire

STATE OF NEW HAMPSHIRE

SUPREME COURT

2016-0130

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

v.

Alan Johnson, William Saturley, and Joseph McDonald

**OBJECTION TO MOTION FOR PERMISSION TO FILE A REPLY TO OBJECTION
TO MOTION FOR RECONSIDERATION OR REHEARING**

NOW COME the Petitioners in the above referenced matter, David Hodges, Jr., Barry Sanborn, and Patricia Sanborn Hodges, by and through their attorneys, Bernstein, Shur, Sawyer, & Nelson, P.A., and object to the Motion for Permission to File a Reply to Objection to Motion for Reconsideration or Rehearing.

1. The Respondents' Motion fails to provide this Court with any basis to allow the Respondents to file additional pleadings in this matter. The issues the Respondent identifies in the Current Motion, *i.e.* the Petitioner's response to the Respondent's arguments regarding the three judge panel and the Petitioner's dispute of Respondent's identification of points of law and fact which the Respondent submits were overlooked or misapprehended, were raised in the Respondent's Motion for Reconsideration or Rehearing. It is entirely expected that the Petitioners would respond to these issues in their Objection. The Respondents fail to point to any new issue of law or fact which would justify the filing of additional pleadings in this matter.

2. The Respondents' arguments concerning the three judge panel of this Court are without merit. The Respondents, and the Amicus party supporting the Respondents, were fully aware of the recusal of two sitting justices prior to oral argument. Neither party raised an issue with having this Case heard by a three judge panel. There is no indication in the record that the

Respondents would not have accepted a 2-1 decision in their favor. Having taken their chances with a three judge panel, the Respondents cannot now claim that this case requires a full panel to be properly heard or to set appropriate precedent.

3. The fact that this Court found that the Trial Court “mistakenly relied on RSA 564-B:8-801,” (Hodges & a v. Johnson & a, No. 2016-0130 at 11 (12/12/17)), but that the Trial Court’s decision achieved a correct result under a related section of the statute (i.e., because 564-B:8-801 “expressly incorporates the statutory duty of impartiality” Id.) was not unusual, and is not a basis for this Court to grant reconsideration or rehearing. See e.g. J & M Lumber and Const. Co., Inc. v. Smyjunas, 161 N.H. 714, 725-6 (2011). As noted in this Court’s decision, this Court is “the final arbiter of the legislature’s intent as expressed in the words of the statute considered as a whole.” Id at 9.

4. The Trial Court found that the Respondents did not take into account the interests of the Petitioners in making decanting decisions. The Trial Court’s decision is not that the Respondents did not give enough consideration to the Petitioners, the Trial Court found that the Petitioners did not give any consideration to the Petitioners. In light of this finding and in light of this Court’s clarification of its prior decision in Shelton v. Tamposi, 164 N.H. 490 (2013), it was entirely reasonable for this Court to conclude that the Respondents’ failure to give any consideration to the interests of the Petitioners breached the Trustees’ duty of impartiality.

5. As this Court noted in its decision, the Trial Court was in the best position to measure the persuasiveness and credibility of testimony and evidence presented to it. The Trial Court was not compelled to accept the Respondents’ assertions regarding their decanting decisions. The Trial Court found that portions of the testimony of one of the Respondents was inconsistent and borderline evasive (See Trial Court Decision, Respondents’ Brief at 79), that the

overall testimony of the Respondents in support of their alleged independence in conducting the decantings was not “particularly convincing” and that there was an “astonishing lack” of supporting evidence to support the Respondents’ testimony (See Trial Court Decision, Respondents’ Brief at 86). Applying these determinations to this Court’s clarification of the Shelton case makes it easy to conclude that there has been a breach of the duty of impartiality.

6. The Court’s decision in this case will not prevent future trustees from exercising decanting powers in appropriate situations. It will prevent future trustees from using the statutory decanting powers without giving any consideration to the interests of the trust’s beneficiaries. To the extent that the Respondents argue that the Court’s decision in this case does not specifically address what that consideration must consist of, this is a direct result of the Respondents’ failure to give any consideration to the interests of the beneficiaries. This Court must decide the case before it, based on the facts before it. In this case, those facts reflect the trustees’ complete failure to give any consideration to the interests of the beneficiaries.

7. Finally, the Petitioners note that the Trial Court’s decision in this matter was issued on February 22, 2016, nearly two years ago. Currently the Respondents’ removal as Trustees of the affected trusts is stayed pending completion of this Appeal. The Respondents’ request to submit additional pleadings further delays the resolution of this case, and the removal of the Respondents as trustees. The Respondents have had ample opportunities to advance their legal and factual arguments, and it is time, in the interests of justice for the parties, for this matter to come to a conclusion.

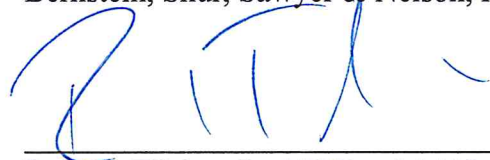
WHEREFORE, the Petitioners pray that this Honorable Court:

- A. Deny the Respondents' Motion for Permission to File a Reply to Objection to Motion for Reconsideration or Rehearing.
- B. Deny the Respondents' Motion for Reconsideration or Rehearing.
- C. Grant such other and further relief as may be just.

Respectfully submitted,

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

By their attorneys,
Bernstein, Shur, Sawyer & Nelson, P.A.

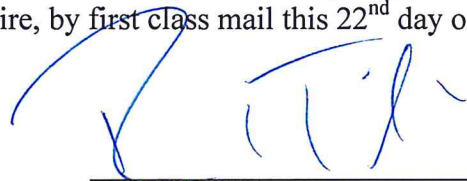


Dated: January 22, 2018

Roy W. Tilsley, Jr., NH Bar # 9400
Edward J. Sackman, NH Bar # 19586
670 N. Commercial Street, Suite 108
P.O. Box 1120
Manchester, NH 03105
(603) 623-8700

CERTIFICATE OF SERVICE

I hereby certify that I provided a true and exact copy of the foregoing to Russell F. Hilliard, Esquire, and Jeffrey H. Karlin, Esquire, by first class mail this 22nd day of January, 2018.



Roy W. Tilsley, Jr., Esq.