BERN
STEIN
SHUR

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

Roy W. Tilsley Jr.
rtilsley@bernsteinshur.com

December 29, 2017

VIA Federal Express

Eileen Fox, Clerk
New Hampshire Supreme Court
One Charles Doe Drive
Concord, New Hampshire 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 7 copies of an Objection To Motion For Reconsideration Or Rehearing for filing with the Court in the above-referenced matter.

I certify that copies of the Objection To Motion For Reconsideration Or Rehearing were sent via Federal Express, this date, to Russell F. Hilliard, Esquire, and Jeffrey H. Karlin, Esquire.

Sincerely yours,

Roy W. Tilsley Jr.

RWT/pjm

Enclosures

CC: Jeffrey H. Karlin, Esq.
Russell F. Hilliard, Esq.

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 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 Reconsideration or Rehearing.

1. The Respondents' Motion fails to state any points of fact or law which this Court overlooked or misapprehended in its comprehensive December 12, 2017 Opinion in this matter. All of the points raised in the Respondent's Reconsideration request were considered by this Court and decided correctly.

2. The Respondents' Rehearing request similarly fails. The three (3) judge panel which decided this case was consistent with the requirements of RSA 490:7. More importantly, this Court advised the parties on August 16, 2016, well before the March 31, 2017 Oral Argument in this matter, that two of the five sitting Supreme Court justices has disqualified themselves from participating in this case. The importance of this appeal and the issues of first impression contained herein were known to the Respondents at the time of the Court's recusal notice. At no time prior to, or during, Oral Argument did the Respondents make any request that this Court exercise its authority under RSA 490:3 to appoint temporary justices in order to comprise a full panel. Having lost in the current Opinion, the Respondents are not entitled to a

second bite at the apple by raising procedural abnormalities which they were aware of, and failed to raise, prior to the issuance of this Court's Opinion.

Reconsideration

3. The Respondents begin, in §6(a) of their motion, by repeating their well-worn argument that the provisions of the trust document granting the trustees the discretion to make unequal distributions to some or all of the beneficiaries of these Trusts relieved the Respondent Trustees from their most basic duties to these beneficiaries. This Court has considered and disposed of this argument by noting that the duty of impartiality does not require a trustee to treat the beneficiaries equally, *see* Order at 11. As such, the provisions of the trust documents allowing unequal distributions does not abrogate the duty of impartiality.

4. In §6(b) of their Motion, the Respondents claim that had the trial court found a breach of the duty of impartiality, the Respondents would have more explicitly addressed the duty of impartiality and its default status. This is the exact same argument raised in §6(a), and which the Respondents raised throughout this case, i.e. because the trust document allows the trustees to treat beneficiaries unequally, the default rule creating a duty of impartiality has been abrogated. However, as set forth above, since the duty of impartiality does not require equal treatment of beneficiaries, trust documents allowing unequal treatment of beneficiaries do not, in and of themselves, eliminate the default duty of impartiality.

5. In §6(c) of their Motion, the Respondents simply repeat their long-standing argument that because the Petitioner's beneficial interests were not vested, the trustees did not owe them a duty, as their interest was a mere expectancy. This issue was addressed at the trial court level, and fully briefed by the parties, *see* Petitioners' Brief at 10-12. The Respondents do not identify any new issue in this area which has not been already fully addressed by this Court.

6. In response to §6(d) and §6(e) of Respondents' Motion, this Court found ample evidence, in the record, to support the trial court's decision that the duty of impartiality had been breached, including but not limited to, the decanting trustee failing to give the Petitioners' financial interest any consideration, the lack of documentary evidence to support whether any alternatives to complete disenfranchisement were considered, and the fact that the trustee's complete elimination of the Petitioners as beneficiaries actually increased the risk of litigation, rather than limiting that risk, *see* Order at 13-5. The Respondents do not challenge the finding of the trial court, as affirmed by this Court, that the trustees never took into account the interests of the Petitioners in making decanting decisions. This case was not about whether the trustees drew the line in the right spot, this case was about the trustees complete failure to draw the line. Given the complete failure to consider the interests of the beneficiaries, this Court's finding that the duty of impartiality has been breached is well supported by the evidence.

7. In §6(f) of Respondents' Motion, the Respondents claim that the trial court substituted its own judgment as to what the trustees should have done, rather than reviewing the trustee's actions for an abuse of discretion. This was an issue that was fully briefed by the Parties, *see*, Petitioners' Brief at 27-9 and Respondents' Brief at 26-7. The Respondents do not raise any argument alleging that this Court has overlooked or misapprehended any evidence on this issue in its current Order.

8. Finally in §6(g) of Respondents' Motion, the Respondents make a policy argument that this Court's Order will discourage future trustees from decanting to remove disruptive contingent beneficiaries. These concerns are without merit. This Court's Order adequately addresses the deficiencies in the Respondents' actions, and will not hinder careful and thoughtful trustees from fulfilling their obligations to future beneficiaries in future decantings. From a policy perspective, this Court's Order upholds the basic nature of a trust relationship, i.e., a trustee holds legal title to assets for the benefit of beneficiaries, thereby splitting legal title and beneficial interest, with the trustee having, at a minimum, certain duties to the beneficiaries. If a trustee's duties to beneficiaries are as minimal as those proposed by the Petitioners, legal and beneficial title have not split and there is no trust relationship. This would likely result in increased litigation addressing whether a trust without some minimal trustee duties even qualifies as a trust under New Hampshire law.

Rehearing

9. While the Respondents allege that they would have raised a different argument had the trial court identified their breach as a breach of impartiality, they fail to indicate what that argument would have been. However, in §§6(a) and 6(b) of their Motion, the Respondents suggest that their argument would have been that the duty of impartiality is a waivable duty which had been abrogated by the trust document which allowed the trustee to make unequal distributions. As pointed out above, such argument was made at the trial court and at the Appellate level. Furthermore, this argument is without merit, as the duty of impartiality does not require complete equality between beneficiaries. This Court recognized this concept at Page 11 of its Order.

10. The Respondents next repeat their previous arguments concerning New Hampshire's alleged status as a permissive jurisdiction for trusts, without raising any fact or law that this Court allegedly misconstrued in its recent decision. The Respondents fail to acknowledge that this issue has been fully briefed and presented to this Court, including through an Amicus Brief from the New Hampshire Trust Council. There is nothing in the statute to support the Respondents' liberal interpretation that would essentially eliminate the trust relationship between trustees and beneficiaries and arguably the trust structure altogether.[1]

11. Respondents' Motion suggests that the Court's opinion is suspect because not all of its five members participated. That argument is contrary to R.S.A. 490:7 which provides that "[s]essions of the court shall be held by at least 3 supreme court justices" and that "at least 3 justices, either full-time or temporarily appointed, must sit, participate, and decide" each case. Three justices participated in this case, thereby complying with the statutory quorum requirement.

12. The quorum statute was amended effective January 1, 2000 to clarify its language. Prior to that, it had been argued that the language of the "statute actually anticipate[d] a single justice being able to determine a case." *Brief for Defendant-Appellee, Richard C. Follender*, 2000 WL 35571126 (1st Cir. 2000). The statute was originally enacted in 1855. Thus, for almost 150 years, it was possible that less than a majority of the justices might decide a case. *Follender v. Scheidegg*, 142 N.H. 192, 194 (1997) (noting that only two justices issued the opinion).

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[1] The Petitioners would respectfully suggest that a New Hampshire Bar News article written by the Respondents' Expert Witness' partner while this matter was pending is not persuasive authority which this Court should consider or rely on, *see* Footnote 10 to Respondents' Motion.

13. Where this Case was decided in a manner consistent with the current quorum requirements of RSA 490:7, Respondents have no cause to suggest that this Court's decision is due anything less than its full weight.

14. The suggestion that a decision by less than a majority of the full Court renders the result suspect is akin to a due process argument that one of the justices should have been recused. When "any cause of recusation or exception to a judge exists" it may be waived "by a defendant who, knowing the existence of just grounds of recusation, appears, and, without objecting, makes defence." *Stearns Adm'r v. Wright Adm'r*, 51 N.H. 600, 1872 WL 4342, at *8 (1872); *see also In re Abijoe Realty Corp.*, 943 F.2d 121, 126) (1st Cir. 1991) ("In general, '[o]ne must raise the disqualification of the ... [judge] at the earliest moment after [acquiring] knowledge of the [relevant] facts.'"). The logic for such a rule is that otherwise a litigant with a recusal concern might choose to see how the litigation plays out, and then raise the issue if he objects to the result. *See In re Cargill, Inc.*, 66 F.3d 1256, 1263 (1st Cir. 1995).

15. In this case, the Clerk of Court issued an Order on August 18, 2016 advising the parties that two justices would not be sitting on the case. **Exhibit A**, Order of Aug. 16, 2016. Oral argument occurred March 30, 2017, meaning that Respondents were aware that three of the five Supreme Court justices would be sitting on this appeal more than six months in advance of oral argument. At no point, either prior to, or during, Oral Argument did the Respondents raise any objection to having the Court decide this matter with only three justices. The basis for their complaint now was just as available in August 2017, and it should have been raised at that time, or deemed waived.

16. If Respondents had promptly raised the issue, it would have permitted the Court to consider it as set forth in R.S.A. 490:3. That statute provides that "[w]henever a justice of the supreme court shall be disqualified or otherwise unable to sit in any cause or matter pending before such court, the chief or senior associate justice of the supreme court *may* assign another justice to sit." (emphasis supplied). Respondents could have filed a motion with the Court presenting their concerns and requesting that the Chief Justice act in her discretion under R.S.A. 490:3 to appoint a temporary justice. Respondents failed to do so. Allowing the Respondents to raise the issue now, after the completion of briefing, oral argument, and opinion, would encourage future litigants to withhold their objections until after the Court issued a final ruling. Respondents are not entitled to a second bite of the apple simply because they are unhappy with the decision of the original panel. Such a decision would be at odds with the public policies of judicial efficiency and the prompt administration of justice. For those reasons, Respondents' motion should be denied.

WHEREFORE, the Petitioners pray that this Honorable Court:

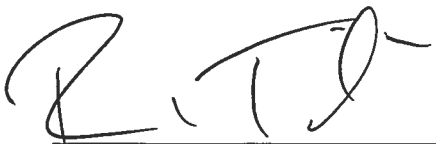
a. Deny the Motion for Reconsideration or Rehearing

b. And for 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, P.A.



Dated: December 29, 2017

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 Federal Express this 28th day of December, 2017.

Roy W. Tilsley, Jr., Esq.

Exhibit A

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2016-0130, David A. Hodges, Jr. & a. v. Alan Johnson & a., the clerk of court on August 16, 2016, issued the following order:

This order is being issued to notify the parties that Justice Gary E. Hicks and Justice Carol Ann Conboy previously recused themselves from participating in this case.

This order is entered pursuant to Rule 21(8).

Eileen Fox,
Clerk

Distribution:
Russell F. Hilliard, Esq.
✓Jeffrey H. Karlin, Esq.
Roy W. Tilsley, Jr., Esq.
Edward J. Sackman, Esq.
File