STATE OF NEW HAMPSHIRE

SUPREME COURT

David A. Hodges, Jr., et al.

v.

Alan Johnson, et al.

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# BRIEF OF ALAN JOHNSON, WILLIAM SATURLEY, AND JOSEPH McDONALD

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court erred, as a matter of law, in denying the respondents' motion to dismiss, given New Hampshire statutory law governing decanting and the express terms of the operative trust documents. Order on Motion to Dismiss, *infra* at 36.

2. Whether the trial court erred, as a matter of law, in ruling that the respondents breached an obligation to adequately consider the petitioners' interests in the trusts at issue, given New Hampshire statutory law governing decanting and the express terms of the operative trust documents. Respondents' Requests for Findings of Fact and Rulings of Law, Appendix at 84, 89; Respondents' Supplemental Requests for Findings of Fact and Rulings of Law, Appendix at 96; Respondents' Second Set of Supplemental Requests for Findings of Fact and Rulings of Law, Appendix at 102.

3. Whether the trial court sustainably found that the respondents breached an obligation to adequately consider the petitioners' interests in the trusts at issue, given the evidence and weight of evidence at trial. Respondents' Requests for Findings of Fact and Rulings of Law, Appendix at 84, 89; Respondents' Supplemental Requests for Findings of Fact and Rulings of Law, Appendix at 96; Respondents' Second Set of Supplemental Requests for Findings of Fact and Rulings of Law, Appendix at 102.

4. Where the duty imposed by RSA 564-B:8-801 is to, "distribute the trust property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries and in accordance with this chapter" and where the petitioners had, "neither a property interest nor an enforceable right" in the trusts, RSA 564-B:814(b), was it error for the trial court to rule that the decantings were void because the respondents "failed to consider the effect of the decantings at issue on the petitioners' interests as beneficiaries?" Respondents' Requests for Findings of Fact

and Rulings of Law, Appendix at 84, 89; Respondents' Supplemental Requests for Findings of Fact and Rulings of Law, Appendix at 96; Respondents' Second Set of Supplemental Requests for Findings of Fact and Rulings of Law, Appendix at 102.

5. In determining that the respondents failed to consider the effect of the decantings at issue on the petitioners' interests as beneficiaries, did the trial court erroneously impose a heightened duty on the respondents, not recognized by the statute or trusts, to act in the best interests of the petitioners? Respondents' Requests for Findings of Fact and Rulings of Law, Appendix at 84, 89; Respondents' Supplemental Requests for Findings of Fact and Rulings of Law, Appendix at 96; Respondents' Second Set of Supplemental Requests for Findings of Fact and Rulings of Law, Appendix at 102.

6. Where the respondents determined that decanting was appropriate because the petitioners' posed a threat to the family business held by the trusts, did the trial court abuse its discretion by failing to give proper presumption of correctness to the trustees' exercise of unlimited discretion and by substituting its own policy preference to void the decantings based on a finding that the respondents failed to consider less draconian measures than decanting. Respondents' Requests for Findings of Fact and Rulings of Law, Appendix at 84, 89; Respondents' Supplemental Requests for Findings of Fact and Rulings of Law, Appendix at 96; Respondents' Second Set of Supplemental Requests for Findings of Fact and Rulings of Law, Appendix at 102.

7. Whether the trial court sustainably determined to remove the respondent trustees, given the evidence and weight of evidence at trial. Answer of the Respondents, Alan Johnson and William Saturley to the Amended Petition, Appendix at 23; Requests for Findings of Fact

and Rulings of Law of the Respondents, Alan Johnson and William Saturley, Appendix at 89; and Order on Motion to Stay Removal of Trustees Pending Appeal, Appendix at 115.

8. Whether the trial court erred in its orders relating to the right of the trustees to be indemnified for the fees and expenses incurred in defending this petition. Order of this Court issued May 26, 2016 on Respondents Johnson and Saturley's Motion to Add Question.

## Statutes

**564-B:1-103 Definitions.** – In this chapter:

(7) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.

(19) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding. The terms of the trust may be interpreted, amended, modified, and reformed as provided in this chapter, including by means of a court order or a nonjudicial settlement agreement made in accordance with RSA 564-B:1-111.

(20) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto.

**564-B:1-105 Default and Mandatory Rules. –**

(a) Except as otherwise provided in the terms of the trust, this chapter governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

(b) The terms of a trust prevail over any provision of this chapter except:

(2) the duty of a trustee to act in good faith and in accordance with the terms of the trust, the purposes of the trust, and the interests of the beneficiaries;

**564-B:4-418 Trustee's Authority to Decant Trust. – [Pre-July 1, 2014 Version]**

(a) Unless the terms of the trust expressly provide otherwise, a trustee with the discretion to make distributions to or for the benefit of one or more beneficiaries of a trust (the "first trust") may exercise that discretion by appointing the property subject to that authority in favor of another trust for the benefit of one or more of those beneficiaries (the "second trust").

(b) Notwithstanding the provisions of paragraph (a), the trustee may not decant property of the first trust in favor of the second trust under any of the following circumstances:

(1) the second trust includes a beneficiary that is not a beneficiary of the first trust. For purposes of this subparagraph, a permissible appointee of a power of appointment held by a beneficiary of the second trust is not considered to be a beneficiary of the second trust;

(2) the exercise of the power to decant will reduce any current fixed income interest, annuity interest, or unitrust interest of a beneficiary of the first trust;

(3) a contribution to the first trust qualified for a marital or charitable deduction for federal or state income, gift, or estate tax purposes or qualified for a gift tax exclusion for federal or state gift tax purposes, while the terms of the second trust include a provision which, if included in the terms of the first trust, would have prevented the first trust from qualifying for the deduction or exclusion;

(4) the property is subject to a presently exercisable power of withdrawal held by a beneficiary of the first trust; or

(5) under the terms of the second trust:

(A) discretionary distributions may be made to a beneficiary or among a group of beneficiaries of the first trust;

(B) the distributions are not limited by an ascertainable standard; and

(C) the beneficiary or group of beneficiaries has the power to remove and replace the trustee of the second trust with the beneficiary or a member of the group of beneficiaries or with a trustee that is related or subordinate to the beneficiary or a member of the group of beneficiaries (as defined in section 672(c) of the Internal Revenue Code).

(e) This section does not abrogate the trustee's duty under RSA 564-B:8-801.

(f) This section does not impose on a trustee a duty to exercise a power to decant in favor of another trust or to consider exercising a power to decant in favor of another trust.

(g) A power to decant is not a power to amend the trust. Accordingly, a trustee is not prohibited from decanting property in favor of another trust solely because the first trust is irrevocable or the terms of the first trust provide that it may not be amended.

**564-B:4-418 Trustee's Power to Decant Trust. – [Current Version]**

(a) Subject to the limitations provided in this section, a trustee has the power to decant a trust. The power to decant is the power to appoint some or all of the trust property of a trust ("first trust") to another trust ("second trust"). A trustee's power to decant is a power with respect to an administrative matter of the trust.

(b) The beneficiaries of the second trust may include only one or more of the beneficiaries of the first trust. The second trust may exclude one or more of the beneficiaries of the first trust. A person is not a beneficiary of the second trust solely by reason of being a permissible appointee of a power of appointment under the terms of the second trust.

(g)(1) A trustee may not decant to the extent that the terms of the second trust reduce or eliminate a vested interest of a beneficiary of the first trust.
(2) A vested interest is:
(A) a current right to a mandatory distribution of income or principal, a mandatory annuity interest, or a mandatory unitrust interest;
(B) a currently-exercisable power of withdrawal; or
(C) a noncontingent, unconditional right to receive an ascertainable portion of the trust property upon the trust's termination.
(3) In addition to other possible contingencies, a beneficiary's right to receive a portion of the trust property upon the trust's termination is contingent if, by reason of the trustee's discretionary power to make distributions or under other terms of the trust, any person other than the beneficiary or the beneficiary's estate could receive that portion unless the beneficiary survives a specified date or a specified event.

(h) If a transfer to the first trust qualified for a deduction, credit, exclusion, or exemption for purposes of any income, gift, estate, or generation-skipping transfer tax, then a trustee may decant only to the extent that the decanting would not jeopardize that deduction, credit, exclusion, or exemption.

(l) A trustee is not prohibited from decanting solely because:
(1) the first trust is irrevocable;
(2) the terms of the first trust provide that the trust may not be amended or modified;
(3) the first trust contains a spendthrift provision;
(4) under the terms of the first trust, the trustee does not have any discretion in making distributions of income or principal; or
(5) except as provided in subsection (d), the terms of the first trust impose a standard on the trustee's discretion to distribute income or principal.

(n) A trustee's power to decant may be expanded, restricted, eliminated, or otherwise altered by the terms of the trust. A nonjudicial settlement agreement made in accordance with RSA 564-B:1-111, however, may only restrict or eliminate a trustee's power to decant. Except as otherwise provided under the terms of the trust, a trustee's power to decant is in addition to any other powers conferred by the terms of the trust, this chapter, or the laws of this state. This section does not expand, restrict, eliminate, or otherwise alter any power that, with respect to a trust, a person holds in a nonfiduciary capacity.

(o) A trustee does not have a duty to decant or an ongoing duty to consider whether to decant. In exercising the power to decant, a trustee has a duty to exercise the power in a manner that is consistent with the settlor's intent as expressed in the terms of the trust, and the trustee shall act in accordance with the trustee's duties under this chapter and the terms of the first trust.

(p) A trustee may exercise the power to decant, without court approval, the consent of the settlor, or the consent of any of the beneficiaries of the first trust. A trustee or any other interested person may ask a court to approve a trustee's exercise of the power to decant.

**564-B:8-801 Duty to Administer, Invest and Manage Trust, and Distribute Trust Property.** – Upon acceptance of a trusteeship, the trustee shall administer, invest and manage the trust and distribute the trust property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter.

**564-B:8-802 Duty of Loyalty.** –
(a) A trustee shall administer, invest and manage the trust and distribute the trust property solely in the interests of the beneficiaries.

**564-B:8-803 Impartiality.** – If a trust has 2 or more beneficiaries, the trustee shall act impartially in administering, investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

**564-B:8-814 Discretionary Powers; Tax Savings.** –

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute," "sole," or "uncontrolled," the trustee shall exercise

a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) Subject to the provisions of paragraph (a), if a distribution to or for the benefit of a beneficiary is subject to the exercise of the trustee's discretion, whether or not the terms of a trust include a standard to guide the trustee in making distribution decisions, then the beneficiary's interest is neither a property interest nor an enforceable right, but a mere expectancy.

(c) Subject to the provisions of paragraph (a), unless the terms of the trust expressly provide otherwise, if 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.

## STATEMENT OF THE CASE

The petitioners (a child and two stepchildren of David A. Hodges, Sr.) sought to invalidate certain "decanting" transfers from trusts of which they were discretionary beneficiaries, to trusts of which they are not beneficiaries. The respondents Saturley and Johnson, trustees of these trusts, and McDonald contended that the transfers were valid pursuant to the terms of the trust instruments and applicable New Hampshire law.

Despite the undisputed fact that the petitioners' interests were not vested, and thus "neither a property interest nor an enforceable right, but a mere expectancy," the trial court concluded that the respondents "failed to consider the effect of the decantings at issue on the petitioners' interests as beneficiaries," Order at 3, and thus violated an obligation purportedly arising out of RSA 564-B:8-801.

The respondents Saturley, Johnson and McDonald have appealed the Order to this Court, asserting that the trial court committed error by imposing a heightened duty on the respondents that does not exist in the applicable statutes or operative trust instruments, and by substituting its own judgement for the respondents' discretionary decision to decant.

The duty imposed by RSA 564-B:8-801 is to "distribute the trust property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter." The trial court found that the respondents considered the terms and purposes of the Trusts, and did not find that the respondents breached the duties of good faith, impartiality, or loyalty, or that the terms of the trusts prohibit decanting. Nor did it dispute the fact that the petitioners' non-vested interests in the trusts were "neither a property interest nor an enforceable right." RSA 564-B:8-814(b).

Instead, the trial court found that the respondents "failed to consider the effect of the decantings at issue on the petitioners' interests as beneficiaries." Order at 3. The statute defines "interests of the beneficiaries" to mean "the beneficial interests provided in the terms of the trusts." The trial court's ruling gave no import to the statutory definition. The ruling in effect ignored the uncontroverted fact that the unvested petitioners had neither a property interest nor an enforceable right in the trusts, and instead imposed a heightened duty on the respondents to act in the "best" interests of the beneficiaries.

The trial court then compounded its error by substituting its own judgment disfavoring decanting (*e.g.*, the respondents failed to consider "less draconian measures," Order at 36), rather than to review the respondents' decision to decant for an abuse of discretion.

Certain aspects of the pretrial proceedings are chronicled here as they are signposts on the path leading to the errors in the Order.

## Respondents' Motion to Dismiss

The respondents moved to dismiss the petition; by Order dated April 14, 2015, *infra*, at 36; the motion was denied.[1] The following aspects of the Order are notable:

a. The petitioners had repeatedly, and incorrectly, asserted that the trustees had an obligation to act in the "best interests" of the petitioners. Without commenting on this material mistake, the Order simply recited it at 6-7.

b. Although the petitioners made no allegation of breach of good faith on the part of the trustees, the trial court, in its Order, at 13, note 13, chose to infer an allegation of this critical element. In addition, the Order again recited the erroneous "best interests" standard. *Id.*

c. The Order, at 10, came very close to making a determination that the decantings were invalid, something wholly inappropriate in the context of a motion to dismiss.

## Deposition of David A. Hodges, Sr.

A dispute arose as to the petitioners' desire to depose David A. Hodges, Sr., an effort opposed by the respondents, as well as Mr. Hodges, Sr. himself, on the ground of his poor health. By Order issued June 30, 2015, Appendix at 9, the Court permitted the deposition to go forward under certain conditions, but more significantly, at 13, admonished counsel for engaging in this dispute. This, despite an unrebutted medical report that it would pose a threat to Mr. Hodges, Sr.'s life, and notwithstanding the fact that this was the first (and it turned out, only) contested issue regarding discovery. Counsel for the respondents made note of this in a motion for

[1] The respondents have appealed both the denial of this motion to dismiss, and the decision on the merits; in any event, the issues presented are essentially the same.

reconsideration dated July 9, 2015, ¶9, Appendix at 35, which was denied by Order dated July 20, 2015, Appendix at 52.

Mr. Hodges, Sr. died on August 16, 2015, less than a month later, before being deposed and before trial.

## Erroneous "Best Interests" Standard

The petitioners continually, but incorrectly, asserted an obligation on the part of the respondent trustees to act in the "best interests" of the petitioners. Because the trial court had not corrected this, and in fact had recited it more than once without correction, the respondents eventually filed a motion *in limine*, seeking an order straightening out the record, Appendix at 59. Such a motion should not have been necessary.

## Mediation

In a pretrial Order issued September 3, 2015, Appendix at 63, the Court noted that the respondents had repeatedly declined to participate in mediation. *Id.* at 4. Continual reference to the refusal of the respondents to participate in a voluntary procedure is wholly inappropriate.

## Decision on the Merits

The decision on the merits, Order in the Notice of Appeal at 20, *infra,* at 51, essentially concluded that the respondents had failed to properly take into account the interests of the petitioners, in violation of duties under RSA 564-B-801. *Id.* at 34-36. The respondents contend that this decision is unsustainable, for the reasons outlined in this brief. The following aspects of the Order are notable:

a. The Order fails to account for the testimony of the respondent's expert, Attorney Robert A. Wells, whose report was in evidence, Exhibit A, Appendix at 691. His opinion, as set forth in his report and testimony, and summarized at Exhibit A,

Appendix at 691, validated the actions of the respondents, both in terms of the applicable statutes and the operative trust instruments. Other than references in two footnotes (Order at 27, note 21 and at 36, note 33) to technical points, about which the trial court itself examined Attorney Wells, there is no discussion in the Order of his testimony and opinion, which bore directly on the issues of the case.

b. By the same token, the Order fails to reference at all the testimony of petitioners' expert, Attorney Mark Langan, or his report which was in evidence, Exhibit 11, Appendix at 646. His opinions were either withdrawn or ultimately lacked any credible basis. *See* Request for Findings of Fact and Rulings of Law[2] dated October 15, 2015, Appendix at 96, and particularly number 8:

> 8. Attorney Langan's opinion that the Respondents should have used a better "protocol" in deciding whether to decant rested on the observation that the Respondents should have done more to determine whether David, Sr. was telling the truth, *i.e.*, the Respondents should have done more to obtain the other side of the story, at least more than was disclosed in their deposition testimony. While the Respondents could have interviewed the Petitioners, there was no legal requirement that they do so, nor were they even legally obligated to notify the Petitioners before decanting. Moreover, whatever Attorney Langan may have gleaned from the depositions (understanding he had not read the trust documents before opining on this case), the Respondents' trial testimony confirmed that they did rely on their own personal knowledge of or interaction with the Petitioners, and the Petitioners' trial testimony verified the accuracy of the Respondents' observations of the antagonism and estrangement that existed between the Settler (sic) and them. In short, the uncontroverted trial testimony confirmed that the Respondents' decision to decant, and the protocol employed in deciding to decant, were not an abuse of discretion.

c. The Order discounts the testimony of an acknowledged expert in the field, co-respondent Attorney Joseph McDonald, and made a number of critical comments about the respondent Saturley, a New Hampshire attorney with an extensive background

[2] The trial court made no specific rulings on requests for findings and rulings. Order at 38.

and practice in professional ethics and professional conduct.[3] The Order also, at 33-34, accuses the respondent Johnson of compromising his integrity as a result of a "payoff" from Mr. Hodges, Sr. in the form of a revocable trust provision that was explained to the trial court (by Attorney Saturley) as a replacement tool for an employment contract (due to apprehension with bringing such a contract before a then dysfunctional board of directors).[4] There was no evidence it had any impact on Johnson's conduct. The conclusion that it caused him to compromise his independence as a trustee is simply unfounded, and unsustainable.

d. Finally, the Order makes scant mention of the misconduct of the petitioners that caused or contributed to cause the decantings in the first instance. Compare Order at 32-33 with Respondents' Supplemental Request for Findings of Fact and Rulings of Law dated October 15, 2015, Appendix at 96, and particularly numbers 4 and 5:

> 4. The change in the family and business dynamics, including the angry and open antagonism displayed by the Petitioners Barry Sanborn and David Hodges, Jr. toward David, Sr., and the estrangement of the Petitioner Patricia Sanborn Hodges from David, Sr. as well as her alliance with Barry and David, Jr., caused the Respondent Trustees to justifiably conclude that the Petitioners posed a potential impediment to HDC and the goals of the Settlor in creating the Trusts.
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> 5. Specifically, the uncontroverted record at trial supports a finding that: (a) the dysfunctional relationship between Barry and David, Sr. had deteriorated to the point that David, Sr. actually feared for his safety; (b) Patricia was estranged from David, Sr. such that she avoided contact with him and they had not spoken in years; and (c) David, Jr. long considered David, Sr. to be a liar, and accused David, Sr. of lying in an angry confrontation after learning that he would not immediately be made

[3] The Order, at 28, includes several footnotes (22-25) commenting on the testimony of the respondents. The insinuations of the footnotes are not justified by any evidence in the record.

[4] Attorney Langan (petitioners' expert) acknowledged the dysfunctional situation in his testimony. *see also* notes 11 and 19, *infra.*

president of HDC (Barry and David, Jr. were terminated as employees and later commenced wrongful termination litigation against HDC).

The Order does not make any finding of bad faith on the part of the respondents, but instead is premised upon the Court's conclusion that they did not appropriately take into account the interests of the petitioners and that "less draconian" measures were not considered. Order at 36.[5]

The respondents respectfully appeal.

[5] The post-trial order staying removal of the Trustees pending this appeal, with its treatment of the issue of reimbursement of the Trustees, discussed *infra* at 38, is another example of the manner in which the trial court addressed the issues presented here.

## STATEMENT OF THE FACTS

The witnesses at trial were the petitioners and respondents, as well as two experts. The exhibits were entered by agreement, and included the Trusts and decanting instruments, as well as some historic information. The evidence was largely undisputed, and presented the trial court with a narrow question: did the decantings comply with the authority granted to the trustees by the Trusts, and with applicable New Hampshire law? The trial court concluded that, because the trustees did not adequately consider the effect of the decantings on the petitioners' interests as the beneficiaries, they failed to comply with RSA 564-B:8-801, and accordingly voided the decantings.[6]

The Trusts at Issue

The three (3) children and two (2) stepchildren of David A. Hodges, Sr. were discretionary "sprinkle" beneficiaries of the 2004 David A. Hodges, Sr. Irrevocable GST Exempt Trust and the 2004 David A. Hodges, Sr. Irrevocable GST Non-Exempt Trust (the "2004 Trusts").[7] Exhibits 1, 2, Appendix at 123, 171. A discretionary sprinkle beneficiary is one to whom the trustee may choose to make distributions, equally or unequally with other beneficiaries, or not at all.

The assets of the 2004 Trusts comprised the non-voting stock of Hodges Development Corporation ("HDC"), the parent entity of the Hodges enterprises. These assets were "decanted" in 2010 and 2012 into the 2010 and 2012 David A. Hodges, Sr. Irrevocable GST Exempt Trusts and the 2010 and 2012 David A. Hodges, Sr. Irrevocable GST Non-Exempt Trusts (the "2010

[6] This Statement of Facts provides a summary, but other detailed facts are set forth in the Argument as they bear on a particular point.

[7] *See* RSA 564-B:8-814(b), providing that "if a distribution to or for the benefit of a beneficiary is subject to the exercise of the trustee's discretion ... then the beneficiary's interest is neither a property interest nor an enforceable right, but a mere expectancy."

and 2012 Trusts"). Exhibits 3, 4, 5, and 6; Appendix at 214, 229, 328, 420. The petitioners, a child and two step-children of Mr. Hodges, Sr., have no beneficial interest in the 2012 Trusts; the beneficiaries of the 2012 Trusts are, however, two other children of David A. Hodges, Sr. who were also beneficiaries of the 2004 Trusts.[8]

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."[9] 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

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[8] The 2010 decantings did not eliminate the beneficial interests of the petitioner David A. Hodges, Jr.

[9] *See also* RSA 564-B:8-814(c), providing that "[s]ubject to the provisions of paragraph (a), unless the terms of the trust expressly provide otherwise, if 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 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 other beneficiaries.*" (emphasis added).

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.

The Dysfunction and Hostility in the Hodges Family and Enterprises

There was extensive testimony at trial of the dysfunctional conflict that developed between the Hodges' family members since the creation of the Trusts in 2004. This included the petitioners' longstanding hostility toward David, Sr., antipathy for HDC, and in the case of Barry Sanborn and David, Jr., disruptive conduct within the HDC workplace. *Order* at 31-33. The conflict escalated to the point that armed guards were hired to protect David, Sr. and Mr. Johnson at the HDC workplace. *Order* at 33. Every witness, petitioners, respondents, and experts alike, agreed that the conflict existed, *Order* at 31, and the trial court acknowledged that the conflict posed a risk[10] to the Hodges businesses. *Order* at 29-30, 36.[11] The Trustees met

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[10] This risk to the continued success of the Hodges enterprise, and accordingly fulfillment of the intention of the Settlor, is further described in footnote 20, *infra,* in the context of the *Tamposi*-like situation.

[11] *See* Order at 32-33: "Eventually, HDC became Barry's and David, Jr.'s primary employer. Barry was employed by HDC for approximately thirty-six years, rising to the position of "Senior Vice President" before his termination in October 2012. By the time of his termination, his employment had become part-time by his own choosing, although he was paid a generous, essentially fulltime salary. His underemployment became a source of friction between Barry and David, Sr. The tension between them became rather acute, and eventually led to intervention by Attorney Saturley, as counsel to HDC, in the form of a March 19, 2009 letter entitled "Working Together" that specified Barry's part-time schedule and his duties with the company. *See* Exh. B. It also set forth an understanding that both David, Sr. and Barry "must set examples of the highest standards of behavior." The latter was instructed to "avoid public displays of temper" and both were exhorted to "show patience with each other." *Id.*

"David, Jr. also worked for the family business from a very young age. He testified he was told by his father from about the age of six that someday he would take over the company. In April 2012, however, he was informed that respondent Johnson would instead be appointed President of HDC. *This resulted in a confrontation between the Davids, the ferocity of which is disputed. Shortly thereafter, David, Jr. informed Barry of this development. Barry confronted his stepfather at the family home that evening and a dispute ensued. Although, again, the measure of discord is disputed, what is clear is that David, Sr. moved out of the family home, Barry had a heart attack, and a divorce action between Joanne and David, Sr., ensued.* When David, Jr. returned to the company headquarters, he discovered that armed guards had been

frequently to consider how best to deal with the conflicts, and Attorney Saturley and Mr. Johnson testified that, in each instance, after considerable deliberation over a period of many months, they made an independent decision to proceed with the decanting in deference to the business purposes of the Trusts. *Order* at 28-30.

The Decision to Move Forward with the Decantings

The Order, at 27-31, chronicles the contacts and conversations that led to the 2010 and 2012 decantings. Each of the respondents testified, under oath, to his recollection of the sequence of events, the consideration given to the decanting process, both procedurally and as a matter of substance, leading to the decisions to do so, and the manner in which each decanting was accomplished, *i.e.*, via delegation by Saturley to McDonald, and via resignation of Johnson and appointment of McDonald.

The trial court expressed, both in questioning of the witnesses at trial, and in its Order, concern that the trustees were acting more at the behest of David A. Hodges, Sr., but made no such finding; the Trustees all testified to their concerns regarding the impact of the petitioners' continued interests in the trusts on the integrity and success of the Hodges' businesses, including Sr.'s long-held and clearly expressed philosophy regarding continuation of the businesses for the benefit of the employees and the community.

Expert Testimony

The petitioners relied upon testimony from Attorney Mark Langan, whose report was in evidence (*see* Exhibit 11, Appendix at 646). As noted in the Statement of the Case, his opinions were either withdrawn, or lacked any credible basis. To the extent relevant to the rationale of the trial court, Attorney Langan opined that the respondents should have used a better "protocol" in

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hired allegedly to protect David, Sr. and Johnson from Barry. Eventually, David, Jr. was later fired from HDC in August 2012." (Footnote omitted; emphasis added)

deciding whether to decant, including doing more to obtain "the other side of the story." Transcript at 205.

The respondents, in addition to the essentially expert testimony of the respondent McDonald, relied at trial on the testimony of Attorney Robert A. Wells, whose report was also in evidence as Exhibit A, Appendix at 691. Attorney Wells' opinions and testimony validated the actions of the respondents, both in terms of the applicable statutes and operative trust instruments. The trial court's Order makes no note of his testimony, other than references in footnotes (Order at 27, note 21, and at 36, note 33) to technical points about which the trial court itself examined Attorney Wells.

## SUMMARY OF THE ARGUMENT

The Trusts were established by their Settlor, David Hodges, Sr. to preserve the Hodges enterprise[12] for its employees and the community and for those beneficiaries in the Trusts who did nothing to subvert that purpose. The terms of the Trusts and the applicable statutes authorize the Trustees to remove non-vested beneficiaries from the Trusts by the method of decanting. The Trustees determined, in the exercise of their discretion, that the purpose of the Trusts would be served by decanting the non-vested petitioners from the Trusts as they were a cause of dysfunction within the Hodges enterprise and posed a threat to its existence in the long term.

Under New Hampshire law, a trustee who is granted an extended discretion is empowered to exercise that discretion to effectuate the Settlor's purposes in granting it. The law assumes that the Settlor invested faith and confidence in the Trustees' judgment to exercise their discretion appropriately and in good faith. In setting aside the decantings, the trial court did not find that the Trustees failed to consider the terms and purposes of the Trusts, or breached any duty of good faith, impartiality, or loyalty. The trial court set aside the decantings on the unprecedented basis that the Trustees failed "to give due consideration to the petitioner's interests" and in particular, failed to consider "less draconian" alternatives to protect the Hodges enterprise from risk and disruption by the petitioners. In so ruling, the trial court misread the statute.

The statute defines "interests of the beneficiaries" to mean "the beneficial interests provided in the terms of the trusts." The Trustees duly considered the attenuated, unvested interests of all the beneficiaries in the Trusts, including the petitioners, and correctly determined,

[12] The term "Hodges enterprise" refers to Hodges Development Corporation ("HDC") and its subsidiaries. The Settlor funded the Trusts at issue in this case primarily with non-voting HDC shares. Those shares remain the most substantial assets of the Trusts to this date.

as did the trial court itself, that their interests in the Trusts had not vested, and that the petitioners' removal from the Trusts by decanting was therefore authorized by the terms of the Trusts and by statute. The Trustees thereby fulfilled their duty to consider the petitioners' interests.

Moreover, the law prohibits the trial judge from substituting his own judgment for that of the Trustees in the absence of affirmative evidence that the Trustees acted in bad faith or arbitrarily. The fact that the trial court may not have considered the threat to the Hodges enterprise to be as grave as the Trustees did at the time or may have opted for a different – but unspecified -- solution to deal with the threat had it been a Trustee, are not sufficient grounds to find that the Trustees acted arbitrarily or abused their discretion. The trial court's decision to void the decantings erroneously usurped the Trustees' discretion and imposed on the Trustees a vague and heightened duty and standard of conduct.

Finally, the trial court's decision ignores the public policy reflected in our General Court's enactment of the decanting statute and other provisions of our Trust Code intended by the legislature to provide flexibility to trustees of New Hampshire irrevocable trusts. Those provisions are intended to empower such trustees by providing an extrajudicial means to modify obsolete trust provisions without significant restrictions. By invalidating the decantings, the trial court ignored the terms of the Trusts, misread the statute, and improperly substituted its judgment for that of the Trustees.[13]

[13] The respondents Johnson and Saturley have also appealed the decisions of the trial court removing them as trustees, and comments of the trial court regarding indemnification for expenses of this litigation. *See* Arguments VIII and IX, *infra* at 27.

## ARGUMENT

### I. The Statutory Scheme Controlling Trust Law in New Hampshire Encourages the Grantor to Give Broad Discretion to the Trustee in Administering the Trust.

This dispute arises out of "decanting," a process by which assets of one trust are "poured" into another trust (thus, the use of the label decanting). This procedure is recognized and authorized by New Hampshire statutory law, *see* RSA 564-B:4-418, "Trustee's Authority to Decant Trusts," and the trust instruments at issue here expressly provided, and extended authority to the trustees, for decanting.

The Order described decanting generally at 8-10, including the following observations:

> "Decanting is the term generally used to describe the distribution of irrevocable trust property to another trust pursuant to the trustee's discretionary authority to make distributions to, or for the benefit of, one or more beneficiaries of the original trust." *Morse v. Kraft*, 992 N.E.2d 1021 1024 (Mass. 2013)(quotations and brackets omitted) *quoting* William R. Culp & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities,* 45 Real Prop. Tr. & Est. L.J. 1, 48 (2010).
>
> The "decanting statute" in effect at the time of the decantings provided for unequal treatment of beneficiaries, directing that: "[u]nless the terms of the trust expressly provide otherwise, a trustee with the discretion to make distributions to or for the benefit of one or more beneficiaries of a trust (the "first trust") may exercise that discretion by appointing the property…in favor of another trust for the benefit of one or more of those beneficiaries (second trust)." RSA 564-B:4-418 (Supp. 2013).[14]

RSA 564-B:4-418 was enacted in 2008. The purpose of the enactment, as set forth in Laws 2008, Chapter 374:1, was as follows:

> The general court finds:
>
> I. The market for trusts and fiduciary services across the nation is a rapidly growing sector of the nation's economy.
>
> II. New Hampshire is uniquely positioned to provide the most attractive legal and financial environment for individuals and families seeking to establish and locate their trusts and investment assets.

[14] This section of the New Hampshire Trust Code was amended effective July 1, 2014. The trial court applied the prior version that was in effect at the time of the decantings at issue, and it is set forth at length in the compilation of statutes at the front of this brief. There are no material differences between the two versions.

III. This act will serve to continue New Hampshire's firm commitment to be the best and most attractive legal environment in the nation for trusts and fiduciary services, an environment that will continue to attract to our state good-paying jobs for trust and investment management, legal and accounting professionals, and other professionals to provide the support and infrastructure required to service this growing sector of the nation's economy.

This same purpose had been expressed in the original act in 2006, called the "Trust Modernization and Competitiveness Act of 2006," Laws 2006, Chapter 320, as noted in a New Hampshire Bar Journal article by Attorneys Michelle M. Arruda and William F.J. Ardinger, "The Policy and Provisions of the Trust Modernization and Competitiveness Act of 2006," 47 N.H.B.J. 6:

> On June 20, 2006, Governor Lynch signed into law the "Trust Modernization and Competitiveness Act of 2006." According to the act, the purpose of the TMCA is "to establish New Hampshire as the best and most attractive legal environment in the nation for trusts and trust services." In signing the bill, Governor Lynch hoped "to make New Hampshire first in the country in the new national market for trust services and the good, high-paying jobs in that industry."
>
> Think trust law is boring and arcane? Well, think again! The *Wall Street Journal* reported on TMCA's enactment just two days after the Governor signed the bill, stating that the "latest entrant in the trust wars is New Hampshire, whose governor signed into law this week a bill that seeks to surpass most other states in innovative trust features."

The New Hampshire Trust Code is, by design, as forward looking and liberal as any in the nation, and it is clearly intended to be. This point is confirmed by the testimony of Attorney Langan Tr. at 202, and that of the respondent McDonald at 134.

## II. The Purpose of the Hodges Trusts is to Support and Preserve the Hodges Enterprise, and the Settlor Went as Far as the Law Permits in Granting Discretion to the Trustees to Accomplish that Purpose.

The Trusts were established by their founder, David Hodges, Sr., to preserve the Hodges enterprise after his death for its employees and the community. The petitioners were non-vested beneficiaries in the Trusts who created conflict and disruption within the Hodges enterprise and

posed a threat to its existence in the long term. After thoughtful consideration over a period of many months, the Trustees determined that the appropriate solution to eliminate the ongoing conflict and risk to the Hodges enterprise was to decant the assets of the Trusts into new trusts that did not include the unvested interests of the petitioners, as is expressly allowed by the terms of the Trusts and statute. Tr. at 309-22 (Testimony of Attorney Saturley).

David A. Hodges, Sr. created the trusts at issue in this litigation for an important, specific, and undisputed purpose. From the beginning in 1969, Mr. Hodges, Sr. created, expanded, and preserved a number of business enterprises, all centered on the development of real estate throughout New Hampshire. Those enterprises grew to employ, at times, upwards of 85 individuals, and contributed prominently and significantly to the community. Mr. Hodges, Sr. wanted these enterprises to remain intact and successful for the benefit of those employees and the community.[15] Indeed, the Trusts created a Committee of Business Advisors and contained many other provisions designed to accomplish his purpose. *See* Testimony of Joseph McDonald, Tr. at 122; Testimony of William Saturley, Tr. at 302-06; Testimony of Alan Johnson, Tr. at 391-93.

## III. New Hampshire Trust Law on Decanting.

In addition to the express authority set forth in the trust documents, applicable New Hampshire law authorizes and validates these decantings. In particular, RSA 564-B:4-418(a), "Trustee's Authority to Decant Trust," provides:

> [U]nless the terms of the trust expressly provide otherwise, a trustee with the discretion to make distributions to or for the benefit of one or more beneficiaries of a trust (the "first trust"), may exercise that discretion by appointing the property subject to the

[15] As Attorney Saturley testified, Tr. at 315, Mr. Hodges, Sr. "did not want what I'll call trust babies." *See further,* Article VII of the Trusts, "Trusts for Descendants," ¶D.2, Appendix at 135, 183: "It is my wish to avoid use of the trust property in a manner that might undermine the beneficiaries' self sufficiency, productivity, and work ethic." *See also* Art. XII, ¶¶ G, H (preference to perpetuate HDC over distributions to beneficiaries). Appendix at 150, 198.

> authority in favor of another trust for the benefit of one or more of those beneficiaries (the "second trust").[16]

Moreover, RSA 564-B:4-418(n) contemplates and permits even broader decanting authority by providing that "a trustee's power to decant is in addition to any other powers conferred by the terms of the trust," and "[a] trustee's power to decant may be expanded, restricted, eliminated, or otherwise altered by the terms of the trust." Thus, the decantings at issue in this matter are authorized and validated both by the express terms of the trust documents, as well as by applicable New Hampshire statutory law.

Consequently, because distribution was "subject to the exercise of the trustee's discretion," the petitioners were discretionary beneficiaries only, and their "interest [was] neither a property interest nor an enforceable right, but a mere expectancy." RSA 564-B:8-814(b).

Accordingly, the Trustees were authorized to make unequal distributions among the beneficiaries and to "make distributions entirely to one beneficiary to the exclusion of other beneficiaries." RSA 564-B:8-814(c).

The statutory decanting provision, RSA 564-B:4-418(a), is completely consistent with RSA 564-B:8-814:

> "[A] trustee with discretion to make distributions to or for the benefit of one or more beneficiaries of a trust ('first trust') may exercise that discretion by appointing the property subject to the authority in favor of another trust for the benefit of one or more of the beneficiaries ('second trust')."

The only limitations placed on the trustee's power to decant are set forth in Subparagraph (b). Significantly, a trustee may not decant if it "will reduce any *current* fixed income interest, annuity interest or unitrust interest of a beneficiary of the first trust, Subparagraph(b)(2), or if the property is subject to a *presently* exercisable power of withdrawal held by a beneficiary of the first trust." Subparagraph (b)(4)." (emphasis added). In other words, consistent with RSA 564-

[16] This section of the chapter was amended in 2014, but not in any way material to this dispute.

B:8-814, the trustee may not eliminate a beneficiary's interest through decanting where the beneficiary has a *vested* interest in the trust.

In addition, the statute specifically provides that decanting is not prohibited just because a trust is irrevocable.[17]

Since the Trustees retained discretion to distribute Trust assets and the petitioners did not have a vested interest in the Trust property (*see* Argument V, *infra*) , there is no basis in the statutes, or by virtue of the applicable trust provisions, to nullify the decanting.[18]

## IV. The Trustees were Familiar with the Petitioners and Their Relationship to the Business, and Determined that the Petitioners were a Threat to the Preservation of the Business, Including the Threat of a *Tamposi-like* Situation.

From decades of personal experience, Attorney Saturley and Mr. Johnson possessed extensive, firsthand knowledge of the dynamics of the Hodges family conflict and its adverse effect on HDC. *E.g.* Tr. 286, 297, 306-308, 316-22, 394-402, 407-11. They did not need to talk with the petitioners to understand the nature of the conflict or its cause, and there was no evidence to suggest that further investigation would have led the Trustees to reach any different conclusion. *Morse*, 100 N.H. at 157.[19] Further, while the magnitude of the conflict and risk may

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[17] RSA 564-B:4-418(g) ("A power to decant is not a power to amend the trust. Accordingly, a trustee is not prohibited from decanting property in favor of another trust solely because the first trust is irrevocable or the terms of the first trust provide that it may not be amended."). The current version of the statute also recognizes this point. *See* RSA 564-B:4-418(l).

[18] RSA 564-B:8-801 does not impose the duty to act "for the *benefit* of the Trust beneficiaries" or in their "*best interests*" as often stated by the petitioners. RSA 564-B:8-801 references the "interests of the beneficiaries," defined in RSA 564-B:1-103(7) as "the beneficial interests provided in the terms of the trust." Thus, the Trustees did not breach a duty to the petitioners by exercising their discretion to decant given that the petitioners' "interest [was] neither a property interest nor an enforceable right, but a mere expectancy." RSA 564-B:8-814(b).

[19] As described by the petitioner, Sanborn, there was a "family feud" going on, Tr. at 56, and David, Sr. and David Jr. were "warring." Tr. at 19. Sanborn admitted calling David, Sr.'s secretary and threatening that it didn't make a difference if David, Sr. spoke with him because he knew where he lived and he'd go get him. Tr. at 33. Sanborn also admitted threatening both David, Sr. and Saturley that if he was not left alone he would report HDC to the IRS. Tr. at 19-27. David, Jr. made similar noises about the IRS and claimed that he was not made president because he had requested an audit. Tr. at 246-47. According to David, Jr., when David, Sr. told him he would not be made president he was in shock and considered it a "game changer." Tr. at 234-35. He did not speak with David, Sr. again for months. Tr. at 233-34, 243. When David, Sr. asked him why he did not respond when he said hello at the HDC office, David Jr. responded "I'll start speaking to you when you quit lying." Tr. at 237-40. Patricia testified that she had not talked with David, Sr. for years, Tr. at 421-28, and when Sanborn and David, Jr. told her about the

be open to debate, there is no dispute that the conflict existed and posed a risk. The trial court explicitly acknowledged the risk in its Order when it listed a number of measures that in its judgment had "already limited, if not greatly diminished, the potential threat to HDC arising from the inter[sic]-family discord," Order at 29-30, and when it faulted the Trustees for not considering "options that would have mitigated or neutralized the risk to the company, but resulted in something less than complete removal of the Petitioners' beneficial interests...." Order at 36. The trial court's affirmation of the risk to the Hodges enterprise – the very consideration that led the Trustees to decant – is consistent with the Trustees' position that their decision to decant was not arbitrary.

While the trial court clearly did not agree that the threat posed by the petitioners was sufficient to justify their removal from the Trusts, Attorneys Wells, McDonald and Saturley considered the petitioners' removal to be necessary because the risk of a *Tamposi*-like situation[20] would continue to exist so long as the petitioners remained as beneficiaries. Tr. 123, 141-42, 149-54, 329, 491-92, 515-17. Attorney Wells explained:

> And again, the interest of the beneficiaries is defined by the purposes and terms of the trust, which was the long-term operation of this closely held business. And in this particular matter where the issues that were raised by the conduct and the relationships of

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armed guards at the HDC headquarters, they all laughed about it. Tr. at 422. The petitioners' own testimony thus confirms the Trustees' observations that circumstances had changed since the Trusts were created in 2004, and the petitioners posed a risk to HDC.

[20] As referenced by the Trustees in their deliberations, and as used in the Order, the "*Tamposi*-like situation" relates to the litigation heard by the trial judge involving disputes between Elizabeth Tamposi, the primary beneficiary of an irrevocable trust created by her father that held interest in the Tamposi family business, and the trustee of that trust, and Ms. Tamposi's two brothers who served as fiduciary advisors with the power to manage those business interests and control dividend distributions to Ms. Tamposi's and her other siblings' trusts. Ms. Tamposi and her hand-picked "disinterested trustee" engaged in vexatious litigation over a period of several years in an effort to force the brothers, among other things, to liquidate trust assets, and make substantial cash distributions to Ms. Tamposi's trust. *See Shelton v. Tamposi, Jr.,* 164 N.H. 490 (2013) (affirming probate judge Cassavechia's Order requiring Ms. Tamposi to pay brothers' fees incurred in defending litigation based on finding that the litigation was instituted and prosecuted in bad faith, and recounting probate judge's extensive findings that support award of attorney's fees and costs as well as removal of trustee). The respondents testified that they were well aware of the strain that years of this fractious litigation had on the Tamposi family businesses and the diversion of resources away from their successful operation that resulted. Tr. at 123-25, 136-41, 314.

> the Petitioners to the grantor and to his business, not just to the grantor, but to his business, became a critical factor that, in my judgment, the trustees had a duty to act upon. And I think a failure to act upon that duty would have been a breach of their duty to those other beneficiaries which did not have that relationship problem or dysfunctionality ...
>
> If you have disgruntled beneficiaries, I don't care what you do, if you do not have the ability to eliminate them, as in this case with a closely held business, you're always going to have grave difficulties and problems with trust administration ...
>
> My judgment is to leave (the Petitioners) in as beneficiaries would have resulted in long-term litigation, and it would I think defeat the purpose of what Mr. Hodges intended. I think that's why we have the definition of distributee trust up there.

Tr. at 459, 492, 516. The fact that the trial court, after only listening to brief testimony from the Petitioners, did not agree with the Trustees' conclusion that the degree of risk was sufficient to warrant decanting does not justify substituting its judgment for that of the Trustees.

## V. The Trustees Considered the Petitioners' Interests Provided in the Trusts and Correctly Determined They were Not Vested, and Therefore Decanting was Permitted.

The trial court set aside the decantings based on a finding that "the Respondents, although giving consideration to the terms and business purposes of the 2004 Trusts, did not undertake and complete the other task required by law, namely, to give due consideration to the Petitioners'... interests." *Order* at 36; *see also*, *Order* at 3. In arriving at this unprecedented result, the trial court neither explained what it considered the petitioners' interests to be nor what the Trustees should have done to satisfy their duty to consider the petitioners' interests. Nor did it find that the Trustees breached their duty of good faith, loyalty or impartiality as set forth in RSA 564-B: 8-801, 802 & 803. The trial court instead imposed a vague, open-ended and heightened duty on the Trustees to consider whether the petitioners' removal from the Trusts was

in the petitioners' interests, or in effect, "best" interests. In so ruling the trial court misread the statute and abused its discretion.[21]

RSA 564-B: 8-801, the provision upon which the trial court relied to void the decantings, provides:

> The trustee shall administer, invest and manage the trust and distribute the trust property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter.

RSA 564-B:1-103(7) defines "interests of the beneficiaries" to mean "the beneficial interests provided in the terms of the trusts." *Appeal of Rehab. Assoc's of N.E.*, 131 N.H. 560, 565 (1989) (the definition of a term in a statute controls its meaning); *U.S. E.E.O.C. v. Fuller*, 134 A. 3d 17, 22 (N.H. 2016). It necessarily follows that Section 801 required the Trustees to administer the Trusts in accordance with the petitioners' "*beneficial interests provided in the terms of the Trusts*." *Greenhalge v. Town of Dunbarton*, 122 N.H. 1038, 1040 (1982)(it is well established that the words in the statute itself are the touchstone of the legislature's intention); *In re Richard M*, 127 N.H. 12, 17 (1985)(when a statute is unambiguous, the court will confine its review to the actual words of the statute); *In re Jerome*, 150 N.H. 626, 629-30 (2004)(the court will not create a judicial exception to the statute's plain language or impose upon the statute policy considerations that the plain language does not support).

Attorney Wells described the Trustees' duty this way:

> So if we look at the interest of the beneficiary, we have to look at what was intended by going back to the trust document. We always go to the trust document to determine the

[21] It is apparent that the trial court imposed on the Trustees a duty to act in the petitioners' best interests. The trial court, for example, found that the Trustees "failed to consider *the effect* of the decantings at issue on the Petitioners' interests as beneficiaries." (emphasis added) *Order* at 3. The Trustees were well aware that the effect of the decantings would be to eliminate the petitioners' interests in the Trusts, as it was the purpose of the decantings. This finding only makes sense if the trial court had the Petitioners' *best* interests in mind, and in so ruling, the trial court made the fatal flaw of confusing vested interests with *non-vested* interests.

> fundamental interest of a beneficiary in order to determine whether the trustees are acting consistently and appropriately.

*Tr.* at 447. The decantings were in accordance with the petitioners' beneficial interests provided in the terms of the Trusts and the Trustees did what they were legally and ethically required to do as fiduciaries to consider the petitioners' interests. Attorney McDonald, an expert in trust and estate law, and Attorney Saturley, an expert in legal ethics, testified that they considered the terms of the Trusts and statute before determining that decanting was permitted. *Tr.* at 114, 127, 286, 309-11, 314. Their testimony is not only uncontroverted on this point, but it is consistent with the findings of the trial court.

The trial court found that the Trustees considered the terms and purposes of the Trusts, *Order* at 29, 35, and concluded, as did the Trustees, that the interests of the beneficiaries in the Trusts, including the interests of the three petitioners, had not vested, *Order* at 14-15. Therefore, the petitioners' removal from the Trusts through decanting was permitted by the terms of the Trusts. *Order* at 10, 20-21, 34. While the trial court clearly did not approve of the Trustees' decision to decant, the record, as well as the trial court's own findings, lead to the conclusion that the Trustees indeed considered the interests of the petitioners. *Morse v. Trentini*, 100 N.H. 153 (1956) (fiduciary did not abuse his discretion and gave proper consideration to ward's intentions). The trial court's conclusion to the contrary was error.

Since the petitioners' interests in the Trusts were not vested, their beneficial interests in the Trusts were "neither a property interest nor an enforceable right, but a mere expectancy." RSA 564-B: 8-814 (b); *In re Goodlander*, 161 N.H. 490, 497-98 (2011). The trial court acknowledged that "the petitioners' 'beneficial interests' are those delineated in the trust", *Order* at 14, and that the petitioners' interests in the trusts were not vested, *Order* at 14-15. The trial

court also found that the Trustees considered the terms of the Trusts, *Order* at 35, but it disregarded the implications of its own findings and the provisions of the statute.

While not in the best interests of the petitioners, the decantings were in accordance with the petitioners' attenuated, non-vested interests, *i.e.,* discretionary sprinkle beneficiaries, as provided in the terms of the Trusts. *Tr.* 127- 30. The Trustees were therefore authorized by the terms of the Trusts and by statute to decant and "make distributions unequally among the beneficiaries and ... entirely to one beneficiary to the exclusion of the other beneficiaries." RSA 564-B: 8-814 (c); *Order* at 34.[22] The Trustees were mindful of the law, gave due consideration to the terms and purposes of the Trusts and to the interests of all of the beneficiaries as provided by the terms of the Trusts in their determination of whether the decantings were authorized by the Trusts and by statute. The Trustees thereby fulfilled their fiduciary obligation under Section 801 to consider the petitioners' beneficial interests and did not, as the trial court erroneously found, "dismissively ignore them." *Order* at 35, fn. 31.

It is important to emphasize that the Trustees' duty to consider the interests of the beneficiaries ran to all beneficiaries and not only to the petitioners. Any unequal distribution of trust property will necessarily have an adverse, and in some cases, harsh impact on some of the beneficiaries. The effect of removing the petitioners from the Trusts was obviously not in the petitioners' best interests, *it never could be*, but it was in accordance with their non-vested interests and with the terms and purposes of the Trusts. It was also in accordance with the

[22] If the trial court's vague and expansive interpretation of Section 801 is upheld then the provisions of the statute and trusts which authorize decanting will become virtual nullities. No unequal distribution or elimination of a non-vested, beneficial interest, regardless of how justified the distribution or attenuated the interest, will ever withstand scrutiny. The trial court's analysis not only conflicts with the plain wording of the statute but it potentially undermines the entire statutory scheme. *Jerome,* 150 N.H. at 639 (court will interpret statute in the context of the overall legislative scheme and not in isolation).

interests of the two other beneficiaries of the Trusts who were not disruptive and who fully supported the purposes of the Trusts.

## VI. The Petitioners were Subject to Decanting if the Trustees Determined in Their Discretion That Step was Warranted.

Section 801 also required the Trustees to consider the Trusts' terms and purposes. The Trustees undertook and completed this task. The trial court found that the Trustees gave consideration "to the business purposes of the 2004 Trusts," *Order* at 36, 29-30, and "the effect of the decanting on HDC," *Order* at 29-30, 36. Because the Trustees acted in accordance with the petitioners' interests in the Trusts as set forth in the preceding argument, the trial court's own findings do not provide any grounds to set aside the decantings based on a finding that the Trustees abused their discretion.

It is a fundamental principle of trust law that "in determining what the duties of the trustees are ... (the Court's) purpose is to effectuate the settler's intention in creating the trust." *Bartlett v. Dumaine*, 128 N.H. 497, 504 (1986)(courts have shown a signal regard for settlor's intention). *See also Order* at 5-6; *Shelton v. Tamposi*, 164 N.H. 490, 495 (2013); RSA 564-B: 1-112. The trial court found that David, Sr.'s purpose in forming the Trusts was to "provide continuation of the family business (HDC) after the death of the founder (David, Sr.)," *Order* at 26-27.

Following good faith deliberation which extended over a period of many months and years, *e.g., Order* at 28; *Tr.* 99-100, 122-135, 303-322, 391-411, the Trustees exercised their discretion to decant the petitioners from the Trusts because *in their independent judgment* the petitioners' hostility toward the Trusts' founder, antipathy toward the Hodges enterprise, and in the case of Mr. Sanborn and David, Jr., disruptive conduct, posed a significant threat to the Hodges enterprise that the Trusts were established to protect and preserve.

The Trust instruments in question grant broad discretion to the Trustees to administer the Trusts and distribute Trust assets to effectuate the settlor's purpose, including the power to completely eliminate the beneficial interests of a non-vested beneficiary through decanting. *Order* at 20-21; Art. II, ¶B at 4; Art. XVl. H; Art. X.A.3. It is firmly established that "a court of equity may not substitute its judgment for that of a fiduciary in exercising his discretion and may only set aside the latter's judgment where discretion has been abused." *Morse v. Trentini*, 100 N.H. at 156; *Dumaine*, 128 N.H. at 512-13 (the Court will only interfere in trustees' corporate decisions where trustees have abused their discretion).

Accordingly, the issue for the trial court to decide in this case was not whether the Trustees should or could have selected a better or "less draconian" method to deal with the threat posed by the petitioners. *See Hanford v. Clancy*, 87 N.H. 458, 460 (1936) (court does not exercise discretion for trustee, or act as substitute trustee). Because the Trustees acted in good faith and considered the terms and purposes of the Trusts and interests of the beneficiaries provided in the Trusts, the fact that the trial court disagreed with the Trustees' decision to decant or may have selected some other "less draconian," but unspecified, measure to protect and preserve the Hodges enterprise had it been a Trustee, does not justify a finding that the Trustees abused their discretion. *Katz v. Katz*, 104 N.H. 478, 482 (1963)(the court may not exercise trustee's discretion); *In re Lykes Estate*, 113 N.H. 282, 286 (1973)(the court may not substitute its judgment or discretion for trustee).

## VII. In Determining that the Trustees Abused their Discretion by Failing to Consider "Less Draconian" Alternatives to Decanting to Protect the Hodges enterprise, the Trial Court Improperly Substituted its own Judgment for that of the Trustees.

While the trial court was highly critical of the Trustees' decision to decant, even to the point of questioning their motivation for the decantings and integrity,[23] *e.g. Order* at 29-31, it nonetheless found that the Trustees considered the purpose of the Trusts - to preserve the Hodges enterprise - and the effect of the decanting on the Hodges enterprise. *Order* at 29-30, 36. It also found no evidence that the Trustees were deficient in the exercise of their duties as members of the Committee of Business Advisors and did not remove the Trustees from the Commitee. *Order* at 37-38. It is difficult to reconcile these findings, which reflect that the Trustees acted within their discretion, consistent with the purpose of the Trust, with the trial court's skepticism that the Trustees' motivation for the decantings was their concern that the petitioners posed a risk to the Hodges enterprise held by the Trusts. [24]

It seems apparent that the trial court recognized that its disagreement with the Trustees' choice of means to protect the Hodges enterprise was not a sufficient basis by itself to find an abuse of discretion, since its decision did not rest on such a finding. *See, e.g., Lykes Estate*, 113 N.H. at 286 (court may not substitute its judgment or discretion for trustee). That clearly being so, there was by the same token no other legitimate grounds to find an abuse of discretion, particularly since the trial court's expressed reason for voiding the decantings relied on an

---

[23] The extent to which the trial court went out of its way to impugn the testimony of the respondents was unwarranted and deeply unsettling. The trial court, for example, noted that Attorneys Saturley and McDonald were unclear about who first initiated the idea of decanting in 2013 and remarked that "Attorney McDonald's testimony on this point was fairly inconsistent and struck the Court as borderline evasive." *Order* at 28, fn. 23. Attorney McDonald testified that he recalled that David, Sr. initiated all of the conversations that led to decanting, *Tr.* at 111, but conceded that it was possible that Attorney Saturley first broached it in 2013. *Tr.* at 146. That was hardly being "evasive." Attorney Saturley testified that he wasn't sure Attorney McDonald was correct about the 2013 decanting, *Tr.* at 290-91, and that he believed that he initiated it. *Tr.* at 322. This was a remarkably petty point, of no material consequence to the case, and neither attorney had any reason to be evasive about it.

[24] The trial court also cited the *in terrorem* clauses as reasons the Trustees need not fully eliminate the petitioners' interests. *Order* at 31. Respectfully, regardless of what power such provisions might have -- always uncertain -- the Trustees always had the duty and responsibility to act as they deemed fit to protect the Trusts. *See* note 20, *supra* at 20, regarding the *Tamposi* litigation.

erroneous and overly broad interpretation of the phrase "interests of the beneficiaries" within the governing statute.

Moreover, the trial court utterly ignored the fact that the Trustees actually did consider and attempt to implement "less draconian" measures prior to the decantings. Attorney Saturley tried to address the conflict by negotiating an agreement between Mr. Sanborn and HDC in 2009, for example, *Tr.* 13, 284, 306-308, and by contacting David, Jr. in 2012. *Tr.* 251-52, 316-18. Neither of these efforts succeeded to mitigate the conflict or the risk as evidenced, in part, by the eventual hiring of armed guards at the HDC headquarters to protect David, Sr. and Mr. Johnson. *See, e.g., Order* at 33; *Tr.* 41, 211, 308, 311, 320, 409-11. The Trustees' decision to remove the petitioners from the Trusts was, if not essential, at the very least a rational measure to extinguish the risk, and while critical of the Trustees' decision to decant, neither the trial court nor any witness at trial, including the petitioners' expert, offered any alternative solution that would have protected HDC and avoided a *Tamposi*-like situation. [25]

The trial court focused a great deal of attention on David, Sr. and convinced itself, based on "the deeply personal and harsh nature of the decantings along with the testimony of Attorney McDonald," that the driving force behind the Trustees' decision to decant was their desire to carry out David, Sr.'s wish to disinherit the petitioners. *Order* at 29-30. But Attorney McDonald's testimony provides no such support, as he testified that he explained to David, Sr. and to the Trustees that the Trustees had to independently decide for themselves what action to take. *Order* at 27; *Tr.* 77-81, 85, 102, 144-45. Attorney Saturley and Mr. Johnson confirmed that

[25] The trial court cited the lack of documentation to justify its skepticism of the Trustees' testimony that they removed the petitioners from the Trusts due to a concern that a *Tamposi*-like situation would develop in which the disgruntled petitioners would disrupt the family business and place its future existence in jeopardy. *Order* at 30-31, 35. Such record keeping, however, is not legally required by statute or case law in this jurisdiction. *Indian Head Bank v. Theriault*, 97 N.H. 212, 215 (1951). Further, it is readily apparent from the record, including the petitioners' testimony, that the petitioners were disgruntled and that their conduct was disruptive.

they made their decision independently. *Order* at 28; *Tr.* at 300, 310-11, 313-14, 321-22, 326-27, 357, 359, 406-7. In fact, consulting with David, Sr., HDC's CEO, should be viewed as a prudent step in helping to inform the Trustees of the effect that the discord had on HDC.

As Attorney Wells stated: "When (the Trustees) acted in the decanting to remove (the Petitioners), they were acting in my judgment in an unbiased, objective, disinterested way to preserve the purposes of the Trust. I cannot tell you how strongly I feel about that." *Tr.* at 515. Those actions were based on the Trustees' judgment, which should have been respected by the trial court. Instead, the trial court ignored the Trustees' judgment in favor of its own opinions. That error should be reversed.

## VIII. The Trial Court Unjustifiably Removed the Trustees, and this Aspect of its Order Should be Reversed.

(Submitted on Behalf of Respondents Johnson and Saturley only)

Without prejudice to their argument that the trial court decision voiding the decantings cannot be sustained, the respondents Johnson and Saturley respectfully submit that the decision to remove them as Trustees should be reversed. While the trial court has stayed their removal pending this appeal, there is no legitimate ground to justify the original decision.

The relevant statute, RSA 564-B:10-1001(b)(7), authorizes removal to "remedy a breach of trust that has occurred or may occur," as provided in RSA 564-B:7-706. None of the factors identified subsection (b) thereof is present.[26] Here, the respondents Johnson and Saturley did not

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[26] **564-B:7-706 Removal of Trustee. –**

(a) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) In addition to the power to remove a trustee pursuant to RSA 564:9, the court may remove a trustee if:

(1) the trustee has committed a serious breach of trust;

(2) lack of cooperation among cotrustees substantially impairs the administration of the trust;

(3) because of unfitness, unwillingness, persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

act out of any self-interest, and relied upon acknowledged expert advice in their actions in connection with the decantings.

The trial court did not find that the trustees did anything dishonestly or in bad faith, nor was there any finding or allegation of mismanagement. Order at 37-38. The trial court's reliance on RSA 564-B:7-706(b)(4) (misidentified as (2)) is misplaced, as neither predicate, "substantial change of circumstances" or "removal requested by all of the qualified beneficiaries," is present, and the reasons enumerated in the Order at 37 are immaterial or lacking in evidentiary basis. If enmity exists between the trustees and the petitioners, the evidence demonstrates without doubt that it arose from actions of the petitioners, and it cannot be the case that beneficiaries can unilaterally create ill will, and then rely on it to seek removal of trustees.

Here, the trustees sought advice from an acknowledged expert in the field. The trial court finding, that they did not adequately consider the beneficial interests of the petitioners, provides no basis to justify removing them.

## IX. <u>This Court Should Confirm that the Trial Court's Observations Regarding the Right of the Trustees to be Indemnified for Fees and Expenses Incurred in this Proceeding were not Determinations</u>.

(Submitted on behalf of Respondents Johnson and Saturley only)

The respondents added this question to their notice of appeal out of an abundance of caution.[27] None of the parties to this action raised any issue as to the right of the trustees to be indemnified for the fees and expenses incurred in defending the action, nor did this issue arise at trial.

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(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under RSA 564-B:10-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

[27] By Order issued May 26, 2016, this Court granted the motion to add question, but did not "express[] a view as to the procedural viability or substantive merits of the added question."

In its decision on the merits, Notice of Appeal at 20, the trial court, *sua sponte*, included the following text and footnotes:

> After appointment of the independent fiduciary, the Court will request that he/she consider and advise[5] the Court on whether the Trust has been paying and if so, should it be responsible for, fees incurred by the Respondents in this litigation. *Cf. In re Dumaine*, 135 N.H. 103, 110 (1991).[6]
>
> [5]The Court will provide the parties an opportunity to brief and otherwise comment on any such submitted requests concerning appointment of an independent fiduciary.
>
> [6]At common law: "the allowance of attorneys' fees is not a matter of right but rests in the cautiously exercised discretion of the court. Attorneys' fees should be allowed only in those cases where the litigation is conducted in good faith for the primary benefit of the trust as a whole in relation to substantial and material issues essential to the proper administration of the trust." Id. (quotations and brackets omitted); see RSA 564-B:7-709(a)(1)(trustee is only "entitled" to reimbursement from the trust for "expenses that were *properly incurred* in the administration of the trust" (emphasis added)); cf. RSA 564-B:10-1004 ("[i]n a judicial proceeding involving the administration of a trust" a court may award attorney's fees "as justice and equity may require" to "any party, to be paid by another party").

The Order also included a provision removing the Trustees, and the respondents sought a stay of this portion of the Order pending the resolution of their appeal. In their motion, the Trustees included the following footnote:

> [1]The respondents Saturley and Johnson note the provision in the Order at 4, notes 5 and 6, regarding payment of their attorneys' fees from the Trust. This issue was not raised before or during trial, and they respectfully reserve their rights with respect thereto. *See* Circuit Court, Probate Division Rule 59-A(1).

In its order staying the removal of the Trustees subject to certain conditions (Clerk's Notice dated March 15, 2016), Appendix at 115, the trial court included the following, at 7-8:

> Finally, the Court pauses to address a footnote in Respondents Saturley and Johnson's *Motion to Stay Removal of Trustees Pending Appeal,* id. at 2, n.1, asserting the reservation of a "right" to appeal and/or reconsider its observation in footnotes five and six of the Decree concerning payment of both the Respondents' and Petitioners' attorney's fees and costs incurred during the litigation. The notation in the *Motion to Stay Removal of Trustees Pending Appeal* fails to address

> the Respondents concerns or objections with any particularity, and does not cite any opposing authority. Circuit Court-Probate Division Rule 59-A(1)[.[28]]
>
> The Court is dubious of a litigant's ability to "reserve" a right to file a motion for reconsideration. The rule is clear in both scope and duration of the reconsideration period. To allow a party to "reserve" the right would endlessly, and without Court approval, extend the reconsideration period. Put another way, "reservation" of right to plead for reconsideration would allow parties to amend the rule by fiat and undermine the purposes of it, namely providing the Court with an ability to reconsider rulings in a timely manner before appeal with the benefit of sufficient briefing on the law and facts. The ten-day reconsideration period for the Decree has passed, the Respondents never requested extension of that period, and although the Court is confident in accuracy of the law as cited in footnotes five and six, it discerns that any concerns the Respondents may have had are waived.

Respectfully, the trial court's advisory comments to a possible successor trustee regarding an issue not raised by any party, coupled with a footnote stating "the Court will provide the parties an opportunity to brief and otherwise comment on any such submitted requests concerning appointment of an independent fiduciary," can only reasonably have been read to raise an issue to be resolved later if necessary. The trial court's response to the respondents' reservation of rights in their motion to stay is inappropriate and unsustainable.

The respondents seek nothing more from this Court than confirmation of their right to be heard on this question if and when it should become ripe. This would only be if this Court

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[28] "A Motion for reconsideration or other post-decision relief shall be filed within ten (10) days of the date on the Register's written notice of the order or decision ... The Motion shall state, with particularity, points of law or fact that the Court has overlooked or misapprehended and shall contain such argument in support of the Motion as the movant desires to present; .. . . To preserve issues for an appeal to the Supreme Court, an appellant must have given the Court the opportunity to consider such issues; thus, to the extent that the Court, in its decision, addresses matters not previously raised in the case, a party must identify any alleged errors concerning those matters in a motion under this rule to preserve such issues for appeal."

affirms the trial court decision in all respects, and a successor trustee addresses an issue of reimbursement.

Beyond this, there have been no decisions on this issue requiring review by this Court.

## CONCLUSION

Elimination of the petitioners' non-vested interests in the Trusts may not have been the only way to achieve the Trustees' goal of preserving and protecting the Hodges enterprise, but it was a way that was contemplated and authorized by the Trusts, and applicable New Hampshire statutory law. There is no sustainable basis upon which the trial court could void the decantings. Accordingly, the respondents respectfully request that this Court reverse the order denying their motion to dismiss, or the decision on the merits voiding the decantings, and direct the entry of judgment in their favor.[29]

## REQUEST FOR ORAL ARGUMENT

The respondents respectfully request the opportunity for oral argument, through their undersigned counsel, before the full Court.

[29] Without prejudice to the above, the respondents Johnson and Saturley respectfully request that this Court reverse the order removing them as trustees, and confirm that there have not as yet been any determinations regarding indemnification for the fees and expenses incurred in defending this litigation.

Respectfully submitted,

**Alan Johnson and William Saturley,**

By their attorneys,

**UPTON & HATFIELD, LLP**

Date: November 1, 2016

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Date: November 1, 2016

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**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing have this day been forwarded to Roy W. Tilsley, Jr., Esq. and Edward J. Sackman, Esq.

Russell F. Hilliard

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
NH CIRCUIT COURT

7th Circuit - Probate Division - Dover
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## NOTICE OF DECISION

**RUSSELL F. HILLIARD, ESQ**
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**159 MIDDLE STREET**
**PORTSMOUTH NH 03801**

Case Name: **DAVID A. HODGES, JR., PATRICIA SANBORN HODGES, and BARRY R. SANBORN v. ALAN JOHNSON, Trustee of the 2004 David A. Hodges, Sr.,**
Case Number: **317-2014-EQ-00283**

On April 15, 2015, Judge Gary R. Cassavechia issued orders relative to:

Respondent's Motion to Dismiss
Motion is Denied. See Enclosed Order.

Any Motion for Reconsideration must be filed with this court by April 25, 2015. Any appeals to the Supreme Court must be filed by May 15, 2015.

April 15, 2015

Suzanne R. Doyle
Clerk of Court

C: David A. Hodges, JR; Patricia Sanborn Hodges; Barry R Sanborn; Roy W. Tilsley, ESQ; Alan Johnson; William Saturley; Joseph McDonald; Jeffrey H. Karlin, ESQ

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APR 16 2015

THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

TRUST DOCKET
7TH CIRCUIT COURT
PROBATE DIVISION

DAVID A. HODGES, JR., BARRY R. SANBORN, & PATRICIA SANBORN HODGES

v.

ALAN JOHNSON, WILLIAM SATURLEY, & JOSEPH MCDONALD

317-2014-EQ-00283

ORDER ON MOTION TO DISMISS

Presently before this Court is a *Motion to Dismiss* filed by respondents Alan Johnson, William Saturley, and Joseph McDonald (the "Respondents"), see Index #23, seeking dismissal of the *Petition to Declare Decanting of Trusts Void Ab Initio* filed by petitioners David A. Hodges, Jr., Barry R. Sanborn, and Patricia Sanborn Hodges (the "Petitioners"). See Index #1. The Petitioners have seasonably objected. See Index #26. A hearing was held on March 11, 2015. Present at the hearing were: Roy W. Tilsley, Jr., Esq., counsel for the Petitioners; Russell F. Hilliard, Esq., counsel for respondents Alan Johnson and William Saturley; and Jeffrey H. Karlin, counsel for respondent Joseph McDonald. For the reasons that follow, the *Motion to Dismiss* is DENIED.

**Standard of Review**

In ruling on a motion to dismiss, this Court must determine "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery."

Harrington v. Brooks Drugs. Inc., 148 N.H. 101, 104 (2002) (quotation omitted). In doing so, the Court must "assume the truth of the facts alleged in the [Petitioners'] pleadings and construe all reasonable inferences in the light most favorable to [them]." Id. (quotation omitted). "Although the trial court's decision on a motion to dismiss is normally based solely on the allegations in the pleadings, if additional evidence is submitted, without objection, the trial court should consider it when making its ruling." Delaney v. State, 146 N.H. 173, 175 (2001)(quotations omitted).

**Facts**

The Court notes the following relevant facts as gleaned from the Petitioners' petition for purposes of this order. See, e.g., Suprenant v. Mulcrone, 163 N.H. 529, 530 (2012). The Court also relies on the trust and decanting documents submitted without objection for this Court's review. See Delaney, 146 N.H. at 175.

In August 2004, David A. Hodges, Sr. (the "Grantor") created "The David A. Hodges, Sr. Irrevocable GST Exempt Trust" (the "2004 Exempt Trust"). *Motion to Dismiss* Exh. 1 (Index #23). At that time, he also created "The David A. Hodges, Sr. Irrevocable GST Non-Exempt Trust" (the "2004 Non-Exempt Trust")(collectively the "2004 Trusts"). Id. Exh. 2. Respondents Saturley and Johnson were appointed as trustees of both trusts. Id. Exh. 1 at 1; Exh. 2 at 1.[1] The Petitioners, three of five children and stepchildren of the Grantor, were collectively referenced as "children" of the Grantor, id., and conferred benefit to the receipt, or potential receipt, of certain distributions as descendants and/or beneficiaries of both 2004 Trusts. See, e.g., id. Exh. 1 at 2, 4, 5; Exh. 2 at 2, 4, 5. The 2004 Trusts also identified as "contingent

[1] Originally, only Respondent Johnson was trustee, see id., however, it is undisputed that by 2010, Respondent Saturley was a co-trustee of both trusts with Respondent Johnson.

beneficiaries" unnamed charitable organizations "the purposes of which are to benefit children, the destitute, and animals" which are to receive a distribution "[i]f no descendant of [his] survives [him]." Id. Exh. 1 at 5, 12; Exh. 2 at 5, 12.

Both 2004 Trusts provide for certain "withdrawal rights" during the lifetime of the Grantor whenever there is a contribution of property. The Petitioners are identified as "beneficiaries" with a right of withdrawal exercisable within 60 days after a contribution. Id. Exh. 1 at 1-4; Exh. 2 at 1-4. The 2004 Trusts also provide, during the lifetime of the Grantor and subject to the right of withdrawal, for discretionary distributions to the Grantor's ex-wife[2], his descendants, and "distributee trusts" in Article II as follows:

> Distribution in the Trustee's Discretion. Subject to the provisions of [the right to withdrawal], the Trustee may distribute all or any portion of the net income and principal of the trust to any one or more of the group consisting of my [ex-wife], my descendants, and distributee trusts, in such amounts and at such times as the Trustee, in the Trustee's discretion, may determine, except that the Trustee shall make no distributions as will relieve me of any legal obligation of support.

Id. Exh. 1 at 4; Exh. 2 at 4. The "distributee trust" referenced in Article II is defined as:

> any trust being administered under this trust instrument for the benefit of any one or more, but not necessarily all, of the group consisting of my [ex-wife] and my descendants, or any trust established by me under another trust instrument for the benefit of any one or more, but not necessarily all, of the members of such group . . . ."

Id. Exh. 1 at 37; Exh. 2 at 37. Both 2004 Trusts also include provisions directing the Trustees to take into account certain concerns when exercising their discretion to

[2] At the time the 2004 Trusts were established the Grantor was married to Joanne M. Hodges, who is referenced in them as his "wife". Id. Exh. 1 at 1; Exh. 2 at 1. They were later divorced. As a consequence, in this Order any spousal reference set out in the 2004 Trusts will be to her current post-divorce status.

distribute property or income, but not specifically guaranteeing an income stream to the Petitioners or limiting the Trustees' discretion to make distributions. Id. Exh. 1 at 13-14; Exh. 2 at 13-14. The Trustees are asked to reflect on, *inter alia*: (1) purposes "reasonable and appropriate for the welfare, enjoyment, and education . . . of the beneficiaries"; (2) the beneficiaries' financial circumstances; and (3) potential tax savings. Id. Exh. 1 at 13; Exh. 2 at 13. The Trustees are not placed under any obligation "to equalize" distributions, and in fact, the "welfare, enjoyment, and comfort" of the Grantor's ex-wife is deemed "paramount." Id.

On October 21, 2010, assets of the 2004 Non-Exempt Trust were purportedly decanted[3] into the "David A. Hodges, Sr. 2010 Irrevocable GST Non-Exempt Trust" (the "2010 Non-Exempt Trust"). See id. Exh. 4. It is uncontested that this decanting was undertaken by Respondent McDonald. Before the decanting, Respondent Johnson resigned as a co-trustee and was replaced by Respondent McDonald. Respondent Saturley then "delegated" his decanting power to Respondent McDonald, who then executed the decanting.[4] Id. As a result of the decanting, Petitioners Barry R. Sanborn and Patricia J. Hodges were specifically "excluded" from the definition of "descendants";

[3] The Petitioners claim that a factual dispute exists whether "the Respondents' actions actually constitute decanting" as the decanting documents provide for a distribution or transfer of assets after the death of the Grantor, see *Objection* at 1 (Index #25); *Objection Memorandum* at 13 (Index #26), an event that has not yet occurred. Id. at 2-3; 13-14. While the parties dispute whether the non-transfer of property until occurrence of a future event can properly constitute a decanting, or is simply an impermissible amendment to the 2004 Trusts, neither has cited legal authority for their respective position. For purposes of this Order, the Court will refer to the actual or attempted decanting as the former for convenience only, without making a ruling that there was or was not an efficacious decanting.

[4] The Court notes that some of these facts were not included in the *Petition*, but were in documents, or can be inferred from documents, submitted without objection to the Court. In addition, neither party contests these facts.

effectively all but negating their interests in the 2010 Non-Exempt Trust. Id.[5] After the decanting documents were executed, Respondent McDonald resigned as a co-trustee and Respondent Johnson was reappointed. See *Objection Memorandum* Exhs. G, H (Index #26).

On July 9, 2012, assets of the 2004 Exempt Trust were allegedly decanted into the "David A. Hodges, Sr. 2012 Irrevocable GST Exempt Trust" (the "2012 Exempt Trust"). See *Motion to Dismiss* Exh. 3 (Index #23). It is uncontested that this decanting was also undertaken by Respondent McDonald. It is further undisputed that before the decanting, Respondent Johnson resigned as a co-trustee and was replaced by Respondent McDonald. It is less clear, however, whether an attempt by Respondent Saturley to again delegate his decanting authority was properly executed prior to the decanting as the record indicates that he executed the delegation after the 2012 decanting was purportedly accomplished. See *Objection Memorandum* Exh. B, H (Index #26). In this decanting, all three Petitioners were expressly excluded from the definition of "descendants." *Motion to Dismiss* Exh. 3 at 2, ¶A (Index #23). After the decanting documents were executed, Respondent McDonald resigned as a co-trustee and Respondent Johnson was reappointed.[6] See *Objection Memorandum* Exh. H (Index #26).

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[5] The Court notes that the parties both indicate in their submissions that Petitioner David Jr. was "excluded" in the 2010 decanting in addition to Petitioners Barry and Patricia. The plain terms of the decanting instrument, however, list only Barry and Patricia. Id. David Jr. was not excluded until a 2012 decanting that will be soon referenced. The Court further notes an observation it made during the hearing that the decanting documents are not a model of clear and concise articulation, which, together with certain additional inconsistencies and drafting errors, have made this Court's even preliminary adjudication of the matters before it a challenge.

[6] According to documents submitted without objection to the Court, both trusts were decanted yet again in 2013. See *Objection Memorandum* Exh. D (Index #26).

On April 8, 2014 the Petitioners filed the instant *Petition* seeking: (1) a declaration that the decantings of the 2004 Non-Exempt Trust and the 2004 Exempt Trust *void ab initio*; (2) removal of the current Trustees, Respondents Johnson and Saturley, followed by appointment of an independent trustee; and (3) an order that property decanted be returned to the 2004 Non-Exempt Trust and the 2004 Exempt Trust. See *Petition* (Index #1). The Respondents filed the instant *Motion to Dismiss* contending that their actions incident to the decantings were permitted by statute, see RSA 464-B:4-418 (Supp. 2013) (the "decanting statute"),[7] and the terms of both 2004 Trusts, in particular the provisions allowing creation of distributee trusts. See *Motion to Dismiss* at 2-4 (Index #23). More specifically, they contend that the Respondent McDonald's decanting power was properly exercised because the 2004 Trusts authorize creation of "distributee trusts" benefiting some, but not all of the listed beneficiaries. See id. Exh. 1 at 4; Exh. 2 at 4. Finally, they assert that because they view the interests of the beneficiaries as contingent, "there is no basis by statute or virtue of the applicable trust provisions to nullify the decanting." *Reply to Petitioners' Objection* at 3 (Index #27). They concede, however, that if the beneficiaries' interests are vested, they may not be eliminated by decanting. Id. at 2.

The Petitioners maintain that dismissal is inappropriate because the Respondents owed an "unwaivable" duty under the Uniform Trust Code to exercise their discretion: (1) reasonably; (2) in good faith; and (3) in the Petitioners' best interests.

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[7] Although the Respondents reference in their *Motion to Dismiss* the current version of the decanting statute, the Court notes that it should rely more properly on the statute in effect in 2010 and 2012, when the decantings of those years occurred as the statute was amended in 2014. See 2014 Laws 195:9; RSA 564-B:4-418 (Supp. 2013). In fact, both 2004 Trusts grant the co-trustees "all powers conferred on trustees under the laws of the State of New Hampshire . . . as they exist at the date of my execution of this trust instrument."

See RSA 564-B:1-105; B:8-801. *Objection* at 1 (Index #25); *Objection Memorandum* at 5-6 (Index #26). As such, they contend that whether the Respondents exercised their discretion properly cannot be decided on a *Motion to Dismiss.* They also insist that because the decanting statute directs that "[t]his section does not abrogate the trustee's duty under RSA 564-B:8-801," a factual issue exists whether the Trustees have "distribute[d] the trust property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries . . . ." Id. at 8-9.

**Applicable Law**

The question before the court requires it to apply the applicable Uniform Trust Code provisions and interpret the terms of the 2004 Trusts in relation to what decanting powers they contain. Generally, the terms of the trust prevail (including in this case the discretionary power to create distributee trusts) over statutory mandates, except, *inter alia*, the duty of a trustee "to act in good faith and in accordance with the terms of the trust, the purposes of the trust, and the interests of the beneficiaries." RSA 564-B:1-105(b)(2).

The "decanting statute" in effect at the time of the decantings at bar provided that: "[u]nless the terms of the trust expressly provide otherwise, a trustee with the discretion to make distributions to or for the benefit of one or more beneficiaries of a trust (the 'first trust') may exercise that discretion by appointing the property . . . in favor of another trust for the benefit of one or more of those beneficiaries (the 'second trust')." RSA 564-B:4-418(a)(Supp. 2013). This authority to decant, however, is limited in certain situations not directly relevant here, see RSA 564-B:4-418(b)(Supp. 2013), and in all cases, the decanting statute "does not abrogate the trustee's duty under RSA 564-

B:8-801[,]" RSA 564-B:4-418(e)(Supp. 2013), to "administer, invest and manage the trust and distribute the trust property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries . . . ."

Thus, in order to consider whether the power to decant is limited in this matter, one must consider the meaning of "beneficiary" and "interests of beneficiaries." The Uniform Trust Code defines a beneficiary as: "a person that: has a present or future beneficial interest in a trust, vested or contingent." RSA 564-B:1-103(2)(A). It also defines "interests of the beneficiaries" as "the beneficial interests provided in the terms of the trust." RSA 564-B:1-103(7). In turn, "terms of the trust" means "the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding." RSA 564-B:1-103(19).

**Analysis**

At the hearing, the parties agreed to some basic premises: (1) that the Petitioners are "beneficiaries"; and (2) that if this Court concludes that the Petitioners have a "beneficial interest" in the 2004 Trusts, then under RSA 464-B:8-801 the Respondents are bound by their duties when decanting.[8] If they are so bound, then the *Motion to Dismiss* must be denied as the Court would need to determine largely factual issues regarding whether the act of decanting was "in good faith, in accordance with its terms and purposes and the interests of the beneficiaries

[8] Indeed, the Court need not decide at this juncture whether the provisions creating "distributee trust[s]" are a valid means to decant under the decanting statute. Instead, the inquiry focuses on whether any duty is owed the Petitioners when decanting.

. . . ." RSA 464-B:8-801. The Respondents contend that because the Petitioners' receipt of income is at the discretion of the Trustees and the 2004 Trusts permit complete and unequal decanting into distributee trusts, the Petitioners lack a "vested" beneficial interest, and thus are not owed a duty under RSA 464-B:8-801. The Petitioners answer that that contention "ignores the fiduciary duties a trustee owes to trust beneficiaries . . .[and] no matter what the trust document says, trustees always have a duty to act reasonably, in good faith, and in the best interests of the beneficiaries when handling trust assets." *Objection Memorandum* at 5 (Index #26).

The Court determines that the Petitioners have a beneficial interest in the 2004 Trusts sufficient to require that the Respondents act in accordance with RSA 564-B:8-801. Cf. In re Goodlander, 161 N.H. 490, 497 (2011)(fiduciary owes duty to all beneficiaries, even one without a vested interest in future distributions). Although the Court agrees with the Respondents that the amount of any distribution the Petitioners receive and whether they benefit from a distributee trust are contingent on the exercise of discretion by the Trustees, the Petitioners, as "children" and/or "descendants" under the terms of 2004 Trusts, were granted a certain status, namely, membership in a defined group of individuals to whom the Trustees may (or may not), in the proper exercise of discretion, direct income.[9] Their status then gives them a beneficial interest that must be considered by the Trustees when exercising their discretion. See id. To put it another way, simply because the Petitioners possess only an expectancy of

[9] By comparison, under the terms of both trusts, "contingent beneficiaries" only receive an interest in potential distributions should there be no surviving descendants. *Motion to Dismiss* Exh. 1 at 2, 4, 5; Exh. 2 at 2, 4 ,5. Until that condition precedent is satisfied, the co-trustees need not act with the (unnamed and undetermined) contingent beneficiaries' interests in mind.

income or property[10] does not absolve the Trustees of all duties to them when exercising that discretion. See generally, William R. Culp & Briani Bennett Mellen, *Trust Decanting: An Over view and Introduction to Creative Planning Opportunities*, 45 Real Prop. Tr. & Est. L.J. 1, 48 (2010). Further, simply because the Respondents are granted the discretion to create unequal distributee trusts and fund them with distributed assets of the 2004 Trusts, such power cannot be blindly exercised without concern for their duties under the decanting statute, including those duties expressly retained as part of it. See RSA 564-B:4-418(e)(Supp. 2013); cf. RESTATEMENT (THIRD) OF TRUSTS §86, Rptr's notes a & b (express grant of power to a fiduciary does not justify its exercise if it is improper in light of the applicable fiduciary duties).

This is not to say, and the Court does not today decide, that the decanting(s) undertaken here are improper and *void ab initio*.[11] Such a ruling would necessitate findings of fact and rulings of law that either: (1) there has been a breach of duty invalidating the decanting(s); or (2) that the Trustees cannot create or have not created distributee trusts. Such a ruling would be wholly improper at this stage of the litigation. Instead, the Court rules that, viewing the pleadings and trust documents in a manner most favorable to the Petitioners, the Respondents are not entitled to relief as a matter of law.

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[10] The Court does not imply that the interest is a "vested" property interest subject to devise or distribution because, with the exception of withdrawal rights, "there is no mandated financial benefit." See In re Goodlander, 161 N.H. at 498. Rather, it merely inquires whether it is of a status for which a fiduciary duty is owed.

[11] The Respondents assert that the statutory decanting provisions expressly limiting a trustee's decanting power, see RSA 464-B:4-418(b), (c), indicate that trustees owe fiduciary duties only to beneficiaries with vested property interests. However, these provisions do not limit the reach of the duties owed under RSA 464-B:4-418(e), rather, they enumerate instances where decanting is expressly prohibited.

The Court's determination is bolstered by the Uniform Trust Code. Courts determine the meaning of a statute by analyzing its plain terms. Landry v. Landry, 154 N.H. 785, 787 (2007). The language of a statute, however, "should not be read in isolation; rather, all parts of a statutory act must be construed together. [Courts] construe statutes so as to effectuate their evident purpose and to avoid an interpretation that would lead to an absurd or unjust result." State v. Bulcroft, 166 N.H. 612, 614 (2014)(quotations and citations omitted). Courts are not permitted, however, to add words to a statute that the legislature did not see fit to include. See, e.g., Town of Newbury v. N.H. Fish & Game Dep't., 165 N.H. 142, 144 (2013).

First, the plain terms of the definitional section do not support the Respondent's argument. As noted supra "beneficiaries" includes those without fully vested property interests. See RSA 564-B:1-103(2)(A). The Petitioners' "beneficial interests" are those delineated in the trust. RSA 564-B:1-103(7); B:1-103(19). "[I]t is the settlor's intent, as ascertained from the language of the entire instrument, which governs the distribution of assets under a trust." King v. Onthank, 152 N.H. 16, 18 (2005). Courts "determine that intent, whenever possible, from the express terms of the [instrument] itself." Shelton v. Tamposi, 164 N.H. 490, 495 (2013). In this matter, the Petitioners minimally belong to a class of persons created by or named in the 2004 Trust documents, eligible, at the Trustees' discretion, to receive trust property and income.[12] See *Motion to Dismiss* Exh. 1 at 2, 4, 7, 37; Exh. 2 at 2, 4, 7, 37. They are also within a class of individuals who may be named beneficiaries of a distributee trust. Id. Exh. 1 at 4, 37; Exh. 2 at 4, 37. Thus, they are granted special

[12] In so stating the Court, for the moment, ignores the beneficial "right of withdrawal" given them in the 2004 Trusts.

status, as compared to those not named in the 2004 Trusts, and are conferred beneficial interests under them. This status, though arguably less than a fully vested property right, see RSA 564-B:8-814(b), by statute, see RSA 564-B:1-105(b)(2), entitles them to protection from a fiduciary who fails "to act in good faith . . . and the interests of the beneficiaries." Id.

The Respondents contend rather vigorously that RSA 564-B:8-814(b) & (c) justify decanting as that provision limits duties owed to unvested interests and grants broad discretion to treat beneficiaries unequally. Section (b) states:, "if a distribution to or for the benefit of a beneficiary is subject to the exercise of the trustee's discretion, . . . then the beneficiary's interest is neither a property interest nor an enforceable right, but a mere expectancy" and section (c) mandates that "if the terms of a trust permit distributions among a class of beneficiaries, . . . 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." However, the Respondents ignore that both subsections (b) and (c) are subject to good faith limitation set forth in subsection (a) mandating that: "the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries." Thus, the alleged conditional nature of a beneficiary's interest or the ability to treat beneficiaries unequally does not relieve a trustee of the basic duty to make good faith decisions and be mindful of their respective interests.

In addition, while RSA 564-B:8-814(b) states that discretionary distributions are "mere expectanc[ies]" and thus a beneficiary does not have a "property right" to receive such a distribution, that provision does not absolve the fiduciary of its duties. Rather,

this statute merely identifies the nature of the beneficial interest. Cf. G. Bogert, The Law of Trusts and Trustees §181 (discussing possible types of beneficial interests). It does not, however, render a potential interest unworthy of fiducial care. This Court is not at liberty to take the statute one step further, and by judicial fiat, add a provision to relieve fiduciaries of their duties to all beneficiaries where there may be no vested property right. Cf. Town of Newbury, 165 N.H. at 144. Similarly, RSA 564-B:8-814(c), allowing unequal distributions to beneficiaries, does not further state that because of that discretion, a fiduciary need not be mindful of his or her duties to the trust beneficiaries. Indeed, these two provisions specifically are made subject to a preceding paragraph (a) mandating that "the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries."

Finally, interpreting the power to decant in a manner asserted by the Respondents would lead to an absurd result. Cf. Bulcroft, 166 N.H. at 614. It would relieve trustees of their fiduciary duties to beneficiaries with an interest in future income until a distribution is made. This is not, and cannot be the law. Cf. In re Goodlander, 161 N.H. at 497 (beneficiary specifically found not to have a vested interest in income still owed duty of impartial administration of trust).

Consequently, the Respondents' *Motion to Dismiss* is DENIED.[13]

[13] At oral argument, the Respondents contended that the *Petition* should be dismissed because it never asserts that they failed to act in good faith. However, reading the *Petition* in a manner most favorable to the Petitioners, that argument may be reasonably implied from the pleadings. On more than one occasion, the Petitioners assert that they are owed a duty under RSA 564-B:8-801 as applicable to a decanting under RSA 564-B:4-418(e). *Petition* ¶¶ 24, 29. Although the Petitioners' arguments focus on whether the Respondents' acted in their best interests, by asserting that a duty is owed under RSA 564-B:8-801, and that the decanting was accomplished in violation of that duty, the lack of good faith is reasonably subsumed in the pleading.

SO ORDERED

Dated: 4.15.15

Gary R. Cassavechia, Judge

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
NH CIRCUIT COURT

7th Circuit - Probate Division - Dover
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## NOTICE OF DECISION

**RUSSELL F. HILLIARD, ESQ**
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**159 MIDDLE STREET**
**PORTSMOUTH NH 03801**

Case Name: **DAVID A. HODGES, JR., PATRICIA SANBORN HODGES, and BARRY R. SANBORN v. ALAN JOHNSON, Trustee of the 2004 David A. Hodges, Sr.,**
Case Number: **317-2014-EQ-00283**

On February 22, 2016, Judge Gary R. Cassavechia issued orders relative to:

Petitioners' Amended Petition to Declare Decanting of Trusts Void Ab Initio
The Amended Petition is Granted in Part and Denied in Part. See the enclosed order.

Any Motion for Reconsideration must be filed with this court by March 03, 2016. Any appeals to the Supreme Court must be filed by March 23, 2016.

February 22, 2016

Suzanne R. Doyle
Clerk of Court

C: Roy W. Tilsley, ESQ; Jeffrey H. Karlin, ESQ; Edward J. Sackman, ESQ; Joanne Hodges

THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

TRUST DOCKET
7TH CIRCUIT COURT
PROBATE DIVISION

DAVID A. HODGES, JR., BARRY R. SANBORN, & PATRICIA SANBORN HODGES

v.

ALAN JOHNSON, WILLIAM SATURLEY, & JOSEPH MCDONALD

317-2014-EQ-00283

DECREE ON PETITIONERS' AMENDED PETITION TO DECLARE DECANTING OF TRUSTS *VOID AB INITIO*

Presently before the Court is the petitioners David A. Hodges, Jr. ("David, Jr."), Barry R. Sanborn ("Barry"), and Patricia Sanborn Hodges ("Patricia") (collectively the "Petitioners") *Amended Petition to Declare Decanting of Trusts Void Ab Initio*, see Index #42, seeking to set aside a series of decantings from the 2004 "David A. Hodges, Sr. Irrevocable GST Exempt Trust" (the "2004 Exempt Trust") and the 2004 David A. Hodges, Sr. Irrevocable GST Non-Exempt Trust" (the "2004 Non-Exempt Trust")(collectively the "2004 Trusts"). See Exhs. 1-2; 3; 3(B); 4; 4(B); 5; 5(B); 6; 6(B); 7; 7(B); 8; 8(B).[1] Respondents Alan Johnson, William Saturley, Esq., and Joseph McDonald, Esq. (collectively the "Respondents") object and seek denial of the *Amended Petition*. See Index #46. A three-day trial was held. Attending were: Attorneys Roy W. Tilsley and Edward J. Sackman for the Petitioners; Attorney Russell F. Hilliard for

[1] The Court observes that the exhibits, in particular the trust and decanting documents, are not stamped in sequential order, and as such, any pinpoint citations will refer to the pagination in the original documents and not any Bates stamps.

Respondents Saturley and Johnson; and Attorney Jeffrey H. Karlin for Respondent McDonald. For the reasons set forth more fully infra, the *Amended Petition* (Index #42) is GRANTED IN PART; DENIED IN PART.

The case before it requires the Court to determine the contours of permissible fiduciary activity when decanting trust assets given the terms of the trust and the dictates of statutory and common law. In their *Amended Petition* (Index #42) the Petitioners assert five counts, specifically: (1) that the 2010, 2012, and 2013 decantings of the 2004 Exempt Trust and the 2004 Non-Exempt Trust are *void ab initio* as they were accomplished in violation of RSA 564-B:8-801, RSA 564-B:4-418(e)(Supp. 2013), and RSA 564-B:1-105(b)(2) (Counts I & II); (2) declaration that a 2012 decanting was ineffective and void as it was not properly authorized (Count III); (3) removal of the current co-trustees, Respondents Johnson and Saturley, followed by appointment of an independent trustee (Count IV); and (4) an order that any property decanted be returned to the 2004 Non-Exempt Trust and the 2004 Exempt Trust (Count V).[2] See *Amended Petition* (Index #42).

In sum, the Court, after review of the facts presented at trial, the terms of the 2004 Trusts and the decanting statute applicable to these trusts, RSA 564-B:4-418 (Supp. 2013)(the "decanting statute"),[3] concludes that the decantings at issue are void

[2]In a *Stipulation Regarding Status of Trust Assets Upon Death of Grantor* (Index #63) subsequently filed with this Court, all parties agreed that following the death of the Grantor in August 2015, all assets will remain in the 2004 Trusts pending further orders of this Court. As such, Count V is DENIED AS MOOT.

[3] The Court relies on the statute in effect in 2010, 2012, and 2013 when the decantings of those years occurred and notes that the decanting statute, indeed, the New Hampshire Uniform Trust Code, was substantially amended in 2014. See 2014 Laws 195:9; RSA 564-B:4-418 (Supp. 2013).

The Court further observes that both 2004 Trusts grant the co-trustees "all powers conferred on trustees under the laws of the State of New Hampshire . . . *as they exist at the date of my execution of this trust instrument.*" See Exh.1 at 16; Exh. 2 at 16 (emphasis added). To the extent otherwise pertinent, statutory decanting authority was enacted in 2008, see 2008 Laws 374:9, and it is has not been argued in this case, nor is it clear, what, if any, were the fiducial limits on decanting under New

as the Trustees failed to satisfy the requisite duty to consider the "interests of the beneficiaries" when decanting. See RSA 564-B:4-418(e)(Supp. 2013); RSA 564-B:8-801. Specifically, as set forth more fully infra, the Respondents were required by RSA 564-B:8-801 to give "due regard for the diverse beneficial interests created by the terms of the trust." Shelton v. Tamposi, 164 N.H. 490, 500 (2013)(quotations omitted), and because they considered only certain petitioners'/beneficiaries' personalities and self-professed potential business risks arising from them, but failed to consider the effect of the decantings at issue on the Petitioners' interests as beneficiaries, cf. In re Goodlander, 161 N.H. 490, 497 (2011)(fiduciary owes duty to beneficiary whose interest deemed a mere expectancy), established under the 2004 Trusts, the decantings were improper. As such, the decantings are ruled *void ab intio* and Counts I and II of the *Amended Petition* (Index #42) are GRANTED. Given this determination, the Court need not reach Count III, and it is DENIED WITHOUT PREJUDICE AS MOOT.

In light of the circumstances of this case and as set forth more fully below, the Court exercises its discretion under RSA 564-B:7-706(a); (b)(1); (b)(3); RSA 564-B:10-1001(b)(7) to order removal of Respondents Saturley and Johnson as trustees.[4] Their failure to consider the interests of the beneficiaries, as set forth more fully infra, was an abuse of their discretionary powers to decant, and given the obvious enmity and distrust between the parties, removal is deemed appropriate. Accordingly, Count IV of the *Amended Petition* is also GRANTED. The parties are DIRECTED to confer and

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Hampshire common law. As neither party contends that the common law applies, see, e.g., *Petitioners' Requests for Findings of Fact and Rulings of Law* ¶36 (Index #70); *Requests for Findings of Fact and Rulings of Law of the Respondents Alan Johnson and William Saturley* ¶10 (Index #69); *Respondents' Requests for Findings and Rulings of Law* ¶2 (Index #68), this Court will apply the decanting statute in effect at the time of the decantings at issue. Cf. RSA 564-B:11-1104.

[4] It will not, however, at this juncture, order their removal from the "Committee of Business Advisors" if they are to remain so seated. See generally, Exh.1 at 22-26; Exh. 2 at 22-26; see Exh. 8 (Fourth Amendment at 2).

recommend a replacement independent fiduciary within **fourteen days** of the date of this Order. If no recommendation is forthcoming, the Court will endeavor to identify and appoint a replacement fiduciary of its own accord.

Finally, Respondents Saturley and Johnson, as trustees of the 2004 Trusts, and/or the applicable Committee of Business Advisors, see infra, are ENJOINED from encumbering, selling, gifting, transferring, decanting or otherwise disposing of assets under the 2004 Trusts other than as necessary, incident to the ordinary and proper operation and management of the "Business Interests" of the 2004 Trusts, upon commercially reasonable terms and for fair market value, pending appointment of an independent fiduciary and other further order(s) of this Court. Cf. *Stipulation Regarding Status of Trust Assets Upon Death of Grantor* (Index #63)(all assets, by agreement, are to have remained in the 2004 Trusts pending further orders of this Court).

After appointment of the independent fiduciary, the Court will request that he/she consider and advise[5] the Court on whether the Trust has been paying and if so, should it be responsible for, fees incurred by the Respondents in this litigation. Cf. In re Dumaine, 135 N.H. 103, 110 (1991).[6]

## I. Applicable Law

Resolution of this case requires the Court to determine the standard of fiducial

[5] The Court will provide the parties an opportunity to brief and otherwise comment on any such submitted requests concerning appointment of an independent fiduciary.

[6] At common law: "the allowance of attorneys' fees is not a matter of right but rests in the cautiously exercised discretion of the court. Attorneys' fees should be allowed only in those cases where the litigation is conducted in good faith for the primary benefit of the trust as a whole in relation to substantial and material issues essential to the proper administration of the trust." Id. (quotations and brackets omitted); see RSA 564-B:7-709(a)(1) (trustee is only "entitled" to reimbursement from the trust for "expenses that were *properly incurred* in the administration of the trust" (emphasis added)); cf. RSA 564-B:10-1004 ("[i]n a judicial proceeding involving the administration of a trust" a court may award attorney's fees "as justice and equity may require" to "any party, to be paid by another party").

care required of the Respondents according to the terms of the 2004 Trusts and the dictates of our statutory and common law. It begins its analysis by setting forth the general rules of trust interpretation and construction, the decanting statute, and, to the extent necessary, a fiduciary's duties set forth in the New Hampshire Trust Code ("UTC"). As a preliminary matter, it observes that:

> [a] trustee has both (i) a duty generally to comply with the terms of the trust and (ii) a duty to comply with the mandates of trust law except as permissibly modified by the terms of the trust. Because of this combination of duties, the fiduciary duties of trusteeship sometimes override or limit the effect of a trustee's duty to comply with trust provisions; conversely, the normal standards of trustee conduct prescribed by trust fiduciary law may, at least to some extent, be modified by the terms of the trust.

RESTATEMENT (THIRD) OF TRUSTS § 76 comment b(1) (2015).

The Court is not without guidance in deciding the case before it as New Hampshire has well-established rules governing construction of the terms of a trust. See, e.g., In re Trust by Dumaine, 146 N.H. 679, 681 (2001); Indian Head Nat. Bank of Nashua v. Brown, 123 N.H. 87, 91-92 (1983); cf. Shelton, 164 N.H. at 495 ("[t]he rules of construction that apply to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of trust property"). In addition, the UTC identifies the limits placed on a settlor's discretion to modify a trustee's duty to comply with statutory limits of care. See RSA 564-B:1-105(a)-(b).

A. Rules of Construction

It is well-established that the intent of the settlor is the veritable North Star guiding a court when it is interpreting a trust. See, e.g., Shelton, 164 N.H. at 495 (intent of settlor is "paramount"); King v. Onthank, 152 N.H. 16, 18 (2005)(intent of testator is

the "sovereign guide"). "Similarly, it is the settlor's intent, as ascertained from the language of the entire instrument, that governs the distribution of assets under a trust." King, 152 N.H. at 18. Courts "determine that intent, whenever possible, from the express terms of the trust itself." Shelton, 164 N.H. at 495. "[I]f no contrary intent appears in the [trust], the words within the [trust] are to be given their common meaning. . . . [C]lauses in a [trust] are not read in isolation; rather, their meaning is determined from the language of the [trust] as a whole." In re Clayton J. Richardson Trust, 138 N.H. 1, 3 (1993); see In re Trust by Dumaine, 146 N.H. at 681. Finally, settlors are presumed to understand the import of the words *used* in the instrument, see, e.g., Blue Ridge Bank & Trust Co. v. McFall, 207 S.W.3d 149, 157 (Mo. App. W.D. 2006); and similarly, have been found to understand how to include limiting language as well. See Cowan v. Cowan, 90 N.H. 198, 201 (1939).

Technical rules of construction, however, are not iron-clad; rather they are intended to aid in the discovery of the settlor's intention. See In re Frolich's Estate, 112 N.H. 320, 325 (1972)("canons of construction always give way in this jurisdiction to a single broad rule of construction favoring the maximum validity of the [settlor's] dispositive plan" (quotations omitted)). "When interpreting an *inter vivos* trust evidenced by a written instrument, the terms of the trust are determined by the provisions of the instrument as interpreted in the light of all the circumstances and other competent evidence of the intention of the settlor with respect to the trust." In re Trust by Dumaine, 146 N.H. at 681 (quotations and ellipses omitted). "The relationship of the settlor to the beneficiaries and the duties toward them are among the facts to be considered by a court trying to place itself in the shoes of the creator of the trust in order to ascertain

what was intended by the trust instrument." Bartlett v. Dumaine, 128 N.H. 497, 505 (1986)(quotations and brackets omitted).

The New Hampshire Supreme Court has directed that in any effort to discern a settlor's intent, "[a]lthough extrinsic parol evidence is inadmissible to vary or contradict the express terms of a trust, such evidence may be received to determine the settlor's intent where the language used in the trust instrument is ambiguous."[7] Bartlett, 128 N.H. at 505; see, e.g., Simpson v. Calivas, 139 N.H. 1, 8 (1994) ("where the terms of a [trust] are ambiguous, . . . extrinsic evidence may be admitted to the extent that it does not contradict the express terms of the [trust]). Thus, "[e]xternal facts may be received to explain or resolve doubts, but not to create them." 7 C. DeGrandpre *New Hampshire Practice, Wills, Trusts and* Gifts, § 13.07, at 144 (4th ed. 2003) (quotations omitted). For example, our Supreme Court, while observing that courts "examine extrinsic evidence of the settlor's intent only if the language used in the trust is ambiguous," In re Trust by Dumaine, 146 N.H. at 681, noted that what extrinsic evidence was offered lent support to its determined construction of the "unambiguous" trust terms at issue in that case. See id. at 683. Therefore, a settlor's comments before or after execution of a trust is not permitted to contradict the express language in the instrument, but where appropriate may serve as a helpful tool in discerning his or her intent. See, e.g., Merrow v. Merrow, 105 N.H. 103, 106 (1963); accord Simpson, 139 N.H. at 8.

Finally, RSA 564-B:1-103(19) defines, consistent with common law, "terms of a trust" as "the manifestation of the settlor's intent regarding a trust's provisions as

[7] Lack of precision does not make a term "ambiguous," rather, ambiguity exists where there is reasonable disagreement as to a term's meaning. Cf. Anna H. Cardone Revocable Trust v. Cardone, 160 N.H. 521, 531 (2010)(interpretation of deed).

expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding."

"Generally, however, courts will defer to a trustee's discretion in the absence of an abuse of discretion – the heightened standard for imposing liability on trustees in the exercise of their discretionary authority." William R. Culp & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 Real Prop. Tr. & Est. L.J. 1, 48 (2010).[8] An abuse of discretion may be found not only where there is an "improper motive," RESTATEMENT (THIRD) OF TRUSTS §87 comment c (2015), but where, inter alia: (1) acts are undertaken in good faith beyond the purpose to which the power was conferred; (2) there is a failure to exercise discretion by acting "arbitrarily or without knowledge of or inquiry into relevant circumstances"; (3) there is a "mistaken interpretation of the terms of the trust or power"; or (4) there is "a misunderstanding of applicable fiduciary law." Id.

B. Decanting

As noted supra, this matter requires the Court to determine the limits, if any, on the ability to "decant" assets from an irrevocable trust to another. "Decanting is the term generally used to describe the distribution of irrevocable trust property to another trust pursuant to the trustee's discretionary authority to make distributions to, or for the benefit of, one or more beneficiaries of the original trust." Morse v. Kraft, 992 N.E.2d 1021, 1024 (Mass. 2013) (quotations and brackets omitted) quoting Culp supra at 2. It allows a settlor the flexibility to "amend" an otherwise irrevocable trust[9] by including terms that allow a trustee to transfer, or "decant," assets into a second trust whose

[8] The Respondents appear to agree as they assert, without citation, that the Court must analyze their acts for an abuse of discretion. *Respondents' Trial Memorandum* at 9 (Index #68).
[9] Amendment is often not an option as it may endanger certain tax benefits of an irrevocable trust.

terms may differ (in both beneficial interest and/or terms of distribution) from the primary trust. See, e.g., Morse, 992 N.E.2d at 1024. Decanting is allowed in many states either by common law or through statutory grant. Culp, supra at 2. It is intended to provide a settlor to an irrevocable trust the opportunity to obtain certain tax advantages by establishing an irrevocable trust, but maintain some flexibility *for the Trustee*[10] to respond to changes in the tax law, ease administration of the trust, and respond to unforeseen changes in circumstance. See Culp, supra at 14-15.[11]

Decanting authority derives from a settlor's traditional conferral of power on a donee of property that the donee does not own. See id. at 2. In turn, the donee is authorized to "designate recipients of beneficial ownership interests in . . . [the] property." RESTATEMENT (THIRD) OF PROPERTY (WILLS AND DONATIVE TRANSFERS) §17.1, comment c (2015). "In the case of a discretionary power of appointment . . . the donee may exercise the power arbitrarily as long as the exercise is within the scope of the power." Id. comment g. A fiduciary's distributive power of appointment, on the other hand, is deemed to be a "nongeneral power of appointment" and can be broad; however, it is not absolute. For example, the power to create another trust is "[s]ubject to fiduciary standards and the terms of the power. . . ." RESTATEMENT (THIRD) OF PROPERTY (WILLS AND DONATIVE TRANSFERS) §19.14 comments a & f (2015). "[I]t is not a discretionary power . . . [where] the donee may exercise the power arbitrarily as long as the exercise is within the scope of the power." RESTATEMENT (THIRD) OF PROPERTY

[10] As discussed infra, expert testimony at trial indicated that if a settlor is deemed to have directed the decanting, or it is accomplished at his behest, the irrevocable trust risks incurring significant tax liabilities.
[11] The Court senses that the textbook, albeit not exclusive, change in circumstance seemingly involves situations where a settlor establishes an irrevocable trust to benefit all of his children equally. However, decanting provisions are inserted into the trust to allow a fiduciary, not the settlor, to treat the beneficiaries unequally, such as when a greater financial need arises (for example due to a disability) for one beneficiary as opposed to another.

§17.1 comment g (2015); Culp, supra at 48 ("a trustee's decision to decant is subject to fiduciary obligations and may not be arbitrary"). Rather, it is limited by certain obligations and duties imposed upon fiduciaries. RESTATEMENT (THIRD) OF PROPERTY §17.1 comment g (2015); see Culp, supra at 7.

The "decanting statute" in effect in New Hampshire at the time of the decantings provided for unequal treatment of beneficiaries, directing that: "[u]nless the terms of the trust expressly provide otherwise, a trustee with the discretion to make distributions to or for the benefit of one or more beneficiaries of a trust (the "first trust") may exercise that discretion by appointing the property . . . in favor of another trust for the benefit of one or more of those beneficiaries (second trust)." RSA 564-B:4-418 (Supp. 2013). This authority to decant, however, is limited in certain situations not directly relevant here, see RSA 564-B:4-418(b)(Supp. 2013), and in all cases, it "does not abrogate the trustee's duty under RSA 564-B:8-801," RSA 564-B:4-418(e)(Supp. 2013), to "administer, invest and manage the trust and distribute the trust property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter." RSA 564-B:8-801. Indeed, courts routinely observe that a "trustee can only exercise a decanting power . . . in keeping with fiduciary obligations." Morse, 992 N.E.2d at 1024.

Thus, in order to consider whether the power to decant is limited in this matter, one must consider the meaning of the terms used in RSA 564-B:8-801. Generally, the UTC sets forth certain standards of care governing a trustee's duties when managing trust assets. See, e.g., RSA 564-B:8-802 (duty of loyalty); RSA 564-B:8-803 (duty of impartiality); RSA 564-B:8-804 (prudent administration). It recognizes, however, that a

settlor may modify the trustee's duties, thus diminishing or relieving him or her of certain fiducial burdens. See RSA 564-B:1-105(a)("[e]xcept as otherwise provided in the terms of the trust, this chapter governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary"); RSA 564-B:10-1008 ("Exculpation of Trustee"); cf. Bartlett, 128 N.H. at 507-15 (common law). Further, a trustee "who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach" resulting from that reliance. RSA 564-B:10-1006.

The power of a settlor to insulate a trustee from liability, however, is not unlimited. The UTC directs that "[a] term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it: (1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries . . . ." RSA 564-B:10-1008. In addition, it mandates that terms of a trust do not prevail over, inter alia, "the duty of a trustee to act in good faith and in accordance with the terms of the trust, the purposes of the trust, and the interests of the beneficiaries." RSA 564-B:1-105(b)(2). In sum, although certain duties like prudence and impartiality are "default rules" that may be modified by a settlor, "trust terms may not altogether dispense with the fundamental requirement that trustees not behave recklessly, but in good faith, with some reasonable degree of care, and in a manner consistent with the terms and purposes of the trust and the interests of the beneficiaries." RESTATEMENT (THIRD) OF TRUSTS § 77 comment d (2015).

Important to this Court's analysis, the decanting statute, by specifically reserving a trustee's continuing duty under RSA 564-B:8-801, see RSA 564-B:4-418(e)(Supp.

2013), directly recognizes its overarching significance, as section 8-801 mandates that "[u]pon acceptance of a trusteeship, the trustee shall administer . . . and manage the trust and distribute the trust property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter." Id. The New Hampshire Supreme Court recently recognized that section 8-801 "[s]pecifically" imposes on a trustee "a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust; the trustee must act impartially and *with due regard for the diverse beneficial interests created by the terms of the trust.*" Shelton, 164 N.H. at 500 (quotations, brackets, and ellipses omitted and emphasis added) quoting RESTATEMENT (THIRD) OF TRUSTS § 79(1)(a) (2007); cf. Merrill Lynch Trust Co., FSB v. Campbell, No. CIV.A. 1803-VCN, 2009 WL 2913893, at *7 (Del. Ch. Sept. 2, 2009) ("Under Delaware law, when a trust has more than one beneficiary, a trustee is under a duty to administer the trust in a manner which preserves a fair balance between the beneficiaries, and to ensure the integrity of the trust's assets.")

Returning to the specific meaning of the terms of RSA 564-B:8-801, the Court observes that by defining "terms of the trust" to mean "the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding," RSA 564-B:1-103(19), the UTC adopts the common law rules of construction set forth supra. Next, it defines a beneficiary as: "a person that: has a present or future beneficial interest in a trust, vested or contingent." RSA 564-B:1-103(2)(A).

It also defines "interests of the beneficiaries" as "the beneficial interests provided in the terms of the trust." RSA 564-B:1-103(7). "Beneficial interest," however, is undefined. Courts determine the meaning of a statute by analyzing its plain terms. Landry v. Landry, 154 N.H. 785, 787 (2007). In order to discern the plain meaning of a pivotal term, courts may permissibly consult the dictionary for its common definition. See, e.g., State v. Flodin, 159 N.H. 358, 363 (2009); Board of Water Comm'rs, Laconia Water Works v. Mooney, 139 N.H. 621, 626 (1995)(an undefined statutory term is given its "plain and ordinary meaning"). "Beneficial interest" is defined as "[a] right or expectancy in something (such as a trust or an estate) as opposed to legal title to that thing." BLACK'S LAW DICTIONARY at 934 (10th ed. 2009).

The Court also observes that RSA 564-B:8-801 sets forth the required duties in the conjunctive, cf. Gagnon v. New Hampshire Ins. Co., 133 N.H. 70, 78 (1990) (term "and" implies conjunctive application), and thus a trustee has an unwaivable duty, when administering, distributing or decanting trust property, to act not only: (1) in good faith; (2) according to its terms and purposes as discerned using established principles of construction; (3) in accord with the UTC; *and* also (4) giving due consideration to the rights and expectancies of the beneficiaries as they are delineated in the trust.

"Good faith" was undefined in the UTC until 2105. See 2015 Laws 272:64.[12] If one looks to its plain and ordinary meaning, Board of Water Comm'rs, Laconia Water Works, 139 N.H. at 626, the term implies "[a] state of mind consisting in . . . faithfulness

[12] Under the current version of the law, it is defined as: "with respect to a trustee, trust advisor, or trust protector, the observance of common standards of honesty, decency, fairness, and reasonableness in accordance with the terms of the trust, the trust's purposes, and the interests of the beneficiaries as their interests are defined under the terms of the trust . . . ." See RSA 564-B:1-103(30) (Supp. 2015). As an aside, the Court wishes here to disclose, in the interest of full disclosure, that it was asked to consult on the drafting of this provision and indeed it suggested the language, based in part upon that set forth in Centronics Corp. v. Genicom Corp., 132 N.H. 133, 140, 144-45 (1989).

to one's duty or obligation [or]. . . absence of intent . . . to seek unconscionable advantage." BLACK'S LAW DICTIONARY, supra at 808. This approach is not inconsistent with the definition adopted by the UTC in 2015 as both imply an obligation "to observe reasonable limits in exercising" discretionary powers. See Centronics, 132 N.H. at 143; BLACK'S LAW DICTIONARY, supra at 808.

Conversely, an abuse of a trustee's discretion may be found where the action was taken as a result of improper inducement. It is well-established that "[a]n abuse of discretion may result from the exercise of discretionary authority in bad faith or from improper motive. Thus, a discretionary power is abused if a trustee acts dishonestly, such as when the trustee receives an improper inducement for exercising the power in question." RESTATEMENT (THIRD) OF TRUSTS §87 comment c (2015).

C. Duty to Contingent Beneficiaries

In the UTC, the term "beneficiaries" includes those without fully vested property interests. See RSA 564-B:1-103(2)(A). The Petitioners' "beneficial interests" are those delineated in the trust. RSA 564-B:1-103(7); B:1-103(19). In this matter, the Petitioners belong to a class of persons, created by or named in the 2004 Trust documents, eligible, at the co-trustees discretion, to receive trust property and income. See, e.g., Exh. 1 at 2, 4, 7, 37; Exh. 2 at 2, 4, 7, 37. They are also within a class of individuals who may be named beneficiaries of a distributee trust. Exh. 1 at 4, 37; Exh. 2 at 4, 37. Thus, they are granted special status, as compared to those not named in the trust documents, and have a beneficial interest in the Trust. This status, though arguably less than a fully vested property right, see RSA 564-B:8-814(b), by statute, see RSA

564-B:1-105(b)(2), entitles them to protection from a fiduciary who fails "to act in good faith . . . and the interests of the beneficiaries." Id. ; see also 564-B:8-801.

Although RSA 564-B:8-814(b) & (c) limit the duties owed to unvested interests and grants broad discretion to treat beneficiaries unequally, the statute does not absolve the Respondents of all duties to the Petitioners. Section (b) states:, "if a distribution to or for the benefit of a beneficiary is subject to the exercise of the trustee's discretion, . . . then the beneficiary's interest is neither a property interest nor an enforceable right, but a mere expectancy" and section (c) mandates that "if the terms of a trust permit distributions among a class of beneficiaries, . . . 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." Both subsections (b) and (c), however, are subject to good faith limitation set forth in subsection (a) mandating that: "the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries." Hence, the conditional nature of a beneficiaries' interest or the ability to treat beneficiaries unequally does not relieve a trustee of the basic duty to make good faith decisions and be mindful of a beneficiaries' interests. In addition, while RSA 564-B:8-814(b) states that discretionary distributions are "mere expectanc[ies]" and thus a beneficiary does not have a "property right" to receive such a distribution, that provision does not absolve the fiduciary of its duties. Rather, this statute merely categorizes the nature of the beneficial interest. Cf. G. Bogert, The Law of Trusts and Trustees §181 (discussing possible types of beneficial interests). It does not, however, render a potential interest unworthy of fiducial care. This Court is not at liberty to take the statute

one step further, and by judicial fiat, add a provision to relieve fiduciaries of their duties to all beneficiaries where there may be no vested property right. Cf. Town of Newbury v. N.H. Fish & Game Dep't., 165 N.H. 142, 144 (2013)(courts cannot add language that the legislature "did not see fit to include").

Finally, interpreting the power to decant in a manner relieving the Respondents of a duty under RSA 564-B:8-801 would lead to an absurd result. Cf. State v. Bulcroft, 166 N.H. 612, 614 (2014). It would relieve trustees of their fiduciary duties to beneficiaries with an interest in future income until a distribution is made. This is not, and cannot be, the law. Beyond that, it would be an interpretation contradictory to recent New Hampshire case law. See In re Goodlander, 161 N.H. at 497 (beneficiary specifically found not to have a vested interest in income still owed duty of impartial administration of trust).

D. Limits on Fiduciary Liability

A trustee's liability may be limited when employing experts and RSA 564-B:8-816(a)(27)(commonly referred to as the "advice of counsel defense") affords some protection for trustees who employ and rely on that expert legal advice. A plain reading of the statute confirms that a trustee is empowered to: (1) employ the assistance of legal counsel; and (2) use that assistance without the burden of independently investigating the advice. Courts should construe statutes "with an eye towards avoiding absurd results," O'Brien v. O'Brien, 141 N.H. 435, 436 (1996), and as such, it would be absurd to allow trustees to follow legal advice, but still hold them broadly liable for bad advice.

The Court's inquiry, however, does not end with the conclusion that RSA 564-B:8-816(a)(27) allows trustees some protection from liability. Although the statute does not explicitly address the nature of the liability shield provided trustees who "act without independent investigation" under 564-B:8-816(a)(27), it is axiomatic that courts discern the unexpressed contours of the UTC through the common law. See RSA 564-B:1-106 ("The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state").

It is well-established that engagement of counsel is often dictated by a trustee's duty to act prudently when managing a trust, cf. RSA 564-B:8-804, and a trustee's reliance on the advice of legal experts or other advisers is a significant factor in determining whether the trustee's conduct was appropriate. Cf. RESTATEMENT (THIRD) OF TRUSTS § 93 comment c (2015). For example, fiduciaries who hire counsel to decide whether to institute litigation are not charged with liability for reliance on that advice. See Estate of Stetson, 345 A.2d 679, 688 (Pa. 1975)(collecting cases); see generally, Dodge v. Stickney, 62 N.H. 330 (1882). The immunity afforded trustees is not unlimited, however, as:

> [r]eliance on relevant professional advice does not afford a complete defense to allegations of breach of trust, for that protection should not apply, for example, if the trustee acted unreasonably in following the advice or in procuring it, as might be the case in shopping for advice to support a desired course of conduct. If, however, a trustee has selected an adviser prudently and in good faith, has provided the adviser with relevant information, and has relied on plausible advice on a matter within the adviser's competence, this conduct provides significant evidence of the prudence of the trustee's action or inaction in the matter at issue.

RESTATEMENT (THIRD) OF TRUSTS § 93 comment c (2015); see also id. §§ 77, 95; Estate of Heller, 401 N.W. 2d 602, 609-610 (Iowa Ct. App. 1986). When imposing liability for acts committed with advice of counsel, it is appropriate therefore to evaluate "all circumstances of the breach and of the trustee, such as: what is reasonable to expect of the particular trustee; the sincerity of the trustee's efforts to understand and perform the responsibilities in question; and whether the trustee reasonably relied on guidance from legal or other advisers . . . ." RESTATEMENT (THIRD) OF TRUSTS § 95 comment d (2015)(citations omitted). Certainly, trustees may not avail themselves of the defense if they engage in "supine inaction" or "gross inattention" to their duties and blindly follow advice of counsel. Laramore v. Laramore, 64 So.2d 662, 668 (Fla.1952); see Estate of Barbara Rosenthal, 189 So.2d 507, 509 (Fla. Dist. Ct. App. 1966).

## II. Relevant Facts

After three days of trial and in consideration of the exhibits submitted, the Court finds the following facts.

### A. The Trusts and Decantings

The Court begins, appropriately, with the express terms of the 2004 Trusts, see Shelton, 164 N.H. at 495; King, 152 N.H. at 18 and decanting instruments that followed. In August 2004, David A. Hodges, Sr. (the "Grantor" or "David, Sr.") created "The David A. Hodges, Sr. Irrevocable GST Exempt Trust" (the "2004 Exempt Trust"). Exh. 1. At that time, he also created "The David A. Hodges, Sr. Irrevocable GST Non-Exempt Trust" (the "2004 Non-Exempt Trust"). Exh. 2. It is undisputed, and the Court finds, that the 2004 Trusts were themselves the product of a decanting whose efficacy is not in dispute at this time. Respondents Saturley and Johnson were trustees of both trusts

prior to and immediately following the decantings at issue in this case. Exh. 1 at 1; Exh. 2 at 1; Exh. 3(A)-(C); Exh. 4(A)-(C); Exh. 5(A)-(C); Exh. 6(A)-(C); Exh. 7(A)-(C); Exh. 8(A)-(C).[13] The Petitioners, three of five children and stepchildren of the Grantor, were collectively referenced as "children" of the Grantor in the 2004 Trusts, Exh. 1 at 1; Exh. 2 at 1, and conferred benefit to the receipt, or potential receipt, of certain distributions as descendants and/or beneficiaries of both 2004 Trusts. See, e.g., Exh. 1 at 2, 4, 5; Exh. 2 at 2, 4, 5. The definitional provisions of the 2004 Trusts set forth the following:

> "'Child,' 'Children,' and 'Descendants.' . . . As provided on the first page of this instrument, the terms 'child' and 'children,' where in the context of the reference is to my child or children, shall mean my children and step-children, Barry, Patricia, Nancy, Janice, and David, Jr., and the term 'descendants,' where the context of reference is to my descendants, shall mean said children and step-children and their descendants.

Exh. 1 at 35-36; Exh.2 at 35-36. The 2004 Trusts also identified as "contingent beneficiaries" unnamed charitable organizations "the purposes of which are to benefit children, the destitute, and animals" which would receive a distribution "[i]f no descendant of mine survives [the Grantor]." Exh. 1 at 5, 12; Exh. 2 at 5, 12.

The 2004 Trusts are also both irrevocable trusts and provide in Article XVIII that:

> [t]his trust shall be irrevocable, and I acknowledge that I shall have no right or power, whether alone or in conjunction with others, in whatever capacity, to alter, amend, modify or revoke this trust instrument . . . . or to designate the persons who shall possess or enjoy the trust property or its income.

Exh. 1 at 40; Exh. 2 at 40.

[13] The original documents list only Respondent Johnson as trustee. It is undisputed, and the Court finds, that Attorney Saturley was later added as trustee.

Each further provides for certain "withdrawal rights" during the lifetime of the Grantor whenever there is a contribution of property. The Petitioners are identified as "beneficiaries" with a right of withdrawal exercisable within 60 days after a contribution. Exh. 1 at 1-4; Exh. 2 at 1-4. In addition, they provide, during the lifetime of the Grantor, and subject to the right of withdrawal, for discretionary distributions to the Grantor's ex-wife[14], his descendants, and "distributee trusts" in Article II(B) as follows:

> Distribution in the Trustee's Discretion. Subject to the provisions of [the right to withdrawal], the Trustee may distribute all or any portion of the net income and principal of the trust to any one or more of the group consisting of my [ex-wife], my descendants, and distributee trusts, in such amounts and at such times as the Trustee, in the Trustee's discretion, may determine, except that the Trustee shall make no distributions as will relieve me of any legal obligation of support.

Exh. 1 at 4; Exh. 2 at 4. The "distributee trust" referenced in Article II(B) is defined in Article XVI(H) as:

> any trust being administered under this trust instrument for the benefit of any one or more, but not necessarily all, of the group consisting of my [ex-wife] and my descendants, or any trust established by me under another trust instrument for the benefit of any one or more, but not necessarily all, of the members of such group . . . ."

Exh. 1 at 37; Exh. 2 at 37. Included also are provisions directing the trustee to take into account certain considerations when exercising conferred discretion to distribute property or income, but not specifically guaranteeing an income stream to the Petitioners or limiting the trustee's discretion to make distributions. Exh. 1 at 13-14; Exh. 2 at 13-14. The Trustees are asked to consider, inter alia: (1) purposes

[14] At the time the 2004 Trusts were established the Grantor was married to Joanne M. Hodges, who is referenced in them as his "wife". Exh. 1 at 1; Exh. 2 at 1. They were later divorced. As a consequence, in this Order, any spousal reference set out in the 2004 Trusts will be to her current post-divorce status.

"reasonable and appropriate for the welfare, enjoyment, and education . . . of the beneficiaries"; (2) the beneficiaries' financial circumstances; and (3) potential tax savings. Exh. 1 at 13; Exh. 2 at 13. The Trustees are not under any obligation "to equalize" distributions, and in fact, the "welfare, enjoyment, and comfort" of the Grantor's ex-wife is deemed "paramount." Id. Finally, the Trustees are granted certain delegation authority namely, "[a]ny such co-trustee, *by written notice*, may temporarily delegate any or all of such co-trustee's rights, powers, duties, and discretion as co-trustee to any or all of the other co-trustees with such co-trustee's or co-trustees' consent." Exh. 1 at 34; Exh. 2 at 34 (emphasis added).

The 2004 Trusts include "Provisions Relating to Closely-Held Business Interests," see Article XII, pertaining to trust assets comprised of, inter alia, some of David, Sr.'s business interests, including the stock of the Hodges Development Corporation, its wholly-owned subsidiaries and successors, and "Hodges Family Farm, LLC," collectively identified as the "Business Interests." Exh. 1 at 19-26, 36; Exh. 2 at 19-26; 36. Key provisions of this article grant the Trustee(s) certain "business powers" to continue operation of businesses whose stock is held in trust. Exh. 1 at 20-22; Exh. 2 at 20-22. Trustee(s) are relieved from liability when operating the Business Interests,[15] and empowered to collect additional compensation when dealing with the "Business Interests." Exh. 1 at 22; Exh. 2 at 22.

The 2004 Trusts establish a "Committee of Business Advisors," who, by majority vote, have the exclusive authority to make all business decisions for the Business

[15] The Trustees are relieved from liability due to application of the "Prudent Investor Rule," see RSA 564-B:9-901-902, and "shall not be held liable for any loss resulting from the retention and operation of such business unless such loss shall result directly from the Trustee's bad faith or willful misconduct." Exh. 1 at 22; Exh. 2 at 22. It also provides that the Trustee(s) shall not be held personally liable. Id.

Interests. Exh. 1 at 22-24; Exh. 2 at 22-24. The "Committee of Business Advisors" is not empowered to exercise that exclusive authority, however, until the Grantor's "death or incapacity, or upon such earlier date as [he] may designate by a written instrument delivered to the Trustee[s] . . . ." Exh. 1 at 22; Exh. 2 at 22. The 2004 Trusts initially appointed Petitioners Barry and David, Jr., non-party Nancy Hodges, Respondent Alan Johnson, and an un-named "Fifth Member" to the Committee of Business Advisors.[16] Exh. 1 at 23; Exh. 2 at 23. The Grantor reserved the power to amend certain provisions of this arrangement, limited to: "(i) . . . the appointment, resignation, removal, and number of Committee Members, their powers, duties and liability, and other similar administrative matters, [and] (ii) does not change any interests of the beneficiaries in the trust estate." Exh. 1 at 25; Exh. 2 at 25.

The 2004 Trusts, in Articles XII(G)-(H), contain two important provisions limiting the authority of the Committee of Business Advisors to distribute assets, namely:

> (G) Distributions of Business Interests. It is my desire, but not direction, that Business Interests not be distributed to any beneficiary, but rather remain in trust, so that they may be managed by the Committee of Business Advisors, if appropriate. Therefore, the Trustee shall not distribute any Business Interest to or for the benefit of any beneficiary without the written consent of a majority of the Members of the Committee . . . .

Exh. 1 at 26; Exh. 2 at 26. The 2004 Trusts not only direct that Business Interests remain in trust, but that:

> (H) Distributions from Businesses. It has been my experience that retaining cash and other liquid assets in the Corporation and my other businesses is necessary and desirable for the long-term success and viability of each

[16] As discussed infra, the composition of the Committee of Business Advisors has been amended, as have some of the terms. See Exh. 8.

> such business. Accordingly, it is my strong desire and intent that each business retain, and not distribute to its shareholders and owners, cash and other liquid assets, so as not to endanger the viability of such business.

Id.

Importantly, also included in the 2004 Trusts is an *in terrorem* clause. Specifically, Article XVII(E) provides: "[i]f any beneficiary of this trust, directly or indirectly, institutes, conducts or in any manner whatsoever takes part in or aids in any proceedings to impair, invalidate, oppose or set aside this trust, . . . then any and all provisions made for the benefit of such beneficiary under this trust instrument shall thereupon be revoked . . ." Exh. 1 at 39; Exh. 2 at 39; see generally RSA 564-B:10-1014.

On October 21, 2010, assets of the 2004 Irrevocable GST Exempt Trust and the 2004 Irrevocable GST Non-Exempt Trust were purportedly decanted, respectively, into the "David A. Hodges, Sr. 2010 Irrevocable GST Exempt Trust" (the "2010 Exempt Trust") and the "David A. Hodges, Sr. 2010 Irrevocable GST Non-Exempt Trust" (the "2010 Non-Exempt Trust")(collectively the "2010 Trusts"). See Exhs. 3–4. These decantings were accomplished by Respondent McDonald "without the consent and participation of the other co-Trustee, Respondent Saturley," who exercised "the decanting power by directing that immediately upon the Grantor's death, all assets of the Trust are to be distributed to the then Trustees of the 2010 Trust."[17] See Exhs. 3(B);

[17] The Court, during the course of this litigation, was concerned about whether a proper or effective decanting occurred as the decanting documents do not provide for contemporaneous transfer of assets into the new trusts. See Exhs. 3(B); 4(B); 5(B); 6(B); 7(B); 8(B). Rather, they provide for transfer of assets after the death of the Grantor, see id., an event that did not occur until years after the decanting documents were executed. While the parties initially disputed whether the non-transfer of property until occurrence of a future event can properly constitute a decanting, neither cited legal authority for their position.

4(B). Before the decanting, Respondent Johnson resigned as co-trustee and was replaced by Respondent McDonald. Respondent Saturley then "delegated" his decanting power to Respondent McDonald who executed the decanting. See Exhs. 3(A); 4(A). As a result of the decanting, Petitioners Barry R. Sanborn and Patricia J. Hodges were specifically "excluded" from the definition of "descendants;" effectively all but negating their interests in the 2010 Trusts. See Exh. 3 at 1-2; Exh. 4 at 1-2.[18] After the decanting documents were executed, Respondent McDonald resigned as co-trustee and Respondent Johnson was reappointed. See Exhs. 3(C); 4(C).

On July 9, 2012, assets of the 2004 Trusts were purportedly decanted, respectively, into the "David A. Hodges, Sr. 2012 Irrevocable GST Exempt Trust" (the "2012 Exempt Trust") and the "David A. Hodges, Sr. 2012 Irrevocable GST Non-Exempt Trust" (the "2012 Non-Exempt Trust")(collectively the "2012 Trusts"). See Exhs. 5-6. These decantings were also accomplished by Respondent McDonald, "without the consent and participation of the other co-Trustee, William C. Saturley." Respondent

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The Court indicated to the parties that it expected further address of its concern. See Order on Pretrial Conference Held September 2, 2015 at 3 (Sept. 3, 2015)(Index #62). However, after the death of the Grantor in August, the parties appeared to have dropped all consideration of this issue – presumably given the Respondents' argument that it rendered the issue moot. See id. The Court is not so convinced. Although in light of its decision today that the decantings are invalid on other grounds it need not reach the issue, it nonetheless deems the issue waived. Still, the fact that the Respondents appeared to have no ready explanation for how or why a future transfer of assets can in fact constitute a contemporaneous decanting does not reflect positively on their claim that the decantings were accomplished after deliberate and careful consideration by them.

[18] The Court reiterates an observation it made during the hearing on the *Motion to Dismiss* (Index #23) that the decanting documents are not a model of clear and concise articulation, which, together with certain additional inconsistencies and drafting errors, have made this Court's adjudication of the matters before it a challenge. Significant today is that this lack of clarity, along with: (1) issues concerning execution of the delegation of Attorney Saturley's trustee powers in 2012 and 2013, and co-Trustee Johnson's resignation in 2013, see infra,; (2) billing records showing that David, Sr., and not the 2004 Trusts, was billed for Attorney McDonald's time, thus potentially creating a significant tax liability for the 2004 Trusts, see infra,; (3) the uncertainty about whether a decanting may be effectuated by future transfer of assets, see supra,; and (4) the complete lack of any documentation in the form of emails, notes, or even research files regarding consideration of the propriety of the decantings, see infra, calls into question the various Respondents' claims at trial that these decantings were the result of a careful process and due deliberation.

McDonald exercised "the decanting power by directing that immediately upon the Grantor's death, all assets of the [applicable trust] are to be distributed to the then Trustees of the [applicable trust]. See Exhs. 5(B); 6(B). The assets did not then flow from the 2010 Trusts to the 2012 Trusts, as they were not distributed because the Grantor was then still alive, and the documents proclaimed "[t]he decanting will supersede and replace a prior decanting under a document dated October 21, 2010." Id. Respondent Johnson resigned as co-trustee and was replaced by Respondent McDonald before the decanting. See Exhs. 5(A)-6(A). The record indicates, however, that Petitioner Saturley executed his delegation of decanting power on July 26, 2012 after the 2012 decanting was accomplished. See id. In these decantings, all three Petitioners were expressly excluded from the definition of "descendants." See Exh. 5; Exh. 6. After the decanting documents were executed, Respondent McDonald resigned as co-trustee and Respondent Johnson was reappointed by David Sr. as Grantor. See Exhs. 5(C); 6(C).

Finally, on December 23, 2013, assets of the 2004 Trusts were purportedly decanted, respectively, into the "David A. Hodges, Sr. 2013 Irrevocable GST Exempt Trust" (the "2013 Exempt Trust") and the "David A. Hodges, Sr. 2013 Irrevocable GST Non-Exempt Trust" (the "2013 Non-Exempt Trust")(collectively the "2013 Trusts"). See Exhs. 7-8. These decantings were also accomplished by Respondent McDonald, "without the consent and participation of the other co-Trustee, William C. Saturley." Respondent McDonald proceeded to exercise "the decanting power by directing that immediately upon the Grantor's death, all of the assets of the [applicable trust] are to be distributed to the then Trustees of the [applicable trust]. See Exhs. 7(B); 8(B). Again,

the assets did not concurrently pour from the 2012 Trusts into the 2013 Trusts, as they were not distributed given that the Grantor was then still living. The documents specified that "[t]he decanting will supersede and replace prior decanting under documents dated October 21, 2010 and July 26, 2012." Id. Respondent Johnson purportedly resigned as co-trustee and was replaced by Respondent McDonald before the decanting, however, he did not execute the resignation document until after, on December 31, 2013. See Exhs. 7(A); 8(A). The record also reflects that Respondent Saturley executed his delegation of decanting power on December 27, 2013 after the 2013 decanting was accomplished. See id. In these decantings, all three petitioners were expressly excluded from the definition of "descendants." See Exh. 7; Exh. 8. In addition, all interests of the Grantor's ex-wife were removed, as it provided that "property held hereunder is to be administered as if my wife predeceased me, regardless of whether she is in fact living or deceased . . . . the effect of this amendment will be to eliminate any beneficial interest and power . . . that would otherwise be given to my wife . . . ." Id. On December 31, 2013, Respondent McDonald resigned as co-trustee and Respondent Johnson was reappointed. See Exhs. 7(C); 8(C).

The 2004 Trusts, like most irrevocable trusts, were created in order to take advantage of certain related tax benefits. Cf. Exh. 1 at 40; Exh. 2 at 40. Testimony at trial indicated that they were created when market conditions made the transfer of non-voting stock of the family's closely held business, the Hodges Development Company ("HDC"), attractive to the Grantor, supports this conclusion.

The structure of the 2004 Trusts, namely creation of the Committee of Business Advisors and the directives included in Articles XII(G)-(H), further indicates that they

were formed to hold family business assets and provide for continuation of the family business after the death of its founder. This is supported by trial testimony indicating that the 2004 Trusts hold 100% of HDC *non-voting* stock, and that this holding represents over 98% of all company stock.

Attorney McDonald, although not the primary drafter of the 2004 Trusts, was contacted by David, Sr. in 2009 to assist him with his estate plans. At that time, Attorney McDonald testified that David, Sr. was reconsidering his prior generosity toward Petitioners Barry and Patricia. He reported that, while the 2004 Trusts were irrevocable, he advised David, Sr. that their assets could be decanted into distributee trusts. He represented that he explained that only the Trustees could exercise the decanting power, whom he offered to contact. McDonald eventually contacted and met with Respondents Saturley and Johnson. He then proceeded to become and act as counsel[19] to not only David, Sr., but Respondents Saturley and Johnson also in relation to the decantings.[20] Attorney McDonald billed David, Sr. personally, not the trust for his legal work.[21] See Exhs. 9-10. The Court observes that although the bills were heavily redacted, there were a number that note meetings or teleconferences with "Dave." See id. Finally, Attorney McDonald testified that in 2012 David, Sr. approached him again requesting that he initiate a further decanting from the now 2010 Trusts due to

[19] There was no engagement letter, however, but Respondent Saturley stated that he relied on Attorney McDonald for legal counsel as he did not have a trust and estates background in the law. He also testified that he conducted his own unspecified independent research. Thus, the extent of his professional reliance is unclear.

[20] It was uncontroverted that Attorney McDonald never obtained a formal conflict waiver.

[21] This fact is of particular interest to the Court, as Attorney Robert Wells, an expert proffered by the Respondents, testified that if David, Sr. is found by this Court to have directed the decantings, it may endanger the receipt of tax benefits due to the irrevocable nature of the 2004 Trusts and trigger a large federal tax liability. Although not an element of the Court's decision whether to invalidate the decantings, it does factor into its decision whether to appoint an independent fiduciary.

continuing and increasing discord between the Petitioners and him.[22] See infra. Similarly, in 2013, while a divorce was pending between David, Sr. and Joanne, Attorney McDonald was approached by either David, Sr. or Respondent Saturley[23] and asked to effectuate elimination of her interests.

There is no evidence that Respondents Saturley and Johnson, in their capacities as trustees, ever consulted independent counsel specializing in trusts and estates. Attorney Saturley testified that he conducted his own independent investigation and consideration of the propriety of the decantings.[24] Attorney McDonald testified that he offered to act as decanting trustee, Respondents Saturley and Johnson agreed, concluding that it was a "good idea" as the family dynamics and business had changed. Accordingly, at the time of each decanting,[25] Attorney McDonald acted concurrently: (1) as counsel to the Grantor; (2) as counsel to the delegating trustee and former trustee until the latter's temporary resignation; and (3) as temporary decanting trustee.

Attorney McDonald first met with David, Sr. in December 2009, but the first decanting did not occur until October 2010. There apparently were meetings among Attorney McDonald, Respondent Saturley, and Respondent Johnson concerning New Hampshire decanting law, as well as the risks and mechanics of decanting. Accounts of the content of those meetings were rather vaguely presented, and there is no

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[22] Attorney Saturley testified that he was unsure about who initiated the 2012 decanting, rather, he remembered a "process" involving Respondents Johnson, McDonald, David, Sr., and himself. He further testified that he relied on conversations with David, Sr. and wanted his opinion.

[23] Attorney McDonald's testimony on this point was fairly inconsistent and struck the Court as borderline evasive. Respondent Saturley testified, however, to his belief that he may have initiated the 2013 decanting, while Respondent McDonald recollected that David Sr. first contacted him.

[24] There are no records of this investigation, however, and he did not specifically testify to the scope of his independent inquiry to allow the Court to discern if they indeed acted independently of the settlor, David, Sr.

[25] Assuming without deciding that the 2012 and 2013 decantings were effective despite post-decanting execution of key documents by Respondent Saturley in 2012 and both Respondents Saturley and Johnson in 2013.

documentary evidence, in the form of emails, letters, or memorandum, to provide insight into what specifically was discussed or considered, and whether, if at all, the effect on the beneficiaries' interests was of serious, or even more than passing, concern. Because of Respondent Johnson's long-time employment and executive status at HDC, see infra, and Attorney Saturley's position as legal counsel to HDC, consideration was given to the business purposes and effect of the decanting on HDC. See infra. They were also acutely aware, see infra, of personality conflicts among members of the Hodges family. See infra.

The deeply personal and harsh nature of the decantings, along with the testimony of Attorney McDonald, suggests that they were undertaken and completed at the request, with the blessing, and at the direction of David, Sr. Whether they were effectuated after independent consideration by Respondents Saturley and Johnson, however, is less clear. Although both claimed to have made an independent decision, it is apparent that each deeply considered David, Sr.'s wishes. Indeed, the Court is inclined, given the totality of the evidence and testimony before it, to conclude that David, Sr.'s personal desire to disinherit: (1) a daughter with whom he was estranged; (2) sons with whom he was fighting; and (3) a soon-to-be ex-wife who had sided with the sons, took precedence over any concern that the Petitioners and Joanne were a threat to the continuation of HDC as a business entity. Certainly, the power granted to David, Sr. to amend the composition of the Committee of Business Advisors, along with that committee's vast management power, the directives in Articles XII(G)-(H) concerning management of the assets of HDC, the non-voting nature of the stock that was its only asset, and the *in terrorem* clause in Article XVII(E), already limited, if not

greatly diminished, the potential threat to HDC arising from intra-family discord. Thus, the Court deduces that the driving force behind the decision to decant was to honor and carry out the express wishes of the Grantor, David, Sr., to disinherit family members with whom he was unhappy.

More important for the Court's purposes today, however, is that it was never sufficiently demonstrated to the Court that the *beneficial interests* of any of the Petitioners or beneficiary Joanne, were ever taken account of or considered. Similarly, the Court concludes that the Respondents did not make any adjustments to the structure of the decanting or choice of the method with which the beneficial interests might be permissibly modified in light of consideration given to those interests. The Petitioners were never consulted by the Respondents before the decanting documents were executed. Attorney McDonald, the decanting trustee and trustee of the distributee trusts, for his part admitted that he never gave consideration to the Petitioners' financial interests.

At trial, the Respondents asserted that the decantings were effectuated in deference to the business purpose of the 2004 Trusts, namely continuation of HDC after the death of David, Sr. There was testimony that due to: intra-family discord, see infra; and a long-time estrangement of unclear origin between David, Sr. and Patricia, complete disenfranchisement of Barry, Patricia, David, and eventually Joanne, was necessary to avoid a "Tamposi-situation," see generally, Shelton v. Tamposi, 165 N.H. at 493-495,[26] where a family member, in bad faith, disrupts management of a closely

[26] This Court is intimately aware of the damage that can be wrought by a "Tamposi-situation" having presided over that matter. However, it is not convinced that the concerns presented here are even nearly comparable as Elizabeth Tamposi had a well-documented history of seeking liquidation of assets, receiving increased distributions and opposing the family trust constructs there in play.

held business in an attempt to extract liquidity from the company. Again, there is no record of emails, memorandum, or letters concerning, or research into, the possibility of a "Tamposi-situation," and importantly, whether alternatives to complete disenfranchisement were considered or explored as a solution that would take into account both the "terms and purposes" of the 2004 Trusts and the "interests of the beneficiaries." That said, the Court denotes that the decanting solution employed here did not seemingly serve to appropriately protect the business purposes of the 2004 Trusts but rather nearly assured potentially expensive litigation instituted against the Trustees given that the Petitioners, left with nothing to risk forfeiture-wise pursuant to the *in terrorem* clauses, had nothing to lose.

B. The Hodges Family and the Hodges Companies

At trial, there was extensive testimony concerning the Hodges family, the Hodges companies, and certain conflicts among family members and, to a lesser extent Respondent Johnson. Although all agree that the conflicts existed, witnesses disagreed as to the depth and serious nature of them.

HDC is a now rather large and reportedly successful real estate holding and development company founded by David, Sr. in 1969. Before creation of the 2004 Trusts, his ex-wife, Joanne M. Hodges owned 49% of the stock[27] of HDC. Together, Joanne and David, Sr., raised a blended family including children from Joanne's first marriage and children Joanne and he had together. By all accounts, the step-children and children, Barry, Patricia, Nancy Hodges-Friese, Janice Hodges, and David, Jr.,

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In addition, the Court is dubious about the testimony given at trial that the "Tamposi-situation" was indeed a significant motivating factor as there was no contemporaneous record or evidence offered of that concern.

[27] It appears that it was non-voting stock that was sold to David, Sr. and placed in the 2004 Trusts.

(collective the "Hodges Children") were raised as one family unit. Various Hodges Children worked for the HDC Companies from a young age.

Eventually, HDC became Barry's and David, Jr.'s primary employer. Barry was employed by the HDC for approximately thirty-six years, rising to the position of "Senior Vice President" before his termination in October 2012. By the time of his termination, his employment had become part-time by his own choosing, although he was paid a generous, essentially fulltime salary. His underemployment became a source of friction between Barry and David, Sr. The tension between them became rather acute, and eventually led to intervention by Attorney Saturley, as counsel to HDC, in the form of a March 19, 2009 letter entitled "Working Together" that specified Barry's part-time schedule and his duties with the company. See Exh. B. It also set forth an understanding that both David, Sr. and Barry "must set examples of the highest standards of behavior." The latter was instructed to "avoid public displays of temper" and both were exhorted to "show patience with each other." Id.

David, Jr. also worked for the family business from a very young age. He testified he was told by his father from about the age of six that someday he would take over the company. In April 2012, however, he was informed that Respondent Johnson would instead be appointed President of HDC. This resulted in a confrontation between the Davids, the ferocity of which is disputed. Shortly thereafter, David, Jr. informed Barry of this development. Barry confronted his stepfather at the family home that evening and a dispute ensued. Although, again, the measure of discord is disputed, what is clear is that David, Sr. moved out of the family home, Barry had a heart attack,

and a divorce action between Joanne and David, Sr., ensued.[28] When David, Jr. returned to the company headquarters, he discovered that armed guards had been hired allegedly to protect David, Sr. and Johnson from Barry. Eventually, David, Jr. was later fired from HDC in August 2012.

As noted supra, the terms of the 2004 Trusts include creation of a Committee of Business Advisors. The 2004 Trusts grant David, Sr. the authority to direct the composition of that committee, and indeed he did on multiple occasions. At first, the committee was comprised of Barry, David, Jr., Nancy Hodges, and Respondent Johnson. After several amendments, it appears to presently include all three Respondents plus Diane Benoit[29] and Nancy Hodges. Janice Hodges was nominated as a "Special Equity Voting Member." See Exh. 8.

Respondent Johnson has been an employee of HDC since 1984. Prior to his appointment as President, he was the long-time Chief Financial Officer in charge of the company's day-to-day operations. He holds minority shares in Hodges Pembroke, LLC and Hodges Portsmouth, LLC. He also became a substantial beneficiary of a revocable trust established by David, Sr. That trust was designed to provide incentives for Respondent Johnson to remain in the employ of HDC. Respondent Johnson apparently was designated to receive $500,000 from the trust for past service to the company, and, if he continued serving HDC, additional benefits totaling another $500,000 are to vest over time. The revocable trust was chosen as the accomplishment vehicle, instead of a

[28] David, Sr. stated in a deposition conducted in the divorce action that in fact he did not want to divorce his wife of fifty years. She, however, conditioned returning to him on his discharging Saturley and Johnson. He refused, and the divorce action proceeded to eventual termination of the marriage. Exh. 12.
[29] Although Exhibit 8 lists Diane Benoit, testimony by Respondents McDonald and Saturley did not indicate that she is currently on the committee. See Exh. 8 (Third Amendment at 2).

standard employment contract, in order to avoid a vote by the HDC board of directors disapproving the additional incentive compensation.

## III. Analysis

Counts I & II request that this Court declare that the decantings void *ab initio* because they were accomplished without consideration for the interests of the beneficiaries. As noted supra, although the 2004 Trusts provide for unequal treatment of beneficiaries when distributing income and establishing distributee trusts, and the New Hampshire Trust Code also allows for unequal treatment, see RSA 564-B:4-418(a), trustees have an unwaivable duty when decanting to "administer . . . and manage the trust and distribute the trust property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter." RSA 564-B:8-801; RSA 564-B:4-418(e)(Supp. 2013)(decanting statute). Therefore, when exercising a decanting authority granted to them, trustees must give "due regard for the diverse beneficial interests created by the terms of the trust." Shelton, 164 N.H. at 500 (quotations omitted).

In this matter, the Court finds[30] that Respondent McDonald, as decanting trustee, and Respondents Saturley and Johnson, to the extent they assisted as co-trustees in facilitating, if not directly effectuating, the decantings, did not give any consideration to

[30] For purposes of this Order, the Court assumes, without deciding, that he possessed the proper authority in 2012 and 2013 given that Attorney Saturley's delegation of authority was not signed until after the actual decanting, and Respondent Johnson did not sign his 2013 resignation until after that decanting was effectuated. There remains serious doubt in the Court's mind of their efficacy, in particular given the 2004 Trusts' specific requirement that delegation of trustee powers be in writing. See Exh. 1 at 34; Exh. 2 at 34. Although the Respondents assert that under principles of contract theory, written notice is not required where oral notice has been given, see Index #75, the Court is not convinced that theory applies here. Such a reading would render explicit terms of the Trust a nullity and ignores the elevated status of a fiduciary, with concomitant duties and powers inherent to that office, as compared to a standard, negotiated contract between parties involving reciprocal rights and duties. The Court, however, need not decide that issue today, as even assuming proper authority, the decantings are void.

the Petitioners' beneficial interests. As discussed supra, the Respondents, although giving consideration to the terms and business purposes of the 2004 Trusts, did not undertake and complete the other task required by law, namely, to give due consideration to the Petitioners' (and Joanne's) interests.[31] A contrary holding, under the facts found by this Court, would effectively nullify the limits on decanting set forth in RSA 564-B:4-418(e) as it would be condoning complete removal of beneficial interests through decanting based solely on the business purposes set forth in a trust and, in this case, the personal interests of a grantor.[32]

The Court also deems it worthy of mention that determination based on what little was tendered in support of their independence from David Sr.'s direct influence or direction and their consideration of the interests of the beneficiaries has been made eminently more difficult by the astonishing lack of any even modestly selective or self-serving documentation revealing the thought processes, reasoning and content of other discussions relating to and predating each decant. As such, the only evidentiary proffer is their own testimony of operational independence, which the Court did not find particularly convincing. There was not one note, document, email or other written mode of or embodiment reflecting: (1) what they discussed or considered; (2) whether they took into account the Petitioners' beneficial interests; (3) other options; and (4) what influence, if any David, Sr. either tried to exert, or in fact did exert. It was highly unusual that there was nothing in terms of notes, emails, research materials, draft opinion letters, and the like over the many months that the decantings were under

[31] The Court does not mean to imply that David, Sr. may or may not have had valid reasons to be unhappy with members of his family. What it is to say is that having put them irrevocably in the 2004 Trusts, the co-trustees had a duty to take their interests into account and not dismissively ignore them.
[32] Indeed, such a conclusion may well obliterate the functional meaning of irrevocability.

deliberation.[33] Thus it is difficult to rely on their testimony alone that at least in some way, within the context of the totality of all other circumstances and relationships, David, Sr.'s personal desires and prejudices, rightly or wrongly based, were not driving the decants. At the very least, the circumstances can rationally be seen to demonstrate neglectful, if not contrived behavior, so far as there is no documentary evidence, and little or no testimonial evidence, that the Respondents ever considered less draconian measures — or to put it another way — options that would have mitigated or neutralized the risk to the company, but resulted in something less than the complete removal of the Petitioners' beneficial interests established under the 2004 Trusts.

In so holding, the Court need not make findings concerning the good or bad faith of the Respondents in effectuating the decantings. Similarly, it need not decide whether Respondent Johnson's substantial beneficial interest in a separate revocable trust controlled by David, Sr., and his knowledge that David, Sr. desired that the Petitioners (and eventually Joanne) be completely cut out of the 2004 Trusts, constituted an improper inducement that would justify voiding the decantings. It does deduce, however, that Respondent Johnson's trust interest, his appointment as President and long- term status as David, Sr.'s chief financial officer; along with Attorney Saturley's position as corporate counsel and member of the Committee of Business Advisors; and the fact that Respondent McDonald was hired by, and billed, David, Sr. for the specific purpose and in the course of investigating removal of disfavored family members from his irrevocable trusts, leastwise leave a taint that is not removed by the very fact a law exists requiring trustees to act independently of a grantor.

[33] The Court observes that the Respondents' expert, Attorney Wells, noted that: (1) he had never seen a case like this and had never removed a beneficiary through decanting; and (2) the complete lack of memoranda was very unusual.

## IV. Remedy

The Court now turns to the issue of removal of Respondents Johnson and Saturley as co-trustees. RSA 564-B:7-706(a) provides: "a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative." Courts may, in their discretion, remove a trustee if: "(1) the trustee has committed a serious breach of trust;" or (2) "the court determines that removal of the trustee best serves the interests of the beneficiaries." RSA 564-B:7-706(b). In the case before the Court, it is determined that it best serves the interests of all beneficiaries to order removal of Respondents Saturley and Johnson as co-trustees. In light of the circumstances of this case, it has concluded that removal is necessary given: (1) the history of relations between the parties, including the bitterness and outright hostility that was testified to at trial; (2) the co-trustees willingness to engage in activities without proper concern for the interests of the beneficiaries under the 2004 Trusts and as a consequence of the decants; (3) its determination that efficient and proper management of the 2004 Trusts would be nearly impossible if it maintained the status quo in view of what it discerns to be a complete breakdown of trust and confidence between the Petitioners and Respondents Saturley and Johnson; and (4) its expectancy that non-removal will very likely engender another round of decanting, as well as further litigation to undo it. As such, it is considered most prudent to appoint an independent successor fiduciary.

In so ordering removal, however, the Court wishes to make clear that it is not directing removal of the Respondents from membership on the Committee of Business Advisors. First, that remedy has not been requested by the Petitioners. Moreover,

while the facts support a conclusion that the Respondents failed in exercising their duties when decanting, there was no evidence presented that they have not properly managed the company or otherwise were deficient in the exercise of their duties as members of the Committee of Business Advisors.

The Court also concludes that any shelter Respondents Saturley and Johnson may find in RSA 564-B:8-816(a)(27) based upon reliance on the advice of Respondent McDonald, does not alter the outcome of this case. Attorney McDonald effectuated the decantings as a trustee in possession of his co-trustee's decanting power. As such, his acts, done without proper consideration of the interests of the Petitioners and Joanne, render the decantings ineffective. Further, given the discord and lack of trust noted supra, retention of them as co-trustees is not advisable regardless of whether they may assert an advice of counsel defense.[34]

Finally, as the Court is satisfied that it has sufficiently set out the facts and applicable law essential to support its rulings on appeal, the parties' respective requests for findings of fact and rulings of law are granted so far as consistent with the narrative facts, rulings and law set out within. Any of their requests that are inconsistent, either expressly or by necessary implication, are denied or determined otherwise unnecessary. See Crown Paper Co. v. City of Berlin, 142 N.H. 563, 571 (1997).

SO ORDERED

Dated: 2/22/16

Gary R. Cassavechia, Judge

[34] That is not to say that shelter in RSA 564-B:8-816(a)(27) may not be available if there is future litigation against them.