STATE OF NEW HAMPSHIRE

SUPREME COURT

David A. Hodges, Jr., et al.

v.

Alan Johnson, et al.

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

Russell F. Hilliard
UPTON & HATFIELD, LLP
NHBA #1159
159 Middle Street
Portsmouth, NH 03801
(603) 436-7046
rhilliard@uptonhatfield.com

Jeffrey H. Karlin
WADLEIGH, STARR & PETERS, PLLC
NHBA #1311
95 Market Street
Manchester, NH 03101
(603) 669-4140
jkarlin@wadleighlaw.com

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

ARGUMENT

I. The trial court erred as a matter of law in defining the duty owed the beneficiaries by the Trustees.

In Section II of their Brief, the Petitioners both misstate the Trustees' position, and fail to address the Trustees' argument.

The trial court erred as a matter of law when it found that "the Trustees failed to satisfy the requisite duty to consider the 'interests of the beneficiaries' when decanting," *Order* at 3, 36, because the trial court misconstrued the term "interests of the beneficiaries" and thereby applied an incorrect standard of duty to the Trustees' actions. To begin with, the trial court acknowledged that the Trustees considered the terms of the Trusts, *Order* at 29, 35. The trial court also found that, by their own terms, the Petitioners' interests in the Trusts had yet to vest. *Order* at 14-15. These two findings unequivocally confirm that the Trustees considered the "interests of the beneficiaries," as that phrase is defined by RSA 564-B:1-103(7): "'Interests of the beneficiaries' means the beneficial interests *provided in the terms of the trust.*" (emphasis added). The trial court's conclusion otherwise is wrong, a point the Petitioners never address.

The Trustees never claimed that the unvested Petitioners are owed no duty, or are "another class of beneficiary below contingent beneficiary to which no duty is owed," as suggested in Petitioners' Brief at 10-11, 13. The Trustees acknowledge that their duty is set forth in RSA 564-B:8-801, :8-814(a), and :1-105(b)(2). This duty, *owed to all the beneficiaries and not only to the Petitioners*, was to administer the Trusts "in good faith, in accordance with (their) terms and purposes and the interests of the beneficiaries." *E.g.,* Respondents' Brief at 1.[1]

[1] It is untrue that "adopting the Trustees' construction (of their duty) would make contingent beneficiary status meaningless" or that it would effectively repeal the protections afforded to beneficiaries under the statute, as suggested in the Petitioners' Brief at 15. A trustee must always administer the trust in good faith and in accordance with its terms and purposes, regardless of the beneficiary's status. The Respondents urge this Court to rule,

But the fiduciary duty owed by the Trustees to all beneficiaries does not mean that the Petitioners enjoy the rights and privileges of vested beneficiaries, as the Petitioners imply in their Brief. Petitioners' Brief at 10-11, 13. Had the Petitioners' interests been vested, their removal from the Trusts by decanting would be prohibited. RSA 564-B:4-418(g) (current version); 4-418((b)(2, 4) (prior version). Respondents' Brief at ix-xi. As unvested beneficiaries, the Petitioners had "neither a property interest nor an enforceable right, but a mere expectancy" in the Trusts, RSA 564-B: 8-814(b),[2] and the Petitioners' removal from the Trusts by decanting was expressly authorized by the Trusts, Art. II (B) & Art. XVI (H), and by statute. RSA 564-B:4-418(a), :8-814(c).[3]

The trial court ignores the implications of RSA 564-B:1-103(7) and RSA 564-B:8-814(b, c) upon the unvested nature of the Petitioners' interests (as do the Petitioners in their brief). While the Petitioners acknowledge that the Trustees do not have a duty to consider the "best interests" of the beneficiaries, Petitioners' Brief at 13-14, and the trial court never actually uses the expression "best interests of the Petitioners," it erroneously redefines the term "interests of the beneficiaries" to mean just that. The trial court, for example, cites Attorney McDonald's "admission" that he never considered the "Petitioners' financial interests," *Order* at 30, loosely refers to the Trustees' failure "to consider *the effect* of the decantings at issue on the petitioners'

---

however, that the interests associated with any particular status must be defined by the terms of the trust, rather than the reverse, as was done by the trial court.

[2] This provision is not in the Uniform Trust Code, but is unique to New Hampshire. *See* Testimony of Attorney Mark Langan, Transcript at 195.

[3] The Petitioners state that, because none of the provisions they cite distinguish between vested and contingent beneficiaries, a duty is owed to the unvested Petitioners. Petitioners' Brief at 10-11. This is misleading. While a duty is owed to all beneficiaries, there are other provisions that distinguish the duty owed, depending upon whether the beneficiary is vested or unvested. *See, e.g.,* RSA 564-B:4-418(g) (current version); 4-418((b)(2, 4) (prior version); 8-814(b, c).

interests as beneficiaries," *Order* at 3 (emphasis added), and suggests that "less draconian measures" should have been applied to protect the family business. *Order* at 36. [4]

Since the Petitioners lack any property interest in the Trusts, RSA 564-B:4-418(b), they also have no financial interest in the *corpus* held by the entities. The Trustees therefore breached no duty to the Petitioners by ignoring their supposed financial interests, or by choosing to by-pass less draconian measures than decanting, or by disregarding the effect of the decanting on the Petitioners' interests. The only way that the Trustees could breach the duties enumerated by the trial court is if the term "interests of the beneficiaries" means "best interests of the beneficiaries." Such an interpretation is contrary to RSA 564-B:1-103(7) and RSA 564-B:8-814(b).

The vague references used by the trial court throughout its Order to describe the Trustees' breach of duty reflect a misconception that the Trustees were required to do far more than to consider the Petitioners' "beneficial interests provided in the terms of the trust." RSA 564-B:103(7). Although these interests were "neither a property interest nor an enforceable right," the Trustees' duty, as construed by the trial court, was to consider *the effect* of the decantings on the Petitioners' *financial interests,* and to avoid any action that might harm such a financial interest. The decantings could never be in the Petitioners' interests in the sense construed by the trial court, but they nonetheless were in accord with the Petitioners' unvested interests in the Trusts. The trial court's conclusion to the contrary was error.[5]

---

[4] The trial court also notes that Black's Law Dictionary defines "beneficial interest" to mean "a right or expectancy in something" and concluded that Section 801 required due consideration of the "rights and expectancies of the beneficiaries as they are delineated in the trust." *Order* at 13. The trial court's gratuitous exposition of the duties arising from the definition in Black's Law Dictionary adds nothing to the analysis of whether the Trustees properly considered the Petitioners' interests, since Sections 103(7) and 801, read together, already specify that the beneficiaries' rights and interests, *if any*, will depend on the terms of the Trusts. By citing the definition as he does, the trial court endows the Petitioners with rights and interests they do not possess.

[5] The conclusion of the Petitioners' Brief, at 29, perpetuates a fundamental misapprehension that is also present in the decision on the merits. The trusts at issue are irrevocable ones, but this does not mean that they are not subject to decanting, or that the petitioners' interests are irrevocable. First, the applicable statute, RSA 564-B:4-418(l)(1) (current version); 4-418(g) (prior version), Respondents' Brief at ix-xi, expressly provides that a trustee may decant

II. The trial court committed error by substituting its judgment for that of the Trustees.

In Section III of their Brief, the Petitioners state that "the key factual finding was that the Trustees 'did not give any consideration to the Petitioners' beneficial interests'." Petitioners' Brief at 16. As explained above, however, the trial court misinterpreted the Trustees' duty and hence, this factual finding cannot stand. This error then led to the trial court substituting its judgment as to the appropriate response to the risk posed by the Petitioners for that of the Trustees. This was likewise error.

In addition to a consideration of the beneficiaries' interests, RSA 564-B:8-801 also required the Trustees to administer the Trusts "in good faith, in accordance with (their) terms and purposes." The trial court found that the Trustees considered the terms and purposes of the Trusts, *Order* at 29-30, 35, and did not find that the Trustees breached their duty of good faith. *Order* at 36. Thus, the trial court's own findings do not provide any basis to conclude that the Trustees breached their fiduciary duty and abused their discretion. To the contrary, the trial court's findings as well as the record confirm that the Trustees were mindful of their fiduciary obligations in their consideration of whether to decant.

The trial court found that the Trusts' purpose was to "provide continuation of the family business (HDC) after the death of the founder (David, Sr.)." *Order* at 26-27. The Trustees testified that they removed the Petitioners from the Trusts in order to protect the family business from the risk posed by the Petitioners' hostile and disruptive conduct. *Order* at 28; *Tr.* at 99-

---

an irrevocable trust. Second, and contrary to the trial court's reference to the Settlor "having put [the Petitioners] irrevocably in the 2004 Trusts," Order at 35, note 31, "the terms of the trusts expressly empowered the Trustees to distribute the trust property to a distributee trust that excluded the Appellees as beneficiaries." *See* New Hampshire Trust Council Amicus Brief at 9. Both by statute and the terms of the Trusts, the Petitioners' interests could be eliminated.

100, 122-135, 303-322, 391-411. Advancing the purpose of the Trusts by protecting the family business from risk was within the Trustees' authority and a valid reason to decant.

Indeed, Attorney Wells testified that a failure by the Trustees to remove the Petitioners, under the existing circumstances, would have been a breach of their duty to the other beneficiaries, who were not disruptive and who shared the Settlor's goals in creating the Trusts. *Tr.* at 459, 492, 516. The trial court disagreed with the judgment of Attorney Wells and the Trustees on this issue, but in doing so, it committed error –its judgment as to what might have been more appropriate is not the standard for review. Rather, "a court of equity may not substitute its judgment for a trustee exercising his discretion, and may only set aside the latter's judgment where discretion has been abused." *Morse v. Trentini*, 100 N.H.153, 156 (1956); *Bartlett v. Dumaine*, 135 N.H. 497, 512-13 (1986).[6]

The Trustees' duty was to thoughtfully consider whether the decantings were in accordance with the terms and purposes of the Trusts, and the interests of the beneficiaries as those interests are defined in the Trusts. There is no requirement that they make the "best" or the "right" decision, as might later be determined by a court reviewing the Trustees' conduct for an abuse of discretion. *Bianco v. Home Ins. Co,* 147 N.H. 249, 251 (2001) (the reversal of a trial court's discretionary decision is a determination that the record fails to disclose an objective basis for a sustainable exercise of discretion); *City of Dover v. Kimball*, 136 N.H. 441, 445 (1992) (in applying abuse of discretion standard, the Court looks for some support in the record for the trial court's decision).

[6] The Petitioners also cite as a reason to be skeptical of the Trustees' motives the trial court's comment that the decanting was almost certain to result in litigation. Petitioners' Brief at 24. Respectfully, the concern that the unvested Petitioners, who had neither a property interest nor an enforceable right in the Trusts, might file a lawsuit to enforce interests and rights they do not possess is not a legitimate reason for the Trustees to defer taking action they deemed appropriate to protect the Trusts.

Further, while the trial court opined that the Trustees (notwithstanding their testimony to the contrary) may have been less concerned about protecting the family business than about promoting the Settlor's wish to disinherit the Petitioners, *Order* at 29-30, 36, it neither made nor rested its decision on such a finding. In fact, the trial court's findings affirm the Trustees' testimony that their decision to decant was motivated by the risk the Petitioners posed to the family business. In this regard, the Trustees' consideration of the purposes of the Trusts, *Order* at 29, 35, and "the effect of the decantings on (the family business)", *Order* at 29, necessarily required their consideration of whether the decantings would benefit the family business by reducing the risk posed by the Petitioners.[7]

The trial court's apparent conclusion that the decantings reflected the current wishes of David Hodges, Sr., and therefore were somehow inappropriate, proceeds from a flawed premise. The power to decant, recognized by statute and expressly provided in the Trust instruments, necessarily contemplates actions taken in response to changed circumstances. Thus, the central purpose of the Trusts being to preserve the Hodges Enterprises for the benefit of the family, employees, and community, the Trustees were more than justified in responding to concerns expressed by David, Sr. regarding the actions and attitudes of the Petitioners.[8]

---

[7] In their Brief, at 16–19, the Petitioners seek to defend the credibility determinations of the trial court, and their significance for purposes of the proper interpretation of trust law and the trust instruments. As noted in the Respondents' Brief, at 27, fn. 23, these findings focused largely on testimony regarding the 2013 decanting, an irrelevant transaction that only affected David, Sr.'s former wife, not the Petitioners. Likewise, the Petitioners' reference to the trial court's indication that the testimony of Attorney Saturley and Mr. Johnson was not "particularly convincing," and their indictment of the credibility of Attorney Robert A. Wells, Petitioners' Brief at 19, implicitly rest on the conclusion that all of these gentlemen were, in fact, lying. Given all of the circumstances and context of this dispute, such a conclusion is an unsustainable exercise of discretion.

[8] The power (and perhaps even the obligation under certain circumstances) to decant for the protection of the Trust assets is there for just this reason. David, Sr. remained in a unique position to observe and evaluate the negative impact, of the conduct of the Petitioners on the intended purpose of the Trusts, and it would have been irresponsible for the Trustees not to take his input into consideration in addition to their own personal observations. Accordingly, there was nothing unreasonable, or inappropriate, in the Trustees' consideration of David, Sr.'s views; the trial court's criticism of this, and reliance on it to void the decantings, is erroneous as a matter of law.

As observed in the *amicus* brief of the New Hampshire Trust Council, at 11:

> There is apparently no dispute that the Settlor felt that HDC would suffer if the Appellees continued to play a role and that they should not retain beneficial interests in the trusts, that he stated this on multiple occasions to the Trustees, and that the Trustees agreed. Contrary to the court's concern, it would seem axiomatic – and consistent with *Merrow* – that, as the Trustees engaged in their assessment as to the propriety of the decantings, the Settlor's statements to them were among the best available evidence of his intent as the Settlor, serving to augment the express terms of the trust and the Trustees' personal knowledge of how circumstances had evolved since the trusts were formed.

The record is replete with evidence to support the assessment of the Trustees (and that of Attorney Wells) that the Petitioners posed a risk to the family business. Every witness, including the Petitioners themselves, confirmed the longstanding conflict and dysfunction within the family. While the trial court expressed skepticism that the situation rose to the level of a "*Tamposi*-like situation," it acknowledged that the family conflict (which at one point expressed itself in the hiring of armed guards at the business headquarters) contained risk to the family business. *Order* at 29-33, 36.

The trial court acknowledged the risk, but disagreed with the Trustees' judgment that the risk was sufficient to justify decanting. The trial court felt the Trustees should have considered other less draconian solutions to deal with the risk, in deference to the "Petitioners' interests" as it erroneously construed the phrase. *Order* at 29-30, 36. Respectfully, the trial court had three days of trial to evaluate the family and business history, while the Trustees had years of direct experience. The trial court should have limited its review to whether the Trustees abused their discretion. Whether the Trustees selected the best method to eliminate the risk posed by the Petitioners -- who had "neither a property interest nor an enforceable right" in the Trusts -- was not for it to say.

CONCLUSION

The trial court's key finding that the Trustees failed to consider the effect of the decantings on the Petitioners' interests is reversible error. Assuming, *as the trial court found*, that: 1) decanting was permitted because the Petitioners' interests in the Trusts were unvested, *Order* at 10, 14-15, 20-21, 34; 2) the hostile and dysfunctional family conflict created risk to the family business, *Order* at 31-33, 36; 3) the purpose of the Trusts was to preserve the family business, *Order* at 26-27; and 4) the Trustees considered the terms and purposes of the Trusts and the effect of the decantings on the family business, *Order* at 29, 35, then the Trustees' decision to decant was a lawful exercise of their discretion. The trial court committed error by finding otherwise.

Respectfully submitted,

Alan Johnson and William Saturley,
By their attorneys,

UPTON & HATFIELD, LLP

Date: January 4, 2017

Russell F. Hilliard
NHBA #1159
159 Middle Street
Portsmouth, NH 03801
(603) 436-7046
rhilliard@uptonhatfield.com

and

Joseph McDonald,

By his Attorneys,

WADLEIGH, STARR & PETERS, PLLC,

Date: January 4, 2017

for Jeffrey H. Karlin
NHBA No. 1311
95 Market Street
Manchester, NH 03101
(603) 669-4140
jkarlin@wadleighlaw.com

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