THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2016-130

David A. Hodges, Jr., et al.

v.

Alan Johnson, et al.

BRIEF IN OPPOSITION OF DAVID A. HODGES, JR., BARRY R. SANBORN, AND PATRICIA SANBORN HODGES

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STATEMENT OF THE CASE

The Petitioners do not dispute the underlying facts that led to the trial: In a series of purported decantings in 2010, 2012, and 2013, the Petitioners' interests in the estate of David A. Hodges, Sr., were reduced to nothing. The relevant trusts and decanting documents are correctly reproduced in the Trustees' Appendix. *See* App. at 123-213 (trusts); 221-226 (first decantings). For ease of reference, and because they contain the same provisions, the trusts from which the Appellants originally decanted assets—known as the 2004 David A. Hodges, Sr. Irrevocable GST Exempt Trust and the 2004 David A. Hodges, Sr. Irrevocable GST Non-Exempt Trust—will be referred to herein as simply the "2004 Trusts."

The appellate record accurately reflects that Attorney William Saturley and Alan. Johnson were the trustees of the 2004 Trusts prior to the decantings at issue. *See id.* at 69-70, 170. Petitioners Barry R. Sanborn, David A. Hodges, Jr. ("David Junior"), and Patricia Sanborn Hodges were all beneficiaries of the 2004 Trusts. *See id. at* 126, 128-29, 174, 176-77. The 2004 Trusts were presumably designed as irrevocable trusts in order to qualify for certain estate and other tax benefits.

In approximately 2009, David A. Hodges, Sr. ("David Senior") approached his estate planning counsel, Attorney Joseph McDonald, about the possibility of reducing the beneficial interests of Petitioners Sanborn and Sanborn Hodges. Tr. at 80. Although the 2004 Trusts could not be amended due to their irrevocability, Attorney McDonald advised David Senior it was possible to accomplish his goal by decanting assets from the 2004 Trusts to new trusts. *Id.*

The record further reflects that, in 2010, the assets of the 2004 Trusts were purportedly decanted to new trusts, thereby reducing the beneficial interests of Petitioners Sanborn and Sanborn Hodges. *Id.* at 100. The 2012 decanting reduced Petitioners' beneficial interests to nothing. *Id.* at 111. The 2013 decanting eliminated the beneficial interest of David Senior's ex-wife, Joanne Hodges. *Id.* Each decanting was performed in the same manner. Mr. Johnson resigned as trustee, and David Senior appointed Attorney McDonald to replace him. *See, e.g.,* App. at 74-77, 221-228, 320-327. Attorney Saturley purportedly delegated his decanting authority to Attorney McDonald. *See id.* Attorney McDonald decanted the trust assets to new trusts. *See id.* Attorney McDonald resigned, and David Senior re-appointed Mr. Johnson. *See id.*

In each of these transactions, Attorney McDonald prepared the documents and acted as the decanting trustee. Tr. at 114. Attorney McDonald was counsel to David Senior at the time he decanted the assets. *Id.* at 107. Attorney McDonald also understood himself to be counsel to the trusts. *Id.* He billed David Senior for his services. *Id.* at 84; App. at 628-45. At no time did Attorney McDonald obtain a conflict waiver. Tr. at 108. At no time were the Petitioners informed of the decantings. *Id.* at 10, 229, 418. Attorney Saturley testified that nobody was supposed to know about the decantings until David's Senior's death. *Id.* at 344.

The Petitioners are dissatisfied with the Appellants' list of Questions Presented insofar as they claim that the trial court applied a "best interests" standard and substituted its judgment for that of the Appellants. The Appellants

have also provided a more charitable description of the trial testimony and subsequent findings than the record supports. The Petitioners will reference the specific portions of the record that belie the Appellants' characterizations in the substance of their Brief in Opposition.

The Petitioners decline to respond in kind to pages 3 through 7 of the Appellants' Brief, which contain sundry comments, *ad hominem* attacks, and complaints concerning the conduct of the litigation on appeal, except to say that they dispute Appellants' claims.

SUMMARY OF ARGUMENT

The trial court (Cassavechia, J.) presided over a bench trial involving a dispute over the propriety of three sets of decantings that effectively disinherited the Petitioners. *See* App. at 74-77. Following a three day trial, the trial court issued a reasoned 38-page order voiding the decantings and removing the Appellants, referred to herein as the "Trustees," from their fiduciary positions. *Id.* at 52-89.

The Trustees claim that they acted within their discretion when they performed the decantings. Brief at 21. They assert that the trial court incorrectly identified the decanting standard under New Hampshire law and improperly found that they failed to meet that standard. *Id.* at 21-22. Trustees Johnson and Saturley further assert that the trial court improperly removed them as trustees. *Id.* at 29.

In order to affirm the trial court, this Court need only address three issues. First, applying *de novo* review, it should confirm that the trial court properly concluded that decanting requires, at a minimum, that the Trustees take into account the interests of the trust beneficiaries. App. at 54 (citing R.S.A. 564-B:4-418(e) (Supp. 2013); R.S.A. 564-B:8-801). Doing so requires simply acknowledging the vitality of the provisions contained in the Uniform Trust Code ("UTC"), as adopted and codified in New Hampshire at R.S.A. Ch. 564-B, and recently cited as controlling law in *Shelton v. Tamposi*, 164 N.H. 490, 500 (2013).

Second, the Court should conclude that the trial court reached reasonable findings of fact under the deferential plain error standard when it found that the

Trustees did not consider the Petitioners' beneficial interests when decanting. App. at 54, 85-86.

Third, the Court should conclude that the trial court's application of the law to the facts was not plainly erroneous when it ruled that failure to consider the Petitioners' beneficial interests voided the decantings. *Id.* at 53-54.

This appeal does not call on the Court to delineate the bounds of trustee discretion when decanting. Rather, it simply requires affirmation of the common sense principle that trustees owe some minimal consideration to adversely affected beneficiaries when decanting. Because of the finding of fact that the Trustees gave no consideration to the Petitioners' beneficial interests, the mere recognition that a duty exists is all that is required to affirm so long as the trial court's factual findings were not plainly erroneous.

ARGUMENT

I. Standard of Review

In the case on appeal, the District Court – Probate Division sat as both the trial judge and the finder of fact. *See* R.S.A. 567-A:4 ("The judge of probate by whom a decree, order, appointment, grant or denial was made shall report the material facts found by him and his rulings of law, on request of any party entitled to appeal therefrom made before the entry of such decision."). This Court will review the trial court's legal conclusions *de novo*. *State v. Rodriguez*, 157 N.H. 100, 103 (2008). The Court will accept the trial court's factual findings unless they are "unsupported by the evidence or plainly erroneous as a matter of law." *In re Estate of Fischer*, 152 N.H. 669, 670 (2005); R.S.A. 567-A:4. This Court will then review whether the trial court properly applied the law to its factual findings, and will not overturn such a ruling unless it is clearly erroneous. *Poland v. Twomey*, 156 N.H. 412, 414 (2007). If this Court finds that the trial court misapplied the law, it will review the matter independently applying a plain error standard. *Id.*

II. The trial court applied the proper legal standard when it concluded that the Trustees had a duty to act in accordance with the interests of the beneficiaries.

1. The trial court identified the proper decanting standard.

The trial court properly concluded that the Trustees had "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)." App. at 85; *see also id.* at 2-3.

The trial court thus correctly held that "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.'" *Id.* (citing *Shelton v. Tamposi*, 164 N.H. 490, 500 (2013)).

The trial court correctly reached the aforementioned conclusions because they are rooted in plain statutory language and recent Supreme Court law. The trial court did not need to apply a broad construction to the language in order to reach its conclusions. Rather, it simply relied on the plain meaning of the text of the UTC, as codified in R.S.A. Ch. 564-B and cited in the *Shelton* decision. *See* 164 N.H. at 500; *see also In re Local Govt. Ctr.*, 165 N.H. 790, 804 (2014) (Stating that, in matters of statutory interpretation, the Court will "first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning."). The text of the UTC is just as quoted: "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." R.S.A. 564-B:8-801. This Court cited that provision twice as controlling law in the *Shelton* matter. *See* 164 N.H. at 499-500, 504. The trial court therefore correctly identified the proper legal standard.

2. The trial court properly reconciled the terms of the 2004 Trusts with the unwaivable duties as provided by statute.

The Trustees' claim that the terms of the 2004 Trusts authorized the decantings required the trial court to reconcile the tension between the settlor's

intent and the unwaivable duties placed upon trustees by New Hampshire statute. In particular, the Trustees allege that the decantings were authorized by Articles II(B) and XVI(H) of the 2004 Trusts, which purported to permit the Trustees discretion to distribute trust assets to "distributee trusts" of which the Petitioners were not necessarily beneficiaries. *See* App. at 71.

The trial court began its inquiry by recognizing that "the intent of the settlor is the veritable North Star guiding a court when it is interpreting a trust." App. at 56 (citing *Shelton*, 164 N.H. at 495). It then acknowledged that the settlor's intent is to be determined first by looking at the trust instrument itself. App. at 57 (citing, *inter alia*, *Shelton*, 164 N.H. at 495). Where the trust language is ambiguous, consideration of parol evidence is appropriate. App. at 58 (citing, *inter alia*, *Bartlett v. Dumaine*, 128 N.H. 497, 505 (1986)). The trial court concluded its statement of the rules of trust construction by noting that courts generally defer to trustees in the absence of abuse of discretion. *See* App. at 59 (citing RESTATEMENT (THIRD) OF TRUSTS § 87, cmt. c (2015)).

While acknowledging the important role the settlor's intent plays, the trial court also recognized that, by statute, "[t]he terms of a trust prevail over any provision of this chapter except... 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." R.S.A. 564-B:1-105(b)(2); App. at 62. The then applicable UTC decanting provision contains a similar reference. *See* R.S.A. 564-B:4-418(e) (Supp. 2013) (specifically providing that nothing in the decanting section "abrogate[s] the

trustee's duty under RSA 564-B:8-801" to "administer, invest and manage the trust and distribute the trust property...in accordance with its terms and purposes and the interests of the beneficiaries."). Although that provision has since been amended, the Trustees concede that the amendment did not make a "material difference[]" in this appeal. Brief at 15, n.14. Thus, as the trial court correctly recognized, the terms of the 2004 Trusts must yield to certain unwaivable duties as set forth in the UTC. *See* R.S.A. 564-B:1-105(b)(2); R.S.A. 564-B:4-418(e) (Supp. 2013); R.S.A. 564-B:8-801.

The Trustees' citations to other provisions in the UTC and material related to the enactment of the decanting provision do nothing to alter this conclusion. It may well be true, as the Trustees contend, that the legislature intended that trustees be given broad discretion. But, by the plain language of the UTC, the existence of broad discretion is subject to certain unwaivable duties "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." R.S.A. 564-B:1-105(b)(2); *see also Woodward v. Jolbert*, 94 N.H. 324, 326 (1947) (holding that trustees with broad discretionary authority must exercise that authority reasonably). Therefore, the extent of any discretion, no matter how broadly conferred in the trust instrument, is always limited by these unwaivable duties.

Thus, the trial court properly held that the trust must be construed in the first instance to honor the intent of the settlor, but that the settlor's intent was limited by certain unwaivable duties established by the UTC. Much like the trial

court's conclusions concerning the proper legal standard for decanting, the trial court did not reach this conclusion by broadly construing existing legal principles or case law, but rather by identifying the UTC provisions and Supreme Court holdings that were directly on point, and adopting them as the appropriate legal rules for reconciling the trust instrument with the limits on such instruments contained in the UTC.

3. The trial court correctly identified the Petitioners' beneficial interests.

The Trustees have made much of the claim that the Petitioners did not have vested interests, deeming the trial court's failure to sufficiently appreciate this point a "fatal flaw" in its reasoning. *See* Brief at 22, n.21. They claim that because Petitioners did not have vested interests, they were subject to decanting and not entitled to the consideration that the trial court found the Trustees should have afforded them. *Id.* at 21.

As with the trial court's identification of the proper legal standard and reconciliation of the trust instrument with the Trustees' statutory duties, the trial court's conclusion concerning the Petitioner's beneficial interests rests on a plain reading of the UTC. The UTC's definition of beneficiaries does not distinguish between vested and contingent interests. Rather, a beneficiary is defined as "a person that...has a present or future beneficial interest in a trust, vested or contingent." R.S.A. 564-B:1-103(2). Once defined as a beneficiary, a person or entity then enjoys the protections enumerated in R.S.A. 564-B:1-105, which requires that the trustee act in accordance with the "interests of the beneficiaries"

without regard to the terms of the trust instrument. *See also* R.S.A. 564-B:4-418(e) (Supp. 2013); R.S.A. 564-B:8-801. None of the cited provisions distinguishes between vested and contingent beneficiaries, they all refer to "beneficiaries." Simply put, a trustee owes a duty to a contingent beneficiary.

The Trustees point to the language of R.S.A. 564-B:8-814(b) defining a beneficiaries' discretionary interest as "neither a property interest nor an enforceable right, but a mere expectancy." This provision does not alter the consideration a trustee must give to a beneficiary's interest as referenced throughout the UTC. *See* R.S.A. 564-B:4-418(e) (Supp. 2013); R.S.A. 564-B:8-801. Indeed, in order to avoid any confusion over the effect of R.S.A. 564-B:8-814(b), that provision explicitly states that it is "[s]ubject to the provisions of paragraph (a)." Paragraph (a) then refers back to the standard contained in R.S.A. 564-B:1-105 and 8-801, stating that, "[n]otwithstanding 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." R.S.A. 564-B:8-814(a). Thus, even "mere expectancies" are owed a duty.

This Court recently confirmed that trustees owe a fiduciary duty to contingent beneficiaries. *See In re Goodlander*, 161 N.H. 490, 494-95 (2011). In *Goodlander*, the petitioner claimed that the trial court had improperly characterized his ex-wife's interest in a trust of which she was a beneficiary as a "mere

expectancy." *See id.* The petitioner's ex-wife happened to be Elizabeth Tamposi, whose history before this Court is discussed below in response to a different argument. In the *Goodlander* matter, the Court disagreed with the petitioner, finding that Ms. Tamposi's interest was indeed a mere expectancy as that term is used in R.S.A. 564-B:8-814(b). *Id.* at 497. On the way to rejecting the petitioner's argument, the Court noted that the trustee of Ms. Tamposi's trust "owe[d] a fiduciary duty to all beneficiaries of the trust." *Id.* After listing several of those duties as codified in the UTC, the Court stated that the trustee of Ms. Tamposi's trust did "not have unfettered discretion to do whatever she want[ed]." *See id.* Thus, the fact that a contingent beneficiary only holds a "mere expectancy" interest does not relieve the trustee of his or her fiduciary duties to that beneficiary.

4. The trial court correctly rejected the Trustees' argument that the decantings were valid because the trust instrument permitted them.

The Trustees claim that the UTC's definition of the "interests of the beneficiaries" as the "the beneficial interests provided in the terms of the trust" authorizes their actions. *See* Brief at 21-22 (citing R.S.A. 564-B:1-103(7)). The Trustees use this definition to construct the following argument:

> (i) The interests of the beneficiaries are defined as those interests provided in the terms of the 2004 Trusts;
>
> (ii) The terms of the 2004 Trusts permitted distribution to distributee trusts of which Petitioners were not beneficiaries;
>
> (iii) The Petitioners' interests had not yet vested;
>
> (iv) Ergo, the decantings were completed consistent with the interests of the beneficiaries as defined by the terms of the 2004 Trusts.

Although this argument has a certain logical tidiness, it breaks down upon examination. First, it is simply another form of the argument that the decantings were proper because the language of the 2004 Trusts would have permitted them. As discussed above, that argument fails because trust language cannot relieve a trustee of the duty to act in the interests of the beneficiaries. *See* R.S.A. 564-B:1-105(b)(2). Second, if accepted, the Trustees' argument would establish another class of beneficiary below contingent beneficiary to which no duty is owed so long as the trust language says so. The UTC, however, only provides for vested and contingent beneficiaries, R.S.A. 564-B:1-103(2), and does not distinguish between the two when stating the unwaivable duties trustees owe them. *See* R.S.A. 564-B:4-418(e) (Supp. 2013); R.S.A. 564-B:8-801. There is no third class of beneficiaries, and the language of the 2004 Trusts cannot create one. Accordingly, the trial court properly rejected this argument because the UTC establishes that a trustee owes certain duties to a contingent beneficiary. Those duties cannot be ignored simply because the beneficiary's interest is contingent.

5. The trial court did not apply a "best interests" standard.

The Trustees insist that the trial court applied a "best interests" standard to their conduct. As a threshold matter, Petitioners note that the phrase "best interests" exists nowhere in the trial court's order. *See* App. at 52-89. Rather, the trial court explicitly roots the applicable standard in the language of R.S.A. 564-B:8-801, which refers to the "interests of the beneficiaries." App. at 54, 85.

In an effort to circumvent this language, the Trustees assert that the trial court "apparently" applied a best interests standard when it noted that the Trustees failed to consider the effect of the decantings on the Petitioners. Brief at 22, n. 21. Respectfully, the Trustees read too much into the use of the word "effect" in this single sentence. At the top of the quoted page, the trial court made clear that it was relying upon "the requisite duty to consider the 'interests of the beneficiaries' when decanting." App. at 54. The trial court reiterated this point later in the order, again stating that the Trustees had "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)." *Id.* at 85. Moreover, the trial court explicitly found that the Trustees "did not give any consideration to the Petitioners' beneficial interests." App. at 85-86. This finding means that the trial court did not limit itself to the Trustees' failure to consider the effect of the decantings when it determined that the Trustees breached their duty.

Where the trial court explicitly stated the standard at least twice, and where it never stated that it was relying upon a "best interests" standard, the assertion that the trial court improperly used such a standard is simply unsupported in the record.

6. The legal standard the trial court identified is consistent with the settled understanding of fiducial relationships.

It is the settled understanding of the law of trusts that trustees have a fiduciary duty to protect the assets of the trust for the benefit of the trust beneficiaries. *See, e.g.*, G. Bogert, *The Law of Trusts and Trustees* § 11 (2016 supp.) ("An express trustee is undoubtedly a 'fiduciary' in the sense that he or she owes the beneficiary a duty to act solely for the latter's benefit and to refrain from obtaining any selfish advantage from the administration of the trust."). This is hardly a controversial concept. Indeed, the amicus brief that the Trust Counsel filed, which otherwise aligns itself with the Trustees, acknowledges that trustees have unwaivable duties to beneficiaries under the UTC. *See* Amicus Brief at 3.

Once it is understood that an unwaivable fiduciary duty exists, it follows naturally that a trustee cannot eliminate a trust beneficiary without giving any consideration to that beneficiary's interest. This is true even if you accept the Trustees' claims that the New Hampshire legislature intended a liberal trust regime, because under no standard can trustees ignore their fiduciary duties to beneficiaries. If that were the case, clever draftsmen could always find a way to insert language into an irrevocable trust relieving the trustee of fiduciary duties. Adopting the Trustees' construction would make contingent beneficiary status meaningless, even in irrevocable trusts. Further, such a reading would effectively repeal the provisions of the UTC providing for protections to that class of individuals and entities that qualify as trust beneficiaries. *See* R.S.A. 564-B:1-105(b)(2); R.S.A. 564-B:4-418(e) (Supp. 2013); R.S.A. 564-B:8-801. Accordingly, the

trial court's order is consistent with the settled understanding of trustee obligations as reflected in the UTC.

III. The trial court made findings of fact that are reasonably supported by the record evidence.

1. The trial court's findings of fact are subject to substantial deference.

By statute, "[t]he findings of fact of the judge of probate are final unless they are so plainly erroneous that such findings could not be reasonably made." R.S.A. 567-A:4. This standard comports with the usual deference given to findings of fact, under which this Court will "defer to the trial court's judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence." *Town of Newbury v. Landrigan*, 165 N.H. 236, 239-40 (2014). Such deference means that this Court will accept the trial court's findings "if a reasonable person could have reached the same decision based upon the evidence before it." *Bergeron v. New York Community Bank*, 168 N.H. 63, 69 (2015).

2. The trial court made reasonable findings of fact in light of the evidence presented.

A. The trial court appropriately assessed witness credibility.

Under the above-quoted standard, the trial court's findings were reasonable in light of the evidence. The key factual finding was that the Trustees "did not give any consideration to the Petitioners' beneficial interests." App. at 85-86. Because the Trustees were required to act in accordance with the interests of the beneficiaries, R.S.A. 564-B:8-801, the finding that they did not is dispositive. A

review of the evidence presented at trial demonstrates the trial court acted reasonably in making that finding.

Despite the Trustees' claims that they acted after due consideration, on the first day of trial, Attorney McDonald admitted that he did not take the Petitioners' financial interests into account when performing the decantings:

> Q: In all of the decanting you performed, you never gave my clients' financial interest any consideration, correct?
>
> A: Correct.

Tr. at 118. This admission alone could have reasonably supported the trial court's finding that Attorney McDonald did not consider the Petitioners' interests. Indeed, the trial court made note of the testimony in its order. App. at 81.

The trial court also found Attorney McDonald's testimony "fairly inconsistent" and "borderline evasive" in at least one instance. App. at 79, n. 23. In their Brief, the Trustees dismiss this observation as "remarkably petty." Brief at 27, n. 23. It is anything but. As the finder of fact, it is the province of the trial court to evaluate witness credibility. *See, e.g., In re Henry*, 163 N.H. 175, 180 (2012) (Observing that "the trial judge was in the best position to evaluate the evidence, measure its persuasiveness and assess the credibility of the witnesses."). Thus, after observing witness testimony and demeanor, it was for the trial court to determine the appropriate weight to give witness testimony, and to resolve differences between testimony. *See Landrigan*, 165 N.H. at 239-40.

The trial court's assessment of Attorney McDonald was critical to its finding that the Trustees as a group gave no consideration to the Petitioners' interests

because of Attorney McDonald's central role in the decanting process. As Mr. Johnson put it, Attorney McDonald was "the quarterback" of the decantings. Tr. at 375. He advised David Senior that the 2004 Trusts permitted decantings that would eliminate the Petitioners' interests. *Id.* at 80-81. Throughout the decanting process, Attorney Saturley relied on Attorney McDonald for legal counsel. *Id.* at 271. Although Attorney Saturley ultimately made his own decision concerning the propriety of the decantings, he depended upon Attorney McDonald to explain to him what the decanting concept was and why the 2004 Trusts potentially permitted it. *Id.* at 283-84. Neither Attorney Saturley nor Mr. Johnson consulted other counsel with respect to the decantings, leaving Attorney McDonald as the only counsel to the 2004 Trusts. *Id.* at 112, 277, 375. In every instance, Attorney McDonald was the decanting trustee. *Id.* at 108, 112.

The credibility of Attorney Saturley and Mr. Johnson did not fare any better before the trial court, which remarked that it did not find their testimony "particularly convincing." App. at 86. The Trustees attempt to use their expert, Robert Wells, Esq., to vouch for their credibility. *See* Brief at 29. However, "[i]t is within the province of the trial court to accept or reject, in whole or in part, whatever evidence was presented, including that of the expert witnesses." *Cook v. Sullivan*, 149 N.H. 774, 780 (2003). In its order, the trial court noted that Attorney Wells admitted he had never seen a case where the trustees completely disinherited a beneficiary, nor had he performed such a decanting. App. at 87, n. 33.

Accordingly, it was well within the trial court's discretion to receive Attorney Wells' assurances with a measure of skepticism.

Given these findings, it is not surprising that the trial court placed little stock in the Trustees' primary justification for decanting—the threat the Petitioners allegedly posed to the family business.

B. The trial court properly rejected the Trustees' claims that they sought to avoid a "Tamposi-like" situation.

The principal justification the Trustees offered for the decantings was that the Petitioners posed such a risk to David Senior's business, Hodges Development Corporation ("HDC"), that their complete removal from the 2004 Trusts was required to avoid a "*Tamposi*-like" situation. *See, e.g.*, Brief at 19-21. The Trustees were referring to the matter detailed in *Shelton v. Tamposi*, 164 N.H. 490 (2013), wherein Elizabeth Tamposi, a beneficiary to a trust related to a family business, engaged in years of "vexatious litigation," thereby diverting resources and straining the family business. Brief at 20, n. 20.

After listening to testimony and reviewing evidence presented in support of the Trustees' justification, the trial court properly questioned the role the "*Tamposi*-situation" concern played in the decantings. It noted that there was "no record of emails, memorandum, or letters concerning, or research into, the possibility of a 'Tamposi-situation,'" nor was there record of whether the Trustees considered "alternatives to complete disenfranchisement." App. at 82. The trial court made further mention of 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." *Id.* at 86. The Trustees' expert, Attorney Wells, also admitted that the complete lack of memoranda was unusual. *Id.* at 87, n. 33. The state of the record left the trial court with only the Trustees' "own testimony of operational independence, which the Court did not find particularly convincing." *Id.* at 86.

The trial court's conclusion that the Trustees' testimony was not "particularly convincing" was reasonable based upon the evidence. For example, on cross-examination, Attorney Saturley was forced to admit that he had not identified a "*Tamposi*-like situation" as one of his reasons for decanting in his interrogatory answers, nor had he done so during his deposition. Tr. at 331-32. Rather, he had adopted the interrogatory answers of Attorney McDonald, which also failed to identify the concern despite being asked to identify all reasons for the decantings. *Id.* at 333-35. In the absence of any explicit reference, Attorney Saturley testified that his references to "family and business dynamics" in prior testimony were meant as "shorthand" for his concern about a "*Tamposi*-like situation." *Id.* at 336. Upon direct questioning from the trial court, Attorney Saturley confirmed that he had used such shorthand in his interrogatory answers despite being prompted to identify all reasons for the decanting. *Id.* at 337-38.

Moreover, the Trustees' admissions concerning the involvement of David Senior in the decantings supplied another reason for the trial court to question whether the concern of a "*Tamposi*-like" situation had driven the process. Attorney

McDonald testified that the 2010 decanting occurred after David Senior approached him and asked what could be done to reduce the beneficial interests of Petitioners Sanborn and Sanborn Hodges. *Id.* at 80. Similarly, the 2012 decanting only occurred after David Senior raised the prospect with Attorney McDonald. *Id.* at 102. Attorney Saturley also thought that it was David Senior who "started the process." *Id.* at 281. This testimony was apparently consistent with David Senior's own understanding of his role, as he testified under oath in another proceeding that he had disinherited Mr. Sanborn and David Junior. *Id.* at 328-29; App. at 684-86 (David Senior's deposition testimony).

At the time of the decantings, Attorney McDonald was estate counsel to David Senior. Tr. at 107. Attorney McDonald billed David Senior for his work in connection with the decantings. *Id.* at 84. At the time of the decantings, Attorney Saturley had also acted as counsel both for David Senior personally and for HDC. *Id.* at 258. Further, it was understood that Mr. Johnson was to receive $1,000,000 from David Senior's estate upon his death. *Id.* at 117-20, 354, 356. It could well have been this constellation of evidence that caused the trial court to discount the Trustees' claims of "operational independence." App. at 86. *Cf. McNeil v. Bennett*, 792 A.2d 190, 194 (Del. Ch. 2001) ("Observing that "Trust Instruments [that] vested extraordinarily wide discretion in the Trustees... could...be seen as enabling [the settlor] to keep a firm hand on the administration of the Trusts during his own lifetime."), *aff'd in relevant part, McNeil v. McNeil*, 798 A.2d 503, 506 (Del. 2002).

Thus, in light of the lack of records and the trial court's assessment of the Trustees' credibility after observing their testimony, and the acknowledged role of David Senior in the decantings, it was reasonable to conclude that the "*Tamposi* situation" threat did not play a crucial role in the decanting decision.

C. The trial court reasonably concluded that the Trustees did not consider alternatives to decanting.

The trial court's finding that the Trustees had not considered alternatives to disenfranchisement finds similar support in the record. For his part, Mr. Johnson admitted that he did not consider any other alternatives. Tr. at 375. Similarly, Attorneys McDonald and Saturley both admitted that they had followed no protocol to determine whether the decantings were in the interest of the beneficiaries. *Id.* at 107, 286. Rather, they discussed the matter amongst themselves, David Senior, and Attorney Saturley's real estate law partner. *Id.* at 278-79.

As noted, no records exist of such discussions. Although the Trustees cite the trial court's order as record evidence of their "good faith deliberation...over a period of many months," Brief at 25, the trial court's observations were more circumspect. It noted that "[t]here apparently were meetings," but "[a]ccounts of the content of those meetings were rather vaguely presented, and there is no documentary evidence...to provide insight into what specifically was discussed or considered." App. at 79-80. As a result, it was unclear to the trial court whether "the effect on the beneficiaries' interest was of serious, or even more than passing, concern." *Id.* at 80.

The trial court also found reason to doubt the Trustees where they did document their actions. Its order expressed concern that the decantings as executed may have been ineffective because Attorney Saturley's delegation of his decanting power to Attorney McDonald was not documented until after Attorney McDonald purported to complete the decanting. *Id.* at 75, n.18. In the eyes of the trial court, this irregularity "call[ed] into question the...claims at trial that these decantings were the result of a careful process and due deliberation." *Id.*

Such observations notwithstanding, the Trustees insist that they considered "less draconian" measures than total disenfranchisement. They point to a March 2009 incident in which Attorney Saturley contacted Mr. Sanborn in order to address a conflict with David Senior and HDC. Brief at 28. This series of events produced a letter that is reflected in the record. App. at 710-12. Attorney Saturley signed the letter in his personal capacity, and not in his capacity as trustee of the 2004 Trusts. *See id.* at 712. The letter is restricted to the working relationship between Mr. Sanborn and David Senior, and neither the letter nor Attorney Saturley's testimony suggest that the 2004 Trusts or the topic of Mr. Sanborn's inheritance ever came up during the March 2009 conversations.

Attorney Saturley also references a conversation he had with David Junior in 2012. Brief at 28, Tr. at 316-18. Like the March 2009 letter to Mr. Sanborn, neither the 2004 Trusts nor David Junior's inheritance are even claimed to have been addressed during that conversation. Attorney Saturley could not have told David Junior he was calling as a trustee because, by his own admission, he ended

the call when David Junior asked what capacity he was calling in. *Id.* at 317-18. Given that Attorney Saturley admits he has acted as counsel to both David Senior and HDC, these two instances are more indicative of Attorney Saturley's service as an emissary on David Senior's behalf than they are proof that the Trustees considered alternatives.

Attorney Saturely confirmed this reading when, under cross-examination, he testified that he had never had contact with the Petitioners in his capacity as a trustee. *Id.* at 265-66. If that is the case, he was not acting as a trustee when he wrote Mr. Sanborn the March 2009 letter, nor was he acting as a trustee when he called David Junior in 2012. Those instances, therefore, cannot reflect consideration of less draconian measures than complete disenfranchisement via decanting. Moreover, as the trial court observed, the path the Trustees did choose was almost certain to result in litigation because it left the Petitioners with little reason not to initiate suit where they had already been completely disinherited. App. at 82. If the goal was to avoid strain on the family business and *Tamposi*-like litigation, making a choice that invited litigation seems an unusual way to proceed.

The existence of identifiable means to insulate the family business from the Petitioners' control lends further doubt to the claim that the Trustees considered alternative measures. As the trial court noted, the 2004 Trusts created a "Committee of Business Advisors" that, by majority vote, had exclusive authority to make all business decisions for HDC. *Id.* at 72-73. The Trustees confirmed the power of the Committee of Business Advisors during their testimony. *See* Tr. at

137-38, 304. The trial court further noted that the 2004 Trusts permitted David Senior to modify the composition of the committee. App. at 84. The Petitioners were on the initial committee, Tr. at 139-40, but, at the time of David Senior's death, the Committee of Business Advisors had been reconstituted to include Attorneys McDonald and Saturley, Mr. Johnson, and family members Nancy Hodges Friese and Janice Hodges. *Id.* at 305.

In addition, the rights of any beneficiary of the 2004 Trusts were limited by the assets in the trusts themselves, which held only non-voting stock in HDC. *Id.* at 151. Whoever held the voting stock of HDC could control the company. *Id.* Thus, beneficiaries to the 2004 Trusts, which did not hold voting stock, were not in a position to control the company. Attorneys McDonald and Saturley assert that the decantings were still necessary because the HDC voting stock would have ended up in the 2004 Trusts after David Senior's death. *Id.* at 153, 343. They both had to admit, however, that because the voting stock of HDC was held in David Senior's revocable trust, he could have simply re-directed the stock prior to his death. *Id.* at 153-54, 343.

Thus, without disinheriting the Petitioners, David Senior, working with his Trustees, had the power to remove them from the Committee of Business Advisors and re-direct the voting stock of HDC to a trust of which they were not beneficiaries. The trial court made note of the availability of these options in its order. App. at 80-81. In light of such alternatives, and the admissions they were never considered, the trial court reasonably concluded that "it was never sufficiently

demonstrated...that the *beneficial interests* of any of the Petitioners or beneficiary Joanne, were ever taken account of or considered." *Id.* at 81 (emphasis in original).

IV. The trial court properly applied the law to the facts when it concluded that the decantings were void because the Trustees failed to give any consideration to the Petitioners' beneficial interests.

The trial court properly applied the law to the facts in voiding the decantings. Because the trial court made the factual finding—reasonably supported by the evidence—that the Trustees failed to give any consideration whatsoever to the Petitioners' beneficial interests, the application of the law to the facts became straightforward. The lack of any consideration relieved the trial court of having to define the minimum level of consideration required prior to a valid decanting. The trial court's finding is not, as the Trustees claim, a substitution of judgment on the part of the trial court. Rather, the trial court found that the Trustees failed to exercise any judgment at all. *See* App. at 81. The failure to exercise any judgment means that this Court can, if it chooses, affirm the result below without defining the minimum level of consideration that must be given to a beneficiary's interest prior to decanting. Whatever that level may be, the Trustees failed to reach it here, because they failed to take any consideration of the interest.

The trial court also acted properly when it decided that the Trustees' failure voided the decantings. It based this ruling on unwaivable duties codified in the UTC. *See* R.S.A. 564-B:1-105(b)(2). Thus, even if it was the intent of David Senior in settling the 2004 Trusts to permit his Trustees to later disinherit his children without considering their interests, the Trustees could not accomplish that result

because of their unwaivable duties. This ruling resulted from a straightforward application of the UTC to the Trustees' conduct as the trial court found it, and was therefore proper.

V. The trial court did not engage in an act of unsustainable discretion when it removed Trustees Saturley and Johnson.

Trustees Saturley and Johnson appeal the trial court's ruling removing them pursuant to R.S.A. 564-B:7-706. In a prior appeal of trustee removal pursuant to that provision, the Court applied an unsustainable exercise of discretion standard of review where no party offered an alternative standard. *See Shelton*, 164 N.H. at 505. Trustees Saturley and Johnson offer no standard of review in their Brief, so the Court should apply the same unsustainable exercise of discretion standard here.

Under that standard, it is apparent that the trial court acted within its discretion. It made factual findings, subject to significant deference on appeal, that Trustees Saturley and Johnson completely disenfranchised the Petitioners without any regard for their beneficial interests. *See* App. at 54, 85-86. In light of those findings, its conclusion that removal "serve[d] the interests of the beneficiaries" under R.S.A. 7-706(b)(3) was a proper one. Moreover, the trial court buttressed its conclusion by observing that there had been a complete breakdown of trust and confidence between the Trustees and the Petitioners, all of whom are beneficiaries the Trustees are bound to serve. App. at 88. Put more directly, Trustees Saturley and Johnson saw and continue to see no objection to disinheriting the Petitioners. To continue to allow them to protect the Petitioners' beneficial interests is therefore nonsensical, and fodder for further litigation.

VI. The Petitioners do not dispute that the trial court has not issued a final ruling on whether the 2004 Trusts are responsible for fees and expenses.

Trustees Saturley and Johnson appear to argue for confirmation that the trial court did not issue a final ruling on their right to indemnification for fees and expenses incurred in connection with the underlying litigation and this appeal. The trial court's order did not contain a ruling on indemnity. Rather, it ordered removal of Trustees Saturley and Johnson and the appointment of an independent trustee. App. at 55. After appointment, the trial court then requested that the independent trustee advise on whether the 2004 Trusts had paid the Trustees' fees, and whether the trustee believed such payment was appropriate. *Id.* By its terms, this portion of the order contemplates further proceedings, and leaves open the question of whether the Trustees are entitled to fee reimbursement. Petitioners anticipate asserting that the Trustees are not entitled to any reimbursement.

For the purposes of this appeal only, the Petitioners agree, in light of the record, that the issue of indemnity has not been finally resolved. They further reserve all rights to contest whether indemnity is an appropriate concept to apply to the Trustees' actions, and to pursue all rights they may have as beneficiaries of the 2004 Trusts.

ORAL ARGUMENT

Attorney Roy W. Tilsley, Jr., will argue for Petitioners. He requests 15 minutes.

CONCLUSION

The Petitioners recognize that New Hampshire has adopted liberal trust laws in recent years. These changes do not, however, eliminate the basic notion of the trust relationship: trustees hold assets for the benefit of trust beneficiaries. If a trustee's duties to contingent beneficiaries are as minimal as the Appellant Trustees suggest, there is no longer a trust relationship. In the usual trust relationship, the trustee holds legal title to trust assets while the beneficiary holds beneficial title. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 42, cmt. a (2015). If trustees have no duty to the beneficiaries, legal title and beneficial title do not split, and there is no trust. If David Senior wanted the ability to disinherit beneficiaries whom he had differences with, he should not have put his assets in an irrevocable trust. The Appellant Trustees should not be permitted to convert David Senior's irrevocable trusts to revocable instruments by stretching trust language to relieve them of their duties to the Petitioner Beneficiaries.

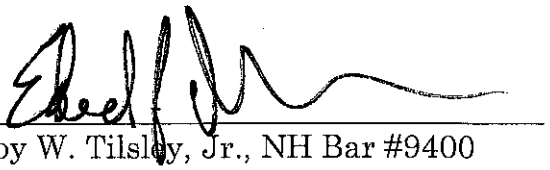
Affirming the trial court would thus be not only a sound exercise of this Court's appellate function, but also a signal that New Hampshire trusts retain their fidelity even in this new era of liberal trust law.

Respectfully submitted,

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

By their attorneys,

Bernstein Shur, P.A.



Dated: December 16, 2016

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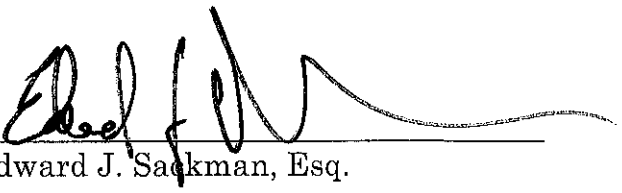
CERTIFICATE OF SERVICE

I hereby certify that I provided two copies of the foregoing to counsel for each of the Appellants in the above-captioned matter via First Class U.S. Mail, postage prepaid, this 16th day of December, 2016.



Edward J. Sackman, Esq.