THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

FEB 2 4 2016

7th Circuit - Probate Division - Dover
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NOTICE OF DECISION

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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; Russell F. Hilliard, 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

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[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.